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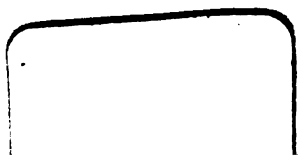
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THE SOUTHEASTERN REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 71
PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST VIRGINIA
THE SUPREME COURTS OF NORTH CAROLINA AND SOUTH
CAROLINA, AND THE SUPREME COURT AND
COURT OF APPEALS OF GEORGIA

WITH TABLE OF SOUTHEASTERN CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

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JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD
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JUDGES.

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GEORGE POFFENBARGER.

WILLIAM N. MILLER.

IRA E. ROBINSON.

AMENDMENTS TO RULES

COURT OF APPEALS OF GEORGIA¹

It is ordered that rule 8 of this court [Civil Code (1910), § 6332] be amended so as to read as follows (the amendment to relate to all bills of exceptions signed after September 1, 1911):

Bills of exceptions must distinctly specify the points on which error is assigned. Where the error alleged is in the granting or denying of a new trial, one assignment of error is sufficient to reach all the grounds of the motion on which the grant or refusal was based; except that where a plaintiff in error in a criminal case intends to insist in this court that the verdict is without evidence to support it because the venue was not properly or sufficiently shown, or the time the offense was committed was not properly

or sufficiently proved, and this particular point is not specifically raised in the motion for a new trial, the bill of exceptions shall specifically assign error as to this point or it will be treated as waived; and if such an assignment of error is made, there shall be incorporated into the bill of exceptions a statement of the evidence relating to the point, or a statement that the evidence on the subject has been set forth fully in the brief of the evidence. Counsel, when signing bills of exceptions, or acknowledging service thereof, will add to their signatures their post-office addresses; and upon failure of counsel to do this, they shall not be entitled to the benefit of any notices required by these rules to be given by the clerk.

¹For original rule, see 57 S. E. 2.

SUPREME COURT OF NORTH CAROLINA

Rules of Practice

Rule 29¹ shall be amended so as to read as follows:

29. HOW PRINTED.

The transcript of an appeal shall be printed under the direction of the clerk of this court, and in the same type and style, and pages of same size, as the reports of this court, unless the transcript is printed or is being printed when the appeal is docketed. If the transcript of an appeal is not printed or is not being printed when the appeal is docketed, and the transcript is required by this rule to be printed under the direction of the clerk of this court, the appellant shall

deposit with the clerk of this court an amount sufficient to cover the estimated cost of printing the transcript, and said estimate shall be made by the clerk of this court at the rate of sixty cents per printed page (which includes 10 cents per page to the clerk). When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the court will, in its discretion, on motion of counsel for appellee or a statement by the clerk, dismiss the appeal.

Adopted by Supreme Court of North Carolina, May 30, 1911.

¹For rule as originally adopted, see 66 S. E. v.

COURT RULES

SUPREME COURT OF APPEALS OF VIRGINIA

I. MOTIONS.

No affidavits shall be read in support of, or opposition to, any motion hereafter made to the court, unless reasonable notice, in writing, be given to the opposing party of the time and place of taking the same; and every motion which is not a motion of course, shall be supported by affidavit.

II. BRIEFS.

A clear and concise printed brief of the points intended to be insisted on by each party in an appeal, writ of error, or supersedeas, and the authorities in support thereof, signed by his counsel, on the part of the appellant, shall be filed in the clerk's office fifteen days before the argument of the case begins; and the appellee's brief shall be filed with the clerk at least eight days before the argument begins, and the reply of the appellant shall be filed at least two days before the argument begins, in which he shall insert all the authorities relied on by him; and no error other than such as shall be pointed out and insisted on in such brief, on the part of the plaintiff or appellant, shall (without leave of the court) be admitted as a ground for argument, on the hearing of the cause. No cause shall be proceeded in without such brief. But a party who has prepared and filed a brief may insist on a hearing when the cause is regularly called, although no brief shall have been made on the part of his adversary. If one of the parties omits to file such a brief, he cannot be heard, and the case will be heard ex parte upon the argument of the party by whom the brief is filed. The plaintiff or appellant may adopt the petition as his brief. If no brief be filed by either party when a cause is called, it shall stand continued until the next term, unless the court shall otherwise order.

Counsel must mail or deliver to the opposing counsel a copy of his brief within the prescribed time for filing briefs.

III. ATTORNEYS AND ARGUMENTS.

When there are two or more counsel on the same side, no one of them shall argue twice, except by leave of the court; nor shall more than two counsel, representing the same interest of one or more party or parties, be permitted to argue for such party or parties.

IV. AS TO READING RECORDS AND CITING AUTHORITIES.

In no case is it necessary or proper to read the record to the court; but counsel may refer thereto, and state what they consider as proved, on which they rely. And in all cases it is recommended to the gentlemen of the bar to select and cite only the most pertinent authorities.

V. ARGUMENTS UPON EXCEPTIONS TO REPORTS.

No oral argument will be permitted upon exceptions to a master commissioner's report, except upon naked questions of law, without reference to details of evidence, or upon any motion to advance a cause to the privileged docket, or upon any motion to require new or additional security upon, or to increase the penalty of an appeal or supersedeas bond. Counsel are required to state the grounds for and against such motions in writing.

VI. CAUSES HEARD OUT OF COURSE.

No cause shall be taken up out of order on the docket, or be set down for any particular day, except under special and peculiar circumstances, to be shown to the court, by motion, in writing, after notice of at least two days to the opposite party.

VII. CERTIFICATES OF JUDGMENTS, DECREES, ETC.

No certificate of a judgment or decree of the Court of Appeals shall, without the special direction of the court, be transmitted to any inferior court in less than sixty days from the rendition thereof, unless the court shall previously have adjourned for one or more weeks.

VIII. CONSIDERATION OF GENERAL ERROR.

In any appeal, writ of error, or supersedeas, if error is perceived against any appellee or defendant, the court will consider the whole record as before them, and will reverse the proceedings, either in whole or in part, in the same manner as they would do were the appellee or defendant to bring the same before them, either by appeal, writ of

error, or supersedeas, unless such error be waived by the appellee or defendant, which waiver shall be considered a release of all error as to him.

IX. REINSTATEMENTS OF APPEAL.

No appeal which shall have been dismissed or abated by the court shall be reinstated or revived after the lapse of sixty days from such dismissal or abatement, except for good cause shown the court, verified by affidavits, and upon reasonable notice to the adverse party of the time of making the motion; nor then, except in very special cases, unless such motion be made within one hundred and twenty days from the time of such dismissal or abatement; provided, that if the court shall not be in session on the day to which such notice shall be given, a further time of ten days shall be allowed the party to exhibit his motion after the next meeting of the court.

X. CERTIFICATE OF CLERK.

When an appeal, writ of error, or supersedeas shall be awarded by this court, it shall be the duty of the clerk to issue a copy of the order allowing such appeal, writ of error, or supersedeas, to certify the fact of the allowance thereof to the court below.

XI. NOTICE TO ABSENTEES.

Whenever it is necessary that a nonresident party should have notice of an order of this court, it shall be published once a week, for four successive weeks, in the manner prescribed by the act of assembly, in the case of absent defendants.

XII. ORDER OF ARGUMENT.

The court on the first day of each term will commence calling the cases for argument, in the order in which they stand on the docket, and proceed from day to day during the term, in the same order, and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and, if neither party shall be ready to proceed in the argument, the case shall go down to the foot of the docket. Ten causes only shall be considered as liable to be called on each day during the term, including the one that may be under argument. No cause shall be taken up out of order on the docket, or be set down for any particular day, except causes which, from their own peculiar character, or the mandate of the law, are regarded as privileged cases.

XIII. TIME OF ARGUMENTS.

In the argument of causes one hour and fifteen minutes will be allowed each side, except in felony cases, in which two hours will be allowed each side, and no more, in either class of cases, without special leave of the court. The time thus allowed may be ap-

portioned between the counsel on the same side, at their discretion; provided always, that a fair opening of the case shall be made by the party having the opening and closing arguments, in which he shall cite all the authorities intended to be relied on by him.

XIV. CALL OF THE DOCKET.

When any case, which shall be called in the due course of the regular calling of the docket, shall be passed, because the proper process has not been executed, though such case shall not lose its place on the docket, yet it shall not be again called until the next regular calling of the docket.

XV. CAUSES MAY BE SUBMITTED ON PRINTED ARGUMENTS.

When a cause shall be called for hearing, the court will receive printed arguments (a copy for each judge) if the counsel on either or both sides shall choose so to submit the same, and the cause shall stand on the same footing as if there were an appearance by counsel. But when a case is taken up for trial upon the regular call of the docket and argued orally in behalf of only one of the parties, no printed argument shall be received, unless it be filed as prescribed by rule two, and the court will proceed to consider and decide the case upon the ex parte argument.

XVI. PROCEEDINGS IN CRIMINAL CASES.

When a writ of error in any criminal case shall be awarded by a judge in vacation, the same shall be made returnable the first day of the next term thereafter, and if awarded by the court when in session, it shall be made returnable forthwith; and in either case the same shall be heard as soon as the record shall be printed, in preference to any civil business on the docket. And when judgment shall be given in any criminal case, the same shall be certified forthwith to the court from which it came, without further orders.

XVII. REHEARING.

No application for a rehearing will be entertained unless made within ten days after the decision is announced (except as otherwise authorized by law) and no rehearing will be allowed unless one of the judges who concurred in the decision shall be dissatisfied with it and desires a rehearing. And an application under the Code chapter 170, section 3492, to rehear and review any case decided by this court within the last fifteen days of the preceding term, shall be made before the end of the said term, or within the first fifteen days of the next succeeding term, and not thereafter. And no application for a rehearing will be entertained by the court, in any case, unless the reasons therefor, printed, shall be filed at the time such application is made.

XVIII. ARGUMENT DOCKET.

It shall be the duty of the clerk, at the commencement of each session, to make a list of all causes ready for hearing and represented by counsel on either side, which shall constitute the argument docket. A cause may at any time, on motion, without notice, be placed on this docket by order of the court.

XIX. MANDAMUS AND PROHIBITION.

Applications addressed to this court for the issue of writs other than the writ of habeas corpus, by virtue of its original jurisdiction, will be placed upon the general docket as they mature, and be heard when reached, upon the regular call thereof; subject, however, to be advanced for good cause shown in accordance with rule six.

The records shall be printed under the supervision of the clerk, as in other cases, and must be submitted upon printed briefs, unless the court shall otherwise direct.

XX. FOREIGN ATTORNEYS.

Foreign attorneys who desire to obtain a certificate from the Court of Appeals to practice law in the courts of this State as provided by section 3192 of the Code of 1904, without standing a law examination, must furnish a certificate from the court of last resort in the state, territory, or District of Columbia, wherein he has qualified, that he has practiced law for three or more years in said court, that he is of good moral character, and a proper person to be licensed to practice law. This certificate must be signed by the Chief Justice, or President, of said court, whose signature must be attested by the clerk of the said court and under the seal thereof.

In addition, a certificate must be furnished from two practicing attorneys of such state, territory, or District of Columbia, practicing in said court, that the applicant is of good moral character and a proper person to be licensed to practice law, whose signatures must be attested by the said clerk in like manner.

Rules and Regulations Prescribed by the Board of Law Examiners for Licensing Persons to Practice Law.

1. Until otherwise provided, examinations will be held under the act of the General Assembly amending and re-enacting section 3191 of the Code, approved March 14, 1910 (Acts 1910, p. 238), as follows:

At the capitol in Richmond on the first Wednesday in November, and at Roanoke on the fourth Wednesday in June, in each year.

2. Every person over twenty-one years of age applying for a license to practice law, must first have obtained from the circuit court for the county, or the corporation court of the city, wherein he resides, a certificate that he is a person of honest demeanor, is over the age of twenty-one years, and has resided in this State the preceding six months.

The application for such certificate shall be in writing, addressed to the court, specifying the day of the month when the motion therefor to the court will be made, and be accompanied by the written recommendation of two members of the bar of his judicial circuit, who are practicing attorneys in the Supreme Court of Appeals, speaking of their personal knowledge, that he is of good moral character and a proper person to be licensed to practice law. Such application and recommendation shall be filed with the clerk of such circuit or corporation court ten days before the day on which the court will be asked to grant the said certificate, and a copy thereof forthwith delivered by the clerk to the judge of the court.

3. Every person over nineteen and under twenty-one years of age applying for a li-

cense to practice law must first have obtained from the circuit court for the county, or the corporation court of the city, wherein he resides, a certificate that he is a person of honest demeanor; that he is over nineteen years of age; that he has studied law for a period of two years in a law school of this State, or in the office of a practicing attorney of this state (as the case may be); that he will attain the age of twenty-one years on the — day of —, 19—, (giving the exact date); and that he has resided in this state the preceding six months; said certificate to be obtained in the manner prescribed for persons over twenty-one years of age.

4. Every person who desires to be examined shall file with the secretary of this board a certified copy of his application, of the recommendations of the members of the bar, and of the certificate of his circuit or corporation court, accompanied by a fee of \$10.00, in certified check, money order or cash (which shall cover all costs of examination, including license), and should the aggregate of the fees prove excessive, after deducting the expense of examination, such excess shall be returned to the applicants ratably. Said papers are to be filed and deposited at least five days prior to the day of examination, and should be addressed to M. B. Watts, Secretary, etc., Richmond, Va., to whom all correspondence also should be addressed. The papers filed must show upon their face that the order of court granting the certificate was made on the day named

in the application, or that the application was docketed on that day. *Applicants are urged and expected to see personally that their applications, the court order thereon and other papers conform strictly to these rules.*

5. Any applicant failing to pass an examination may, after six months, again apply in writing, addressed to the secretary of the board, setting forth that he has diligently pursued the study of the law for six months prior to the second examination, and specifying the school where he has pursued his studies or the course of reading which he has followed, and shall not be required to pay an extra or additional fee for the second examination; and if any applicant who fails to pass the second examination apply again, he shall proceed in the same manner as a new applicant.

6. Any applicant failing to appear shall be charged with his proportionate part of the cost of the examination for which he made application, but may stand any subsequent examination within two years from the date of his original application on his original papers and without additional charge; provided he shall give reason satisfactory to the board for his failure to appear.

7. Applicants must provide themselves with fountain pens or indelible pencils for use in the examination room.

8. The questions and answers of every examination will be in writing, but where is doubt as to the results of the examination of any applicant, he shall be liable also to an oral examination.

9. The board, in grading papers, will take into consideration not only the legal learning of the applicant, but his general qualification to practice in the courts of this state as an attorney and counsellor at law.

10. All applicants will be liable to be examined on the following subjects, viz.: Real and Personal Property, Domestic Relations, Contracts, Agency, Partnership, Negotiable Instruments, Insurance, Corporations, Wills and Personal Representatives, Torts, Equity Jurisprudence, Pleading and Practice at Law and in Equity, Evidence, Crimes and Criminal Procedure, Powers and Duties of the Corporation Commission, Code of Virginia, Constitutional Law, and the Code of Legal Ethics as adopted by the Virginia State Bar Association.

11. Every applicant will be required to affix to his examination and subscribe with his own name the following pledge: "I hereby certify that I have neither received nor given aid or assistance in any manner during this examination."

In case any applicant shall violate this pledge, he will be denied a recommendation for admission to the bar.

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[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

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THE SOUTHEASTERN REPORTER VOLUME 71

(126 Ga. 192)

WYONE SHOE CO. v. DANIELS & CO.
(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 47*)—SALES IN BULK—NOTICE TO CREDITORS.

Under the act of August 17, 1903 (Acts 1903, p. 92), the requirement that the purchaser of a stock of goods in bulk shall, at least five days before the completion of said purchase or the payment therefor, "notify, personally or by registered mail," each of the creditors of the vendor, is met by sending the proper notice by registered mail at least five days before the completion of the purchase or the payment therefor. It is not necessary that the notice so mailed shall be received by the creditor five days before such completion.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 47.*]

2. FRAUDULENT CONVEYANCES (§ 47*)—SALES IN BULK—NOTICE TO CREDITORS—REQUISITES.

The act requires that such notice shall show "the proposed sale, the price to be paid therefor, and the terms and conditions thereof, together with a copy of the statement of the assets and liabilities, as furnished him by the vendor."

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 47.*]

3. FRAUDULENT CONVEYANCES (§ 47*)—SALES IN BULK—NOTICE TO CREDITORS—REQUISITES.

It was not a sufficient compliance with the requirements of the act stated in the preceding headnote to send a notice which contained only the following statement of the terms and conditions of the sale: "The terms and conditions of said purchase being as follows: Cash payment, \$3,000; \$8,000 in stock in the Wyone Shoe Company; balance in deferred payments."

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 47.*]

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action between the Wyone Shoe Company and Daniels & Co. Judgment in favor of the latter, and the former brings error. Affirmed.

G. A. Whitaker, for plaintiff in error.
Woodward & Smith, for defendant in error.

LUMPKIN, J. The second section of the act of August 17, 1903 (Acts 1903, p. 92), reg-

ulating the sale of stocks of goods, wares, and merchandise in bulk, reads as follows: "Thereupon it shall be the duty of the purchaser, at least five (5) days before the completion of said purchase, or the payment therefor, to notify, personally or by registered mail, each of said creditors, of the said proposed sale, the price to be paid therefor, and the terms and conditions thereof, together with a copy of the statement of the assets and liabilities as furnished him by the vendor." Two questions arise for decision: First, was it a sufficient compliance with the requirement of the act that the notice was sent by registered mail to a non-resident creditor of the vendor at least five days before the completion of the sale or payment therefor, or was it necessary that such notice should be received, by the person to whom it was sent, five days before such completion? and, second, was the notice which was sent in this case sufficient in its terms to comply with the act?

[1] 1. It is made the duty of the purchaser "to notify, personally or by registered mail," each creditor of the vendor at least five days before the completion of the purchase. Does the expression, "to notify . . . by registered mail," mean that the purchaser must place the notice in the mail duly registered, or that the person to whom it is addressed must receive it before it becomes a notice? The act is dealing with the duty of the purchaser. If he adopts the method of giving notice by mail, when he places the notice in the mail, duly registered, he has done all that he can do to comply with the law. Whether such notice reaches the creditor or not, or whether it reaches him promptly, is a matter over which the purchaser has no control. If there should be a delay in handling the mails, or if the creditor should be sick, or absent from home on a journey, there might be a long delay; and if the sale could not be completed until five days after every creditor had received the notice personally, and its validity should depend upon the proof of such receipt, sales in bulk would be practically impossible. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

provisions of the act are somewhat stringent, but they do not go to that extent.

[2] 2. 8. Omitting the date, direction, and signature, the notice sent was as follows: "You are hereby notified that the Wyone Shoe Company, a corporation under the laws of Georgia, has traded for and agreed to purchase the entire stock of merchandise owned by O. M. Tift, in Valdosta, Ga., and that said purchase and sale will be fully consummated on Thursday, the 19th inst. You will find inclosed herewith copy statements of assets and liabilities of O. M. Tift, together with the addresses and amount due to each creditor; also copy inventory taken by the purchaser and seller, showing articles purchased and the cost price thereof, as furnished by O. M. Tift. The terms and conditions of said purchase being as follows: Cash payment, \$3,000; \$6,000 in stock in the Wyone Shoe Company; balance in deferred payments."

[3] This did not comply with the requirement of the act above cited. It did not show what was "the price to be paid therefor, and the terms and conditions thereof." It merely mentioned two payments, one of \$3,000 in cash, and the other of \$6,000 in stock in a shoe company, and added, "balance in deferred payments." When such deferred payments were to be made, or what was their amount, or what was the total purchase price, was not stated, as the act required. The judgment of the presiding judge, to whom the case was submitted without a jury, holding that the sale was not valid as against the creditor to whom the notice above quoted was sent, was right, though we cannot agree with him in declaring that the registered notice must have been received by the creditor five days before the consummation of the sale.

Judgment affirmed. All the Justices concur.

(126 Ga. 166)

JOHNSON v. REEVES.

(Supreme Court of Georgia. April 13, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The evidence was conflicting, but was sufficient to authorize the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Webster County; Z. A. Littlejohn, Judge.

Action between W. A. Johnson and J. A. Reeves. From the judgment, Johnson brings error. Affirmed.

W. H. Gurr, for plaintiff in error. J. F. Souter and J. B. Hudson, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(126 Ga. 179)

CARPENTER et al. v. CROWLEY et al. (Supreme Court of Georgia. April 13, 1911.)

(Syllabus by the Court.)

INJUNCTION (§ 137*)—GROUND.

Under the evidence and pleadings in this case, there was no abuse of discretion on the part of the court below in refusing to grant an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 307-309; Dec. Dig. § 137.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Bill by H. W. Carpenter and others against one Crowley and others. Judgment for defendants, refusing an interlocutory injunction. Plaintiffs bring error. Affirmed.

H. M. Broadwell and Mozley & Moss, for plaintiffs in error. D. W. Blair, for defendants in error.

BECK, J. Three named persons, alleging themselves to be three out of the total number of five trustees of the Roswell Methodist Episcopal Church South, brought their equitable petition against the other two trustees and a third person, who they allege is not a trustee, seeking to enjoin the sale of the Roswell Church building and lot by the defendants, who they allege are threatening to sell the same and turn the property over to the purchaser. Later, by appropriate amendment, the plaintiffs struck one of the named trustees as a defendant, leaving their petition to stand against one trustee and one person who they allege is not a trustee, though claiming himself to be and proposing to act as such. It is further alleged in the amendment that, "since the filing of said suit, the trustees in a regular meeting called by the chairman by a majority vote have declared against the sale of the property, and petitioners insist that no sale of the property in question can be made without the joint act of all the trustees." The defendants answered these and other allegations of the petition, and on the interlocutory hearing the court refused to grant the injunction prayed, to which ruling the plaintiffs excepted.

Whether under the express provisions of the trust deed by which the property in controversy was conveyed to the original trustees and their successors in office, the trustees of the Roswell Methodist Episcopal Church South, would have authority to sell the property or permit it to be devoted to other uses than those pointed out in the deed, it is not now necessary to decide. Under the pleadings and evidence in the case, the court did not abuse his discretion in refusing the interlocutory injunction sought by petitioners, as it appears, according to the allegations in the petition and the amendment thereto and the contentions of the petitioners, as shown by the evidence intro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

duced by them, that less than a majority of the trustees are undertaking to dispose of the property; i. e., the Roswell Church building and lot upon which it is erected. Under this showing the court might well refuse to grant the injunction sought by the petitioners, inasmuch as the parties whom they sought to restrain from selling the property were powerless to accomplish that which it is alleged they were attempting to do. Injunction, therefore, was not necessary to prevent the threatened act, and the court did not err in refusing the injunction at the interlocutory hearing.

Judgment affirmed. All the Justices concur.

(136 Ga. 194)

JACKSON v. GEORGIA SOUTHERN & F. R. CO.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 276*)—INJURIES TO EMPLOYÉ—NONSUIT.

This case was before the Supreme Court on a former occasion. *Jackson v. Georgia Southern & Florida R. Co.*, 132 Ga. 127, 63 S. E. 841. Upon the evidence then properly brought to this court, the judgment of nonsuit was reversed. Upon a subsequent trial of the case, the evidence submitted was substantially different from that adduced on the former trial, as appeared in the record, and was sufficient to show affirmatively that the deceased, who was an employé of the railroad company, was at fault, and there was no error in granting a nonsuit.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action by Josephine Jackson against the Georgia Southern & Florida Railroad Company. Judgment of nonsuit, and plaintiff brings error. Affirmed.

W. E. Thomas and Roscoe Luke, for plaintiff in error. Jno. I. Hall, J. E. Hall, and E. K. Wilcox, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(136 Ga. 148)

COFFEE et al. v. ATLANTA OIL & FERTILIZER CO.

(Supreme Court of Georgia. April 12, 1911.)

(Syllabus by the Court.)

INTERLOCUTORY INJUNCTION.

Under the pleadings and evidence, there was no abuse of discretion on the part of the court below in refusing the grant of an interlocutory injunction.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by P. T. Coffee and others against the Atlanta Oil & Fertilizer Company. From

a judgment refusing an interlocutory injunction, plaintiffs bring error. Affirmed.

Green, Tilson & McKinney, for plaintiffs in error. Tye, Peeples & Jordan, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(136 Ga. 148)

DUNLOP v. SMITH et al.

(Supreme Court of Georgia. April 12, 1911.)

(Syllabus by the Court.)

INTERLOCUTORY INJUNCTION.

Under the evidence contained in the record, the court did not err in refusing the injunction prayed by the plaintiff in this case.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by G. A. Dunlop against C. R. Smith and others. From a judgment refusing an injunction, plaintiff brings error. Affirmed.

Lewis W. Thomas, for plaintiff in error. Westmoreland Bros., for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(136 Ga. 157)

BONNER v. STATE.

(Supreme Court of Georgia. April 12, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No error of law is complained of, and the evidence supports the verdict.

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Neal Bonner was convicted of crime, and he brings error. Affirmed.

Hamrick & Thomasson, for plaintiff in error. J. R. Terrell, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(136 Ga. 177)

CARTER v. GABRELS, Sheriff.

(Supreme Court of Georgia. April 13, 1911.)

(Syllabus by the Court.)

HABEAS CORPUS (§ 113*)—RELEASE ON BOND—DISMISSAL OF WRIT OF ERROR.

Where a person instituted habeas corpus proceedings to secure the release of one confined in jail, alleging that his detention there was illegal, because the commitment was illegal and void, being based upon a warrant which itself was defective and void, and upon the hearing of the habeas corpus case the trial judge refused to order the discharge of the person from custody, but remanded him to jail, and a writ of error to this order was sued out, the same will be dismissed, where it appears that, subsequent-

ly to the order complained of, the person was indicted by the grand jury of the county for the same offense for which he had been committed, and upon giving bond had been released from custody, although a decision in the case would determine which of the parties to the habeas corpus proceedings was liable for costs.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102-115; Dec. Dig. § 113.*]

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Application by Jim Carter for writ of habeas corpus against J. M. Gabrels, as Sheriff. From an order denying the writ, relator brings error. Dismissed.

J. C. Edwards, for plaintiff in error. I. H. Sutton, for defendant in error.

BECK, J. Jim Carter instituted habeas corpus proceedings, alleging that he was illegally restrained of his liberty by J. N. Gabrels, sheriff and jailer of Habersham county, and that he was being confined in the common jail of that county under and by virtue of a pretended commitment, which was based upon a warrant which was void because of certain irregularities pointed out in the petition. Petitioner also contended that the commitment was void on its face, on the ground that it failed to "set forth any offense against the laws of the state of Georgia," and prayed an examination into the cause of his detention. Gabrels filed his answer to the petition. Upon the hearing the court remanded petitioner to the custody of the sheriff, and ordered that he be admitted to bail in the sum of \$100. To this order petitioner excepted, and sued out a writ of error to this court. When the case was called for hearing in this court, the same being submitted on briefs, a motion to dismiss the writ of error was made by counsel for the defendant in error, upon the ground that, since the hearing before the court below, the plaintiff in error had been indicted in the superior court of Habersham county upon the charges which constituted the basis of the commitment alleged in the habeas corpus proceedings to be irregular and void, that he had been arrested under that indictment, that he had given bond, and that the case below is now pending. A certified copy of the indictment and bond referred to were attached to the motion to dismiss. Counsel for plaintiff in error filed an answer to the motion to dismiss, but did not deny the material allegations contained in the motion. While it is plainly inferable, from the motion to dismiss and the answer of counsel for plaintiff in error, that the plaintiff in error had been released from custody, it was not expressly stated in the motion or in the answer that he had been so released; and this court passed an order, a certified copy of which was duly mailed to counsel for plaintiff in error, directing that plaintiff in error or his counsel have 10 days

from the date of such order in which to make specific denial under oath of the facts alleged in the motion to dismiss, and that upon failure to make such denial the writ of error would be dismissed. The period of 10 days within which plaintiff in error was allowed to make answer in response to the order referred to above has elapsed, and the answer has not been filed.

It is insisted in the answer to the motion to dismiss, as made by counsel for defendant, that the writ of error should not be dismissed, but that the question made in the bill of exceptions should be decided, inasmuch as upon the decision of the assignment of error for or against the plaintiff in error depends the question as to whether or not the plaintiff or defendant will be liable for costs. But this position of counsel for plaintiff in error is not tenable. Under the decision in the case of Tabor v. Hipp, 136 Ga. —, 70 S. E. 886, it was held that a case would not be retained in this court for decision solely upon the ground that a decision of the case would determine the question as to which of the parties to the case here would be liable for the costs. It is therefore ordered that the writ of error be dismissed.

Writ of error dismissed. All the Justices concur.

(136 Ga. 175)

W. D. PRICE & CO. et al. v. VIRGINIA-CAROLINA CHEMICAL CO.

(Supreme Court of Georgia. April 12, 1911.)

(Syllabus by the Court.)

1. ACTION (§ 50*)—MISJOINDER.

A petition against two defendants, containing an alternative statement of facts, wherein the plaintiff alleges that if one statement be the truth one defendant is indebted to him, and if the other statement be true the other defendant would be indebted to him, and praying that the defendants be required to interplead, so as to determine which one is liable to him, and, upon the liability being fixed, that the plaintiff have judgment against such defendant, is multifarious.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 50.*]

(Additional Syllabus by Editorial Staff.)

2. INTERPLEADER (§ 3*)—PROCEEDINGS—SUFFICIENCY OF PETITION.

A plaintiff, on a petition against two defendants containing an alternative statement of facts, wherein plaintiff alleges that if one statement be true one defendant is indebted to him, and if the other statement is true the other defendant is indebted to him, and praying that defendants be required to interplead, so as to determine which one is liable to him, and, upon the liability being fixed, that plaintiff have judgment against such defendant, cannot require such defendants to interplead and settle their respective rights, to determine which one is liable to plaintiff; Civ. Code 1910, § 5471, providing that whenever one is possessed of property, or owes a debt or duty, to which more than one person lays claim, and the claims are

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

such as to render it doubtful or dangerous for the holder to act, he may apply to equity to compel the claimants to interplead.

[Ed. Note.—For other cases, see Interpleader, Dec. Dig. § 3.*]

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Action by the Virginia-Carolina Chemical Company against W. D. Price & Co. and another. A demurrer to the petition was overruled, and the mentioned defendants bring error. Reversed.

The Virginia-Carolina Chemical Company filed its petition against W. D. Price & Co. and the Citizens' Bank of Kite, Ga., alleging as follows: That on May 1, 1908, W. D. Price & Co. executed and delivered to petitioner their note for \$648.11, due November 1, 1908, and payable at the Citizens' Bank of Kite. Petitioner discounted the note before maturity, and in due course of trade it became the property of the Corn Exchange National Bank of Chicago. That the Corn Exchange Bank, shortly before the maturity of the note, sent same for collection to the Citizens' Bank of Kite, but never received any remittance from that bank, nor was the note ever returned. That W. D. Price & Co. claim that they paid the note in full to the Citizens' Bank of Kite on the 3d of November, 1908, which is denied by that bank, which also denies, that it ever received such note for collection. That petitioner has paid the Corn Exchange Bank the amount of the note, but has never been able to obtain possession of the note. That if the note was paid by W. D. Price & Co. to the Citizens' Bank of Kite, then that bank is indebted to petitioner for the amount of the note; but if it was not so paid, as claimed by Price & Co., then the note has been lost, if it was never received by the Citizens' Bank of Kite for collection; or, if it was received by the bank, the latter has appropriated and converted it to its own use. That either W. D. Price & Co. or the Citizens' Bank of Kite is indebted to petitioner in the amount of the note. The prayer of the petition was that W. D. Price & Co. and the Citizens' Bank of Kite be required to interplead, whether W. D. Price & Co. had paid the note to the Citizens' Bank of Kite, as they claimed, or whether said note had never been received by the bank, as claimed by it, and that petitioner have judgment against whichever of the defendants it should appear owed the amount of its note. It was alleged by amendment that petitioner was without any adequate remedy at law, and that, in order to prevent a multiplicity of suits and settle the contentions of the parties by one decree, it was necessary that a court of equity should take jurisdiction. Price & Co. demurred to the petition, on the grounds that no cause of action was set out, that the petitioner is not entitled

to the relief sought, either legal or equitable, and because separate and distinct actions against separate and distinct defendants are joined in the petition, and there is a misjoinder of parties defendant. The court overruled the demurrer, and Price & Co. excepted.

A. L. Hatcher and Hines & Jordan, for plaintiffs in error. Green, Tilson & McKinney, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1, 2] Under the allegations of the petition, the plaintiff is not entitled to have the defendants engage in an internecine legal battle to settle which one of them should pay the money which it claims to be due from one or the other. The Code declares that "whenever a person is possessed of property or funds, or owes a debt or duty, to which more than one person lays claim, and the claims are of such a character as to render it doubtful or dangerous for the holder to act, he may apply to equity to compel the claimants to interplead." Civ. Code 1910, § 5471. Instead of alleging that he has funds belonging to one or the other of the defendants, whom he invites to settle their respective rights to the same, the plaintiff alleges that he is entitled to recover of one of the defendants a certain sum of money on an alternative state of facts, and asks that they litigate between themselves which state of facts presents the truth, and which one of the defendants is liable to him. This is not permissible. If the bank collected the note, it is accountable to the plaintiff, and that is one cause of action. If the makers have not paid the note, they are liable thereon to the plaintiff, and that is an altogether different cause of action. The petition contains two distinct causes of action against different defendants, and violates the fundamental principle of pleading, which prohibits the inclusion of separate and independent controversies against different parties in the same action.

Judgment reversed. All the Justices concur.

(136 Ga. 172)

YOUNG v. EWING et al.

(Supreme Court of Georgia. April 13, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 977*)—REVIEW—GRANT OF NEW TRIAL.

The evidence did not demand a verdict in favor of the party in whose favor it was found, and the first grant of a new trial will not be reversed. *Cox v. Grady*, 132 Ga. 368, 64 S. E. 262.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3863; Dec. Dig. § 977.*]

2. APPEAL AND ERROR (§ 793*)—CROSS-BILL OF EXCEPTIONS—DISMISSAL.

As the grant of a new trial is affirmed, the cross-bill of exceptions is dismissed, without

prejudice to the right of the defendant in error in regard to a future determination of his exceptions pendente lite. *Armour & Co. v. Burkhalter*, 130 Ga. 370, 60 S. E. 850; *Purser v. Thompson*, 135 Ga. 732, 70 S. E. 569.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 793.*]

Error from Superior Court, Irwin County;
U. V. Whipple, Judge.

Action between E. J. Young and F. E. Ewing and others. From the judgment, E. J. Young brings error, and F. E. Ewing and others assign cross-error. Judgment on main bill of exceptions affirmed, and cross-bill of exceptions dismissed.

A. J. McDonald, H. J. Quincey, and Haygood & Cutts, for plaintiff in error. L. Kennedy and O. H. Elkins, for defendants in error.

LUMPKIN, J. Judgment on main bill of exceptions affirmed. Cross-bill of exceptions dismissed, without prejudice to exceptions filed pendente lite. All the Justices concur.

(126 Ga. 165)

ANDERSON v. ANDERSON, Judge.
(Supreme Court of Georgia. April 18, 1911.)

(Syllabus by the Court.)

MANDAMUS (§ 48*)—REVIEW—DISCRETION OF LOWER COURT—REFUSAL TO GRANT MANDAMUS.

The Supreme Court will not interfere with the refusal of the judge of the superior court to grant a mandamus nisi, calling upon the judge of the city court to show cause why a mandamus absolute should not be made against him, requiring him to hear and determine a given case pending in the city court of which he is judge, and which he has continued to await the final determination of another case which has been appealed from such city court to the superior court; it appearing that there was no abuse of discretion in the ruling made by either of such judges.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 95; Dec. Dig. § 48.*]

Error from Superior Court, Morgan County;
H. G. Lewis, Judge.

Mandamus by Ola V. Anderson, administratrix, against K. S. Anderson, Judge. From a judgment denying a writ nisi, plaintiff brings error. Affirmed.

M. C. Few, for plaintiff in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(126 Ga. 182)

WATERS et al. v. BROWNLEE et al.
(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. ACTION (§ 50*)—PARTIES (§ 25*)—MULTIFARIOUSNESS—MISJOINDER OF PARTIES.

A petition by children, alleging that their father purchased land, taking the title in his own name, and used their money in part pay-

ment of the purchase price, and that subsequently the land was bought at sheriff's sale, under process against their father, by others, with notice of an implied trust, who sold to others, who also had notice of the trust, and in the petition both the father and those ultimately holding under the purchaser at sheriff's sale being defendants, and the prayers being to declare a trust and for an accounting against each for the mesne profits during the time the respective defendants were in possession of the land, is not multifarious, nor subject to objection on the ground that there is a misjoinder of parties defendant. See *Conley v. Buck*, 100 Ga. 187, 28 S. E. 97.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 490-547; Dec. Dig. § 50.* *Parties*, Cent. Dig. §§ 36-40; Dec. Dig. § 25.*]

2. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—ABANDONMENT.

Other grounds of demurrer to the petition were urged, and error was assigned upon the judgment overruling the demurrer; but in the brief of counsel for plaintiffs in error no question was referred to, except as dealt with in the first headnote. The assignments of error on the other questions of demurrer will therefore be considered as abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from Superior Court, Early County;
W. O. Worrill, Judge.

Action between R. O. Waters and others and Stella Brownlee and others. From the judgment, Waters and others bring error. Affirmed.

Glessner & Park, for plaintiffs in error.
Chas. D. Russell and Byron R. Collins, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(126 Ga. 187)

JONES v. STATE.
(Supreme Court of Georgia. April 12, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 956*)—NEW TRIAL—MISCONDUCT OF JURY.

In regard to the ground of the motion for a new trial which alleged misconduct on the part of the jurors in separating while deliberating on the case and in discussing it with persons other than members of the jury, and on the part of the officers in charge in permitting this, in talking to the jury about the case, and in otherwise misconducting themselves, the evidence adduced before the presiding judge on the hearing of the motion for a new trial was conflicting, and there was no error in overruling such ground.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2373-2391; Dec. Dig. § 956.*]

2. CRIMINAL LAW (§ 731*)—PROVINCE OF COURT AND JURY—INSTRUCTIONS.

It furnished no ground for reversal that the presiding judge failed to charge the jury that they were judges of the law and facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1694, 1695; Dec. Dig. § 731.*]

3. REVIEW OF EVIDENCE.

The evidence supported the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Baker County; Frank Park, Judge.

Ed Jones was convicted of crime, and brings error. Affirmed.

E. E. Oox, for plaintiff in error. W. E. Wooten, Sol. Gen., F. A. Hooper, and H. A. Hall, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(9 Ga. App. 272)

GADDIS v. SOUTHERN RY. CO.

(No. 3,136.)

(Court of Appeals of Georgia. April 24, 1911.)

(Syllabus by the Court.)

RAILROADS (§ 405*)—KILLING DOG ON TRACK—LIABILITY OF ROAD.

There was no error in sustaining the certiorari. A suit cannot be maintained against a railroad company for the negligent killing of a dog, and there is no evidence in this case that the killing was wanton or malicious. The decision is controlled by the rulings of the Supreme Court in *Jemison v. Southwestern Railroad*, 75 Ga. 444, 58 Am. Rep. 476, and *Strong v. Georgia Railway & Electric Company*, 118 Ga. 515, 45 S. E. 366.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1399; Dec. Dig. § 405.*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action by W. H. Gaddis against the Southern Railway Company. Verdict for plaintiff. From an order sustaining the certiorari, he brings error. Affirmed.

J. F. Kelly and Eubanks & Mebane, for plaintiff in error. Maddox, McCamy & Shumate and Geo. A. H. Harris & Sons, for defendant in error.

RUSSELL, J. Gaddis filed a suit against the Southern Railway Company for damages on account of the killing of a dog by the willful and negligent running of the defendant's train. The jury returned a verdict for the plaintiff, and the defendant filed a petition for certiorari. The judge of the superior court sustained the certiorari, and entered a final judgment in the case in favor of the railway company, and error is assigned thereon.

According to the testimony, there was no eyewitness of the killing of the dog; and though it is perfectly plain that the dog was killed by one of the trains of the railway company, the manner of his death can only be derived from circumstances, and from these circumstances it must be determined whether the railway company is liable to the owner of the dog. One witness heard a freight train of the railway company coming, and it blew several times. He could not see the train, but saw the smoke. He thought something was on the track, and after the train had passed went down to the

railroad, and found Mr. Gaddis' dog lying on the side of the track, dead. He saw where the dog had run along the track for about 10 steps, and then saw hair and blood, where it had been struck and dragged by the train. He did not see the train hit the dog, and surmised that the dog must have been running a rabbit. Another witness heard the train blow several times, but did not see it kill the dog. He testified that the train got faster after it blew. Both witnesses testified that the track is straight for about 200 yards from the direction in which the train was going up to where the dog was killed, and that the engineer could have stopped the train from the time he came into sight of where the dog was killed up to the place of the killing. There was other testimony that the track was straight at the point where the dog was killed. There was also testimony as to the value of the dog.

As we view this evidence, it is not sufficient to support the inference that the death of the dog was due to negligence; and it is certainly insufficient to establish that the dog was wantonly or maliciously killed by the running of the train. Therefore we conclude that the judge of the superior court very properly sustained the certiorari. The dog appears to have run only about 10 steps on the track before he met his death. The testimony that he was running a rabbit seems to be based upon a mere conjecture, for the witness states that he was not at a place where he could see the train, the dog, or the supposed rabbit. But, granting that the dog was in hot pursuit of a rabbit, he was perhaps so deeply engrossed in the instinctive love of the chase that he was oblivious of his surroundings and unduly negligent of his own safety; and it is possible he ran upon the track in front of the engine when it was too late for the engineer to stop the train, even if he saw him. But, be that as it may, it must be remembered that in the case of the killing of a dog no presumption of negligence arises from the mere fact of the killing itself. *Jemison v. Southwestern Railroad*, 75 Ga. 444 (1). And under the evidence in this case a finding in favor of the plaintiff would not have been justified, even if there could be a recovery for negligent killing of the dog, for the reason that the plaintiff failed to show that the servants of the defendant company were negligent.

The learned counsel for the plaintiff, reasoning from the fact that a dog may be levied on and sold to satisfy the debt of his owner (*Vaughn v. Nelson*, 5 Ga. App. 105, 62 S. E. 708), and that a dog is a subject of taxation, asks: "Why should not the courts of Georgia hold straight out that a recovery may be had for the negligent killing of a dog?" This court is controlled by the decisions of the Supreme Court as precedents,

and therefore our reply must naturally be taken from the ruling in the *Jemison Case*, supra, reiterated in *Strong v. Georgia Railway & Electric Company*, 118 Ga. 515, 45 S. E. 366. For further answer, we refer all who are interested in the subject (as Judge Cobb did in delivering the opinion in the *Strong Case*) to the General Assembly. The question of recovering the value of a dog which has been negligently killed is absolutely foreclosed by prior adjudications to which we have referred, and hence the trial judge could only determine whether the evidence was sufficient to establish that the dog was wantonly killed.

Omitting any consideration of the fact that in the summons which brought the defendant into court at Popskull it was charged only with killing a black bloodhound by the willful and negligent running of its train, and not with having killed him wantonly and maliciously (for that point does not appear to have been raised by demurrer), the single question, under the evidence, is whether the evidence, in any view of it, is sufficient to show that the dog was wantonly killed. The blowing of the whistle, which appears to have been so unusual in its character as to attract the attention and presence of the witnesses, would seem to indicate that the agents of the company, if they saw the dog, used all ordinary diligence to arrest his attention and to drive him from the track to a place of safety. On the other hand, if the servants of the railroad company did not see the dog (and there is no evidence that they did), of course, they could not be said to have wantonly killed him. Although there is testimony that the point where the dog was killed could be seen at a considerable distance by the engineer, there were no tracks of the dog on the railroad track, except for about 10 steps, and no circumstances from which it is to be inferred that the dog was more likely on the railroad track at a time when the engineer could have seen him than that he ran upon the track and made these few steps when the engineer did not see him, or when, if he did see him, it was impossible for him to stop the train.

Judgment affirmed.

(9 Ga. App. 291)

BENTON v. STATE. (No. 8,183.)

(Court of Appeals of Georgia. April 24, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§ 286*)—CRIMINAL LAW (§ 762*)—ASSAULT WITH INTENT TO MURDER—INSTRUCTIONS.

In a trial for assault with intent to murder, the judge charged the jury as follows: "You would consider the testimony precisely as you would if death had resulted from any injury inflicted by the defendant, if any has been proven before you in this case. The only differ-

ence is that when death results, the intention to kill is presumed until the contrary appears; but when death does not result, the intention to kill is never presumed. It is a matter of proof, to be determined by the jury under the circumstances." Held, this instruction aptly and correctly defines the law applicable to assault with intent to murder, and does not intimate an opinion on the facts, is not in any manner calculated to confuse the jury as to the evidence necessary to prove malice in such cases, and is not error for any of the reasons assigned, nor for any other reason, so far as this court can discover. *Whitsett v. State*, 115 Ga. 203, 41 S. E. 699.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 586-591; Dec. Dig. § 286.* *Criminal Law*, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759; Dec. Dig. § 762.*]

2. CRIMINAL LAW (§ 784*)—ASSAULT WITH INTENT TO MURDER—NECESSITY FOR INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

The witnesses for the state having testified that they were present and saw the shooting by the accused with a pistol in a few feet of the prosecutor, and that the shot took effect, producing a serious and dangerous wound, the jury were authorized to infer the existence of the specific intent to kill, and the judge was not required to charge the law of circumstantial evidence. *Nelson v. State*, 4 Ga. App. 223, 60 S. E. 1072; *Paschal v. State*, 125 Ga. 279, 54 S. E. 172; *Johnson v. State*, 4 Ga. App. 59, 60 S. E. 813; *White v. State*, 4 Ga. App. 72, 60 S. E. 803, and cases cited.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1883-1888, 1922-1960; Dec. Dig. § 784.*]

3. HOMICIDE (§ 286*)—ASSAULT WITH INTENT TO MURDER—INSTRUCTIONS.

On a trial under an indictment for assault with intent to murder, it is not error for the court, where the evidence makes the law applicable, to give in charge to the jury the definition of implied malice as laid down in section 62 of the Penal Code of 1910. In a case of assault with intent to murder, malice may be implied "where no considerable provocation appears, and where all the circumstances" of the attempt to kill "show an abandoned and malignant heart."

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 586, 591; Dec. Dig. § 286.*]

4. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

An instruction to the jury that "a reasonable doubt, in terms of the law, is a doubt that legitimately springs from the evidence, or from the want of evidence, or from a conflict in the evidence," was not erroneous in failing to state that the reasonable doubt might arise from a consideration of the defendant's statement; the court charging fully and correctly on the weight which the jury might give to the statement. *Jordan v. State*, 130 Ga. 406, 60 S. E. 1063.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1849, 1904-1922; Dec. Dig. § 789.*]

5. CRIMINAL LAW (§ 797*)—INSTRUCTIONS.

In charging the jury that, if they should find the defendant guilty of the felony charged, they could recommend that the felony may be treated as a misdemeanor, it was not error for the judge to state that the recommendation would not be effective unless approved by the court. Such is the statute. Pen. Code 1910, § 1062; *Echols v. State*, 109 Ga. 508, 34 S. E. 1038.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1935-1937; Dec. Dig. § 797.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6. CRIMINAL LAW (§§ 685, 1153*)—TRIAL—CONDUCT OF TRIAL—PERMITTING WITNESS TO REMAIN IN COURTROOM TO ASSIST A PARTY—DISCRETION OF COURT.

It has been repeatedly held that it is within the discretion of the trial judge to permit a witness to remain in the courtroom to assist either the state or the accused; and while it is better that the witness should be first examined, this, too, is a matter of discretion, and the action of the court in these respects will not be reviewed. *Carter v. State*, 2 Ga. App. 266, 58 S. E. 532; *Shaw v. State*, 102 Ga. 667, 29 S. E. 477.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1549-1566½, 3065; Dec. Dig. §§ 665, 1153.*]

7. NEWLY DISCOVERED EVIDENCE—SUFFICIENCY.

Some of the testimony alleged to be newly discovered would be inadmissible, because hearsay, and that which would be admissible would probably not change the result, being purely cumulative.

8. REVIEW ON APPEAL.

No error of law appears, and the verdict is amply supported by the evidence.

Error from Superior Court, Dougherty County; Frank Park, Judge.

W. L. Benton was convicted of assault with intent to murder, and he brings error. Affirmed.

J. W. Walters, Jr., R. J. Bacon, and Ben T. Burson, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 255)

MILLER v. CARAKER. (Nos. 2,927-2,931.)
(Court of Appeals of Georgia. April 24, 1911.)

(Syllabus by the Court.)

1. DEMURRERS PROPERLY OVERRULED.

There was no error in overruling the special demurrer to the mortgage foreclosure.

2. AFFIDAVITS (§§ 9, 12*)—EVIDENCE (§ 431*)—PAROL EVIDENCE—ADMINISTRATION OF OATH TO AFFIANT.

A written signed statement of facts, purporting to be the statement of the signer, followed by the certificate of an officer authorized to administer oaths that it was sworn to and subscribed before him, is a lawful affidavit. It is not necessary that it should be stated in the instrument, prior to the signature of the affiant, that the declaration was made under oath, if in fact the oath was administered. Whether the oath was or was not administered is a matter as to which the certificate of the officer is prima facie evidence, but as to which parol evidence is admissible.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 38-41; Dec. Dig. §§ 9, 12; Evidence, Dec. Dig. § 431.*]

(Additional Syllabus by Editorial Staff.)

3. AFFIDAVITS (§ 1*)—DEFINITION.

An "affidavit" is a statement or declaration, reduced to writing and sworn to or affirmed before some officer who has authority to administer an oath (citing Words and Phrases, vol. 1, p. 240).

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

Error from City Court of Sylvester; J. B. Williamson, Judge.

Actions by O. T. Caraker against Needy Miller, against Needy Miller and others, against Rowell Chevers, against J. H. Kinchen and others, and against Will Gardner. Judgments for plaintiff, and defendants bring error. Reversed.

Claude Payton and O. E. Hay, for plaintiffs in error. R. J. Bacon and W. E. Grubbs, for defendant in error.

POWELL, J. [1] Caraker foreclosed a number of chattel mortgages against different defendants, and from these cases the present writs of error arise. They are separate cases, but they all involve identically the same points. In each case there was a demurrer to the foreclosure, because of the inadequacy of the description of the mortgaged property. The court overruled the demurrers. We may say, without going into details, that in each case the description of the mortgaged property was sufficient, at least as between the parties to the instrument.

In each of the cases the defendant resisted the foreclosure by filing the defense of non est factum. This defense was presented in a writing in the following form: The case is duly stated. Then comes the statement that the defendant, without waiving his demurrer, "enters a plea of non est factum, and says that the mortgage shown to be foreclosed in the above-stated case was never executed by the defendant, nor by any person authorized by the defendant, and the same is not the act of this defendant, nor has same been in any way ratified by this defendant." The plea concludes in the usual form, demanding jury trial, and is signed by the defendant, followed by a jurat as follows: "Sworn to and subscribed before me this Jan. 10, 1910. J. W. Warren, C. S. C." The court struck this defense, on the ground that it was not verified by the affidavit of the defendant.

[2] It is to be understood, of course, that a defense to the foreclosure of a mortgage on personalty is, in this state, to be made on affidavit of the defendant, and in all cases it is necessary that a plea of non est factum should be sworn to. The question is whether this plea, signed by the defendant and followed by the jurat of the clerk of the superior court, certifying that it had been sworn to, constitutes a lawful affidavit. The controlling point, therefore, is whether the failure to state in the body of the affidavit that it is made under oath or is sworn to is a fatal lack; and we use the words "fatal lack" intentionally, for the defendant in each case offered to prove by parol that the oath as to the truthfulness of the contents of the plea was administered before the plea was signed and attested by the officer.

[3] According to the very general consen-

sus of authority an affidavit is "a statement or declaration reduced to writing and sworn or affirmed to before some officer who has authority to administer an oath," or, as it is sometimes stated, "is simply a declaration on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths." See *Words and Phrases*, vol. 1, p. 240. In many jurisdictions it is held that the signature of the affiant is not an essential; but in this state the contrary rule has been adopted. See *Meadows v. Alexander*, 1 Ga. App. 40, 57 S. E. 901, and cases there cited. So that, to give a definition of an affidavit according to the law as in force in this state, we may say that it is a statement or declaration reduced to writing, sworn to or affirmed before some officer who has authority to administer the oath, and duly signed by the affiant. It has been held in a number of cases that the jurat is not, strictly speaking, a part of the affidavit, but is merely a certificate by which the fact that the affidavit was sworn to is prima facie proved. If the officer fails to sign it originally, he may sign it afterward. Further, "it is not indispensable that the jurat should be signed by the officer who administers the oath, the material question being whether or not the oath was actually administered and taken; and in the absence of the officer's certificate to this effect, all unde testimony may be received to establish this material fact." *Beach v. Averett*, 106 Ga. 73, 31 S. E. 806, 71 Am. St. Rep. 239; *Smith v. Walker*, 93 Ga. 252, 18 S. E. 830; *Veal v. Perkerson*, 47 Ga. 92.

We understand that the chief distinction recognized by the courts as to jurat and affidavit is this: That nothing to which the officer alone certifies is to be regarded as a part of the affidavit, considering the affidavit in a substantive sense, and as being what the affiant in fact swore to; and, on the other hand, that the certificate of the officer is sufficient prima facie evidence to establish the fact that the contents of the writing to which it is attached were sworn to. Under the practice in the British courts, great strictness was formerly required as to the forms of affidavits, and any departure from the prescribed form would vitiate the affidavit. But none of the American courts, so far as our investigation goes, has ever given any great weight to mere form in these matters, and it is well recognized in this state that no particular form is required, provided the facts sworn to are committed to writing and signed by the affiant, if, as a matter of fact, the oath was administered. Now, on account of the requirement in England that in the body of the affidavit itself the words "upon oath," or "being sworn," should be used, it has been held in a number of English cases that the omission of these words is fatal, even though the jurat attests the fact that the statements of the affidavit were made under oath or were sworn to.

This strictness of the British courts was noticed and commented on in the case of *Veal v. Perkerson*, supra, and the fact was also stated in that case that such formality was not observed in Georgia.

It may be safely said that if one should have before him all of the affidavits which have ever been made in connection with judicial proceedings in this state, from its organization down to the present time, he would hardly find in 10 per cent. of them the statement of the affiant himself that he was sworn or that he was under oath; for, while affidavits occasionally begin, "I, the affiant, do swear," or, "I, the affiant, on oath, do say," still the most common form of introducing an affidavit is, "Personally appeared before me, the undersigned, an officer authorized to administer oaths, the affiant [naming him], who, on oath [or, who being duly sworn], deposes and says." It will be noticed that in this form, which is commonly used, the statement that the affiant was duly sworn is not the statement of the affiant, but on its face purports to be the statement of the attesting officer. It is substance; not mere form, that is to be observed. The affidavit is therefore good, provided (1) that there is a written statement; (2) that the oath is administered to the affiant; and (3) that he signs the statement. The verification of the magistrate to the fact that the oath was administered may as completely appear from the jurat as from the mere introductory clause preceding the written statement of the facts sworn to.

Almost the identical point was before the Supreme Court in *Loeb v. Smith*, 78 Ga. 504, 3 S. E. 458. There the body of the paper which was signed by the affiant contained no statement that it was on oath or sworn to, and the fact of its being made under oath appeared only from the jurat of the notary who attested it. But as Judge Bleckley said in that case: "We think the fair construction of the whole document, taken together, is that the agent [the affiant] swore to the truth of the petition. By the terms 'sworn to,' as used in the jurat, the magistrate meant to say, and did say with sufficient certainty, that the petition was sworn to; and to swear to an instrument of writing, such as a petition, is to declare on oath that its contents are true." Chief Justice Bleckley did, in the course of the argument, suggest that this might not amount to a formal affidavit, though it is plain from all he said that he leaned most strongly to the opinion that it did. In that case it was held that a formal affidavit was not necessary.

In the present case, where a formal affidavit is necessary we hold that the writing before us constitutes an affidavit which is sufficiently formal, thus giving effect to what the learned justice intimated, but was not called upon to decide judicially.

Judgment reversed.

(3 Ga. App. 240)

SOUTHERN RY. CO. v. WILEY.

(No. 2,898.)

(Court of Appeals of Georgia. April 24, 1911.)

*(Syllabus by the Court.)***1. TRIAL (§ 250*)—INSTRUCTIONS.**

Where a suit to recover damages was based on the theory of a willful and wanton act, and a recovery was authorized only on that theory, it was error to instruct the jury in effect that the defendant would be liable on proof of negligent conduct alone.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

*(Additional Syllabus by Editorial Staff.)***2. RAILROADS (§ 312*)—DEATH OF PERSON ON TRACK — NEGLIGENCE — FAILURE TO GIVE CROSSING SIGNAL.**

Failure of those in charge of a locomotive to sound a crossing signal at a crossing several hundred yards from the point where the engine struck and killed a person walking upon the track was not of itself negligence as to the person so killed, but could only be considered as a circumstance, in connection with other facts, indicating negligence at the place of the killing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 988-1001, 1003; Dec. Dig. § 312.*]

3. TORTS (§ 18*)—NEGLIGENCE (§ 100*)—WANTON AND WILLFUL INJURY.

There may be a recovery for a willful and wanton injury inflicted upon another, though such other may be a trespasser or wrongdoer, and may be himself guilty of contributory negligence.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 25; Dec. Dig. § 18.* Negligence, Cent. Dig. § 85; Dec. Dig. § 100.*]

Error from City Court of Hall County; Geo. K. Looper, Judge.

Action by Mrs. W. J. Wiley against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

C. B. Faulkner, Ed Quillian, and Jno. J. Strickland, for plaintiff in error. H. H. Dean, for defendant in error.

HILL, C. J. This is a suit brought by the plaintiff against the railroad company to recover damages for the wanton and willful killing of her husband. She recovered a verdict for \$1,500, and the defendant's motion for a new trial was overruled. The evidence is within a narrow compass, and briefly stated is as follows:

The decedent, 60 years of age, was walking on the track of the railroad several hundred yards from a public crossing. He was quite deaf, the wind was blowing at a high rate directly in his face as he walked, and a freight train, running from 20 to 30 miles an hour, coming up behind, ran over and killed him. The engineer saw him walking on the track at a distance of between 300 and 400 yards before he reached him. There was a pathway on the side of the track for pedestrians, although pedestrians were in the habit of using the middle of the track at

that place. As to this point there is no controversy in the evidence. The plaintiff's witnesses testified that the engineer did not blow the whistle at the public crossing, about 300 yards from where the deceased was killed, and did not blow the whistle or ring the bell, or apparently make any effort to check the speed of the train, before reaching the decedent.

The engineer testified that he did blow the whistle at the blow post when approaching the crossing, some 300 yards from where the decedent was killed; that when he first saw the decedent walking on the track he assumed that he would get off the track before the train reached him, but, realizing in a few seconds that the decedent did not intend to get off the track, he blew his whistle, put on the brakes, including the emergency brakes, and did all he could to stop the train, but that it was impossible to stop it in time to prevent the homicide. The other employes of the company substantially corroborate this testimony of the engineer, especially as to the signals which he gave and the efforts which he made to stop the train.

[2] From the undisputed facts it is clear that the decedent was a trespasser, and that he was guilty of contributory negligence. As Chief Justice Bleckley says in the case of *Central Railroad & Banking Co. v. Smith*, 78 Ga. 698, 3 S. E. 398, under somewhat similar facts: "It is manifest that plaintiff was out of his place at the time he was injured. Grant that the track was often used by persons to walk along it and there was no objection to such use, and that plaintiff was there by implied or tacit license, he was there under circumstances which required him to have all his senses on the alert for trains, and to get out of the way when any of them approached." Here, according to plaintiff's own language, as well as the allegations of the petition, the decedent "was quite deaf and very hard of hearing." It cannot be questioned that for a person with this infirmity to walk on a railroad track, where many trains were running at all hours of the day, without constantly using his sense of sight to guard against the approach of a train, was negligence. Indeed, it is not denied that the decedent was a trespasser, or that he was guilty of contributory negligence; and the suit is based entirely on the theory that even though he was a trespasser, and guilty of contributory negligence, the railroad company is nevertheless liable for his death, because the killing was willful and wanton. In other words, the suit is not one to recover damages due to the negligent conduct of the employes of the railroad company, which caused the death of the decedent. It was within its rights in the running of its cars at that place at the rate of speed that the

evidence, even for the plaintiff, shows it was running; and as the decedent was some distance from the crossing, even if it had failed to obey the crossing law with reference to signals, this was not an act of negligence of itself, in so far as the decedent was concerned, and could only be considered as a circumstance, in connection with other facts, indicating negligence at the place of the killing; and the engineer had the right to presume that the decedent, who apparently was capable of taking care of himself, would get out of the way of the approaching train. And while it may be true that, when the engineer first saw the decedent walking on the track, it may have been his duty, out of abundance of caution, to blow the whistle as a warning of approaching danger, yet, having no knowledge of the decedent's deficiency in his faculty of hearing, it was not unreasonable for him to assume that the sound of the running train would be sufficient to give warning of its approach, and his failure then to sound the whistle could only be considered, at most, as an act of negligence.

[3] The recovery in this case, therefore, can be sustained only on the theory that the decedent was killed by the willful and wanton conduct of the engineer; it being well settled that there can be a recovery for a willful and wanton injury inflicted upon another, even though that other may be a trespasser or wrongdoer, and may be himself guilty of contributory negligence. 3 Elliott on Railroads, § 1253; Central Railroad Co. v. Denson, 84 Ga. 774, 11 S. E. 1039; W. & A. Railroad Co. v. Bailey, 105 Ga. 101, 31 S. E. 547; Central Railroad Co. v. Brinson, 70 Ga. 227. Was the engineer, under the facts, guilty of willful and wanton conduct in killing the deceased? There is no evidence that he willfully or intentionally killed him, or that his conduct was so reckless as to amount to wantonness, and, if guilty of either willfulness or wantonness, it arises from the failure to use reasonable care to avoid injury to him after discovering his danger; for, as held by this court in Charleston & Western Carolina Railroad Company v. Johnson, 1 Ga. App. 441, 57 S. E. 1064, "a failure to exercise ordinary care to prevent injuring a person after his presence in a position of peril becomes known is so much akin to wantonness and willfulness as to create liability." De Vane v. Atlanta, B. & A. R. Co., 4 Ga. App. 140, 60 S. E. 1081. This is but the enunciation of the general rule on the subject. Elliott on Railroads, §§ 1253 and 1257; Central of Georgia R. R. Co. v. Denson, supra, and many cases there cited.

When did the engineer first see, or in the exercise of ordinary case could he have seen, the perilous position of the decedent? Clearly this situation was not perilous when he first saw him, for he was between 300 and 400 yards distant, and he had a right to presume, in the absence of any knowledge of any physical deficiency in the decedent, that

he could hear the approaching train and would get off the track in time to prevent the homicide. The principle of law applicable to this case is tersely laid down in 2 Rorer on Railroads, § 1122, as follows: "At places other than crossings, or on public highways, a railroad track is the private property of the company, and no one other than the company's servants or employes, in the necessary discharge of duties there, have any right to be thereon, and more especially as to their using the same as a thoroughfare or pathway, on which to walk or travel. And though the company may not wantonly injure persons thus intruding upon and using the same, yet if the person be an adult, not known to those in charge of the train to be deficient in discretion, or in physical ability to take care of himself, or not known to be deficient in his faculty of hearing, and not in any way presenting indications of being disabled, or incapable of taking care for his safety, then the persons in charge of the train have a right to conclude, and to act on that conclusion, that such person is in possession of all his proper faculties to enable him to do so, and will leave the track in time to save himself from injury, and are not bound to stop or check up the train on his account." The learned author adds, however: "But as a matter of ordinary prudence and care, it is their duty to sound the whistle and ring the bell, as a warning of the approaching danger." This apt enunciation of the law has been approved by the Supreme Court in frequent decisions. Central Railroad Co. v. Denson, supra, and many cases there cited. In the Denson Case the verdict was approved, because the facts in that case showed negligence per se in the failure to observe the blow post law, and also strongly indicated such reckless conduct on the part of the engineer as amounted to wantonness.

Here the engineer testified that, as soon he saw the decedent on the track some 300 or 400 yards away, he sounded his whistle; but the jury were authorized from the plaintiff's evidence to infer that this was not true. The engineer further testified that, when he saw that the decedent did not show any indication of getting off the track, he again blew his whistle repeatedly, and at once put into operation every means at hand to check the running train in time to prevent the homicide. The evidence for the plaintiff would probably have authorized the jury to infer that he did not blow the whistle until after the homicide; but there is no evidence that he did not endeavor by every means possible to check the rapid movement of the train when he realized the decedent's danger. Of course, under the facts of this case, in view of the undisputed evidence as to the decedent's deafness, the blowing of the whistle would have been ineffective, and the timely checking of the train was the only act of prudence that the engineer could have adopted to have been available in the emergency.

The exact period of time in which ordinary diligence would have required him to discover that the decedent would not get off the track was necessarily largely a matter of judgment under the circumstances, and if he failed to exercise proper judgment in realizing when the exact moment of peril would begin, this failure certainly could not be counted against him as willful or wanton, although it might have been charged against him as simple negligence. While we think the evidence in this case is exceedingly close on the question of liability, we are so reluctant to decide that the verdict of the jury on questions purely of fact is unsupported by any evidence, and therefore contrary to law, that we prefer to grant another trial on a specific error of law, if such is disclosed by the record.

[1] In this case error of law appears in the charge of the court, when considered in the light of the evidence. Here was a suit based solely on the willful and wanton conduct of the engineer in a failure to exercise ordinary prudence in reference to a trespasser on the track who was in a position of peril and whose position of peril was known to the engineer, or could have been known to him by the exercise of ordinary care. The learned trial judge failed in any part of his instructions to restrict the right of recovery to the evidence of willful and wanton conduct on the part of the engineer, but distinctly instructed the jury that they would be authorized to find a verdict against the railroad company, if they found from the evidence that the defendant's employes were guilty of negligence in causing the homicide of the decedent. He several times instructed them that if the engineer, after he discovered the decedent on the track, continued the operation of the train at full speed, without sounding any alarm or making any effort to prevent the killing, they would be authorized to find that the defendant was negligent, and was therefore liable. Here the decedent was an admitted trespasser. The railroad company owed him no duty until his position of peril was discovered on the track. His position of peril did not arise as soon as the engineer saw him on the track, for he was then several hundred yards distant, and the engineer had the right to assume that he would get off the track in time to prevent the accident. The duty of diligence to the trespasser arose only when the engineer saw that he did not intend to get off the track. The repeated instructions of the judge that the engineer, in the exercise of ordinary diligence, should have done all he could do to prevent the injury as soon as he discovered the decedent walking on the track, or the railroad company would be liable for negligence, was not the enunciation of a correct principle of law as applicable

to the facts of this case. In other words, the suit was based on the theory of a willful and wanton killing, and a recovery was authorized only on that theory. The charge of the court allowed a verdict against the railroad company if the engineer was only negligent.

The assignments of error made in the motion for a new trial complain of this theory of the case presented in the charge, and we think this objection is well founded, and, in view of the very close character of the evidence on the question of liability, we are constrained for this reason to hold that the court below erred in refusing to grant a new trial.

Judgment reversed.

(30 W. Va. 155)

MILLAN v. BARTLETT.

(Supreme Court of Appeals of West Virginia.
April 11, 1911.)

(Syllabus by the Court.)

1. CONTRACTS (§ 168*)—CONSTRUCTION—COVENANTS IMPLIED.

An express covenant to perform certain acts implies a covenant to refrain from performance of other acts which operate to defeat performance of the express covenant.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 751; Dec. Dig. § 168.*]

2. MINES AND MINERALS (§ 74*)—OIL LEASES—BREACH OF COVENANT.

A covenant by the assignor of an interest in an oil lease that he will pay the rental and prevent a forfeiture is broken by a sale thereafter of the lease to another, who makes a surrender of it, or who by failure to pay the rental suffers a forfeiture.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 74.*]

Error to Circuit Court, Marion County.

Action by Alpheus F. Millan against Fred W. Bartlett. Judgment of dismissal, and plaintiff brings error. Reversed and remanded.

U. N. Arnett, Jr., and Thos. P. Jacobs, for plaintiff in error. W. B. Cornwell and W. S. Meredith, for defendant in error.

WILLIAMS, P. Plaintiff has obtained a writ of error to a judgment of the circuit court of Marion county, pronounced on the 16th of June, 1908, sustaining a demurrer to his amended declaration in an action for breach of covenant, and, on his declining to further amend, dismissing his bill.

[1] The sole question presented is whether the amended declaration sufficiently states a good cause of action. It avers that defendant, for valuable consideration fully paid, assigned to plaintiff, by contract in writing under seal, an undivided one-eighth working interest in 21 certain oil leases, describing them by the dates of their execution, the names of the lessors, the number of acres of land embraced in each, and the terms of years they had to run. It also avers that defend-

ant made certain covenants with plaintiff, which he has since broken, whereby plaintiff has suffered damages to the amount of \$50,000. Stripped of the verbiage of formal pleading, the covenants alleged are: (1) That Bartlett agreed to relieve Millan of the payment of any part of the money necessary to keep the leases in force; or, if Bartlett preferred to suffer the leases to lapse, which it is alleged he had a right to do, then he was bound to notify Millan, and thus give him an opportunity to pay the rental and prevent their forfeiture; and (2) that Bartlett was to assign to Millan, on his request, such leases as Bartlett might decide he would not continue to pay the rental on.

Briefly stated, the breaches assigned are: (1) That Bartlett did not relieve plaintiff of the payment of the rental necessary to keep alive the leases, and did not pay it himself; (2) that he did not notify plaintiff of his intention to let any of said leases lapse; (3) that he did not assign to plaintiff such leases as he did not desire to keep in force; (4) that, without notice to plaintiff, he sold and conveyed an undivided one-half interest in the leases to Neely and Sheakley, and afterwards united with said Neely and Sheakley in a sale of the whole to the Fairmont Gas & Light Company; and (5) that the Fairmont Gas & Light Company immediately surrendered the most valuable ones of said leases, and thereafter obtained new leases for the same property. The breach is sufficiently averred; the declaration states a good cause of action. Its averments show that defendant broke his covenants by voluntarily putting it out of his power to perform them. True he did not covenant not to sell the leases, but it is also true that he could not escape liability by a sale and transfer of them. There was, at least, an implied covenant that he would not sell, if by selling he would put it out of his power to perform his covenants. He agreed not to let any of the leases lapse without notifying plaintiff. This was to give him an opportunity to pay the rental himself, and thereby prevent a forfeiture. He also agreed to assign to plaintiff such leases as he (Bartlett) might not wish to keep alive. He was bound to keep alive the leases, or to notify Millan if he decided not to do so.

[2] It is averred that the Fairmont Gas & Light Company acquired the whole of the leases, which, of course, included plaintiff's one-eighth of the working interest, and that it then suffered the most valuable ones to become forfeited, and thereafter obtained new leases of the same lands. This defeated the rights of plaintiff, which Bartlett was bound either to protect or to notify plaintiff, and thereby afford him an opportunity to protect for himself. The sale to, and later forfeiture by, the Fairmont Gas & Light Company constituted a breach of Bartlett's cove-

nants for which he is liable to plaintiff. The averments show that he has caused to occur, by indirection, that which he had covenanted should not occur directly.

It was error to sustain the demurrer and dismiss plaintiff's action, and the judgment complained of will be reversed; and this court will enter an order overruling the demurrer and reinstating the action, and will remand the case for further proceedings, to be had according to law.

(89 W. Va. 152)

GUTHRIE v. HUNTINGTON CHAIR CO.
(Supreme Court of Appeals of West Virginia
April 11, 1911.)

(Syllabus by the Court.)

1. PAYMENT (§ 59*)—PLEADING (§ 139*)—SET-OFF AND COUNTERCLAIM.

Sets-off and partial payments must be specified in a plea or in an account filed, to be provable. Code 1906, c. 126, § 4.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 143½; Dec. Dig. § 59;* Pleading, Cent. Dig. § 287; Dec. Dig. § 139.*]

2. BILLS AND NOTES (§ 518*)—FAILURE OF CONSIDERATION—EVIDENCE.

Evidence to show failure of consideration in a promissory note must clearly show that the thing on which the failure rests entered into the consideration of the note.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 518.*]

Error to Circuit Court, Cabell County.

Action by J. W. Guthrie against the Huntington Chair Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Geo. S. Wallace, for plaintiff in error.
Holt & Duncan and W. K. Cowden, for defendant in error.

BRANNON, J. The Tucker Chair Company sold out its manufacturing plant to the Huntington Chair Company; the sale including some lumber in the yard. The Huntington Chair Company executed to the Tucker Chair Company four promissory notes. One of these notes was transferred by the Tucker Chair Company to J. W. Guthrie, and upon it he brought an action of assumpsit against the Huntington Chair Company, and the court directed a verdict for the plaintiff, and a verdict and judgment were rendered for him, and the Huntington Chair Company has brought this writ of error.

The Huntington Chair Company asked a witness what was the consideration for the note, and offered to show that "the consideration for those notes was a part of the purchase price paid by the Huntington Chair Company to the Tucker Chair Company for certain assets of the Tucker Chair Company, sold by it to the Huntington Chair Company; the purchase price to be a certain price, paid for certain machinery, plus an amount or so much per car, for certain stock then on hand,

by the Tucker Chair Company, and that the Huntington Chair Company made certain advances to the Tucker Chair Company upon such purchase price, before the stock in the yard of the Tucker Chair Company was delivered by it to the Huntington Chair Company, and that it afterwards turned out that the amount so advanced by the Huntington Chair Company was largely in excess of the purchase price agreed to be paid by it to the Tucker Chair Company, and that there is now due it (the Huntington Chair Company) by the Tucker Chair Company, on account of money advanced in excess of the purchase price, a large sum in excess of the notes herein sued on." The court refused to allow the question to be answered. It will be seen that this evidence would not show that the advances were made before notice to the Huntington Chair Company of the transfer of the note to Guthrie. The evidence shows that they were made after notice.

[2] This proposed evidence would not show that the note was a part of the consideration, both for the machinery and the lumber in the yard. It would not show whether the notes were given for the machinery alone, leaving the lumber in the yard to be priced and paid for in addition to the notes. The language of the proposed evidence indicates that the notes were given for the machinery, and that the lumber was to be paid for at so much per car, without stating that the price was then fixed. The evidence would not show that this lumber was priced and made a part of the \$3,000 for which the notes were taken. Unless that lumber on which the advances were made was a part of the \$3,000, the failure in quantity of that lumber would not be a failure of consideration for the notes. It does not say that the advance was in excess of the price agreed to be paid for both. In other words, it would not show clearly that the lumber was a part of the \$3,000. In fact, the evidence shows that the lumber was to be paid for in addition to the \$3,000, at a price thereafter to be fixed, and to be delivered thereafter. These advances could not be payments, because not offered or accepted as payments.

[1] Payment is a matter of contract; and, secondly, there was no specification of payments filed. Nor could they be treated as sets-off, because there was no specification filed; and, secondly, the proposed evidence did not show that the advances were made before notice of the assignment. Counsel does not seem to rely very much upon these advances as payments or sets-off, but on the theory that the lumber was a part of the consideration for which the notes were given; but the proposed evidence would not show that.

The question was asked a witness, "I will ask you to state whether or not the Huntington Chair Company did pay the Tucker

Chair Company for the lumber," and the court would not allow the question to be asked. The defendant offered to show that at the time the contract was made it was agreed that the Huntington Chair Company would take from the Tucker Chair Company certain stock in material that it had on hand, from time to time as needed, and that before the stock was delivered the Huntington Chair Company, "from time to time, made certain advances to the Tucker Chair Company," and at the time of the assignment of the notes the "Tucker Chair Company was largely indebted to the Huntington Chair Company, and the Huntington Chair Company was entitled to offset that amount." Now this is a claim to set off, and it cannot be allowed, because, if for no other reason, there was no specification of them filed. They are not and cannot be treated as payments, because there is no specification of them as partial payments, and because they were neither offered nor accepted as payments. Payment is a matter of contract. The evidence clearly shows that the four notes of \$750, each, were for the purchase price of the machinery and plant, and that the lumber in the yard, to be thereafter delivered by car loads, from time to time as needed, was to be paid for in addition to the \$3,000 represented by said notes.

We cannot see any error in the case, and therefore affirm the judgment.

(69 W. Va. 136)

MYERS v. CARNAHAN et al.

(Supreme Court of Appeals of West Virginia.
April 11, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 80*)—DECISIONS REVIEWABLE—FINALITY OF DETERMINATION.

A decree sustaining the demurrer of plaintiff to a petition or answer of defendant, filed after final decree, seeking a decree against plaintiff for sums alleged to have been expended in drilling, equipping, and operating an oil well on plaintiff's land, but which decree does not finally dispose of such petition, is not final, and an appeal from such decree will be dismissed as improvidently awarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 429, 432, 450, 456, 457, 494-509; Dec. Dig. § 80.*]

Appeal from Circuit Court, Monongalia County.

Suit by Solomon Myers against John E. Carnahan and others. Decree for plaintiff, and defendants appeal. Dismissed and remanded.

W. S. Meredith and Edmond Englert, for appellants. Moreland, Moreland & Guy and S. F. Glasscock, for appellee.

MILLER, J. This appeal is a sequel to *Myers v. Carnahan*, 61 W. Va. 415, 57 S. E. 134. On the former appeal we affirmed the

decree below in favor of plaintiff, adjudging that a certain lease for oil and gas purposes, executed by plaintiff to O. O. Bradley, October 12, 1899, was fully terminated and ended from and after October 12, 1904, and that the title of the plaintiff to the oil and gas in controversy be quieted; and that defendants and other persons be enjoined and inhibited from extracting the petroleum oil and gas from plaintiff's land, described in said lease, and from committing further acts of irreparable injury thereto. Said decree, on motion of the plaintiff, also provided, that the cause be retained upon the docket for further proceedings contemplated by the plaintiff, to adjudicate, settle and determine questions in regard to rents and profits, and damages to the real estate.

After affirmance of that decree, and the cause had been remanded to and re-docketed in the circuit court, the defendants presented in that court, what they call their petition, or second amended and supplemental joint and several answer, in which, upon the allegations made therein, they represent that they are advised and believe they are entitled to recover from the plaintiff, defendant thereto: "First, the value of all property of every character and kind owned by these defendants upon the lands of plaintiff on the 12th day of October, 1904; second, the value of all property of every character and kind thereafter placed on said land and used in the drilling of said well together with the amount of money expended in drilling, and completing said well after the said 12th day of October, 1904; third, the amount of all moneys expended by these defendants in caring for the well drilled on said premises as aforesaid together with the value of tools, machinery and fixtures placed thereon for said purpose."

The decree appealed from overruled plaintiff's objections and exceptions to the filing of said petition and answer, and ordered that the same be filed, and recites that, plaintiff thereupon entered his demurrer thereto, alleging that the same was not sufficient in law; and the court having maturely considered said demurrer, adjudged only that the plaintiff's said demurrer be sustained. There was no leave given to amend, and there was no decree dismissing said petition for failure to amend or on other grounds.

It has been many times decided by this court that a judgment or decree which on demurrer sustained does not finally dispose of a suit or action is not final, and that no writ of error or appeal will lie from this court thereto. *Kirk v. Camden Interstate Railway Co.*, 66 W. Va. 486, 66 S. E. 683; *Barker v. Stephenson*, 68 S. E. 113; *Bower v. Virginian Ry. Co.*, 70 S. E. 369, and cases cited.

We therefore dismiss the appeal as having been improvidently awarded, and remand

the cause to the circuit court for such further proceedings as the appellant may be advised to take.

(80 W. Va. 146)

DARNELL v. FLYNN et al.

DARNELL et al. v. MUSICK et al.

(Supreme Court of Appeals of West Virginia.
April 11, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 904*)—REVIEW—PRESUMPTIONS—PROCESS SERVED.

Where a decree declares that a case is heard upon process served, it will be taken for true that there was such process, and that it was served.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3671; Dec. Dig. § 904.*]

2. INFANTS (§ 115*)—DECREE—DEFECTS IN PROCEEDINGS—REVERSAL.

The omission of a clerk to enter orders at rules, showing the filing of a bill and setting the cause for hearing, will not reverse decrees as to infants, rendered upon their answer by guardian ad litem.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 326-332; Dec. Dig. § 115.*]

3. INFANTS (§ 115*)—DECREE—NOTICE TO SUSTAIN—FAILURE TO SET FOR HEARING AT RULES—REVERSAL.

Where a case is heard as to infants, upon their answer by guardian ad litem, a decree will not be set aside, on the ground that the case was not set for hearing at rules.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 326-332; Dec. Dig. § 115.*]

4. APPEAL AND ERROR (§ 1166*)—GROUNDS FOR REVERSAL—FAILURE TO PLACE ON HEARING DOCKET.

The omission of a case from the hearing docket of a chancery court will not reverse decrees in it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4527-4530; Dec. Dig. § 1166.*]

5. EQUITY (§ 321*)—PLEADING—"FILING OF BILL."

Delivery of a bill in a chancery suit to the clerk in his office is a "filing of the bill," though no indorsement on it of filing is made (citing 3 Words and Phrases, 2764).

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 629-632; Dec. Dig. § 321.*]

6. TAXATION (§§ 798, 697*)—SALE FOR TAXES—SUIT TO ANNUL TAX DEED—PARTIES ENTITLED TO SUE.

A person having no title to land, or right to redeem, cannot maintain a suit to annul a tax deed for it, or to redeem it.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1583, 1394-1400; Dec. Dig. §§ 798, 697.*]

7. TAXATION (§ 734*)—SALE FOR TAXES—VALIDITY OF TAX DEED.

That the sheriff's affidavit to a list of sales of land for taxes is not signed or sworn to will not invalidate a tax deed under a tax sale.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

Appeal from Circuit Court, Cabell County. Consolidated bills by Viola Darnell against Amy Flynn and others, and by Viola Darnell and others against E. E. Musick and others.

From the joint decree, Musick and others appeal. Reversed, and dismissed.

Marcum & Marcum, Edward C. Lyon, and Sheppard, Goodykoontz & Scherr, for appellants. J. S. Miller, for appellees.

BRANNON, J. Francisco died, leaving Amy, his widow, who later married Flynn, and two infant children, Viola, who married Darnell, and Maggie, who married McTuree. At his death Francisco owned a tract of 150 acres of land. He was indebted to McCoy, and McCoy brought a chancery suit against Francisco's estate to subject the land to the payment of McCoy's debt, and decrees were rendered therein, subjecting the land to sale to pay the debt, and confirming the sale, and directing a deed to be made to Musick, the purchaser under the judicial sale, and the deed was made by a commissioner under decree to Musick. Over six years after the last decree and deed, Viola Darnell brought a chancery suit against Musick and others, claiming the land under him, having for its object the setting aside of all the decrees in said McCoy case, and the deed made to Musick under them, and this suit resulted in a decree setting aside and declaring void all the decrees in the McCoy case and the deed of the commissioner.

The said land, having been returned delinquent for nonpayment of taxes for the years 1895 and 1896, was sold therefor in December, 1897, and purchased by Varney, who received a tax deed therefor. In 1906 Viola Darnell and Maggie McTuree brought a suit to set aside the tax sale and deed for defect in the proceedings under which the same were made. This case was heard along with the case above mentioned, of Darnell against Amy Flynn, Musick, and others, and a joint decree rendered therein, holding the tax deed valid, but allowing Viola Darnell and Maggie McTuree to redeem the land from the tax sale. E. Musick and others interested in the land appeal from this decree.

[1] We first deal with the case of Darnell against Flynn and Musick brought to annul the decrees in the McCoy case. It is claimed that the decrees therein are utterly void. One reason pointed out for this contention is that there was no summons issued in the McCoy case and therefore no suit. We do not find this to be so. That summons is not found in the papers; but the clerk, speaking from the chancery process book, and from memory, swears that a summons in chancery was issued in the case December 31, 1892. Further, there was found among the papers of the sheriff an official copy of this summons and it was proven by two deputy sheriffs that that summons was served by the deputy sheriff on Amy Flynn and Viola and Maggie Francisco. The copy of the summons is filed in the case and is identified by evidence. Further still on this point of the want of a summons to commence the suit we have a decree which declares that it ap-

peared to the court that process had been duly executed upon all the home defendants, and we have other decrees treating the case as a case and proceeding upon that assumption. Can we say, under these circumstances, that there was no process to commence the suit? Can we say that the judge solemnly proceeds in the case by numerous decrees without looking to whether he had a suit before him?

[2] Another ground of attack upon the decrees is that there was no bill in the case. We have the bill before us in the file of papers, perfectly identified as the genuine original bill. It is not denied that this is the bill; but it is said that no rules were indorsed on it, and that there were no rules entered in the rule book, or any order, showing that the bill was filed, and no order setting the case for hearing, and the case was not properly on the court docket. In answer to this contention we find a decree stating that the process had been duly executed on all the home defendants, and order of publication duly published and posted as to nonresidents, and "the cause having been regularly matured and set for hearing at rules in the clerk's office of this county, and this cause now coming on this day to be heard upon the plaintiff's bill and exhibits therewith filed." Here we have a declaration and adjudication by the court that the bill was present, and that the case had been regularly brought on by proceedings at rules. We have another decree, allowing the bill to be amended. We have still another decree, saying that "this cause came on this day to be heard upon the plaintiff's bill," and the case was heard on both those hearings, and decrees made therein. Do we need authority to show that when a court declares such facts by adjudication they are to be held as true, in the absence of fraud? In *Scott v. Luddington*, 14 W. Va. 392, it is held that when a decree finds that an order of publication was duly executed it is taken for true in an appellate court. The same principles in *Moore v. Holt*, 10 Grat. (Va.) 284, and *Riggs v. Lockwood*, 12 W. Va. 133. Furthermore this bill was presented with the original file of papers and identified as the true bill by the present clerk, as an original paper, and by the clerk in office at the time the bill was filed, and by the attorney who prosecuted the McCoy suit.

It does seem to be asking a stretch of power to ask, under such circumstances, that the court, after six years, be called upon to say that there was no suit at all in court. But it may be that we are too broad in saying that counsel alleges that there was no bill, as he means only to say that there is no bill, because not so indorsed and not entered in the rule book. But the court treated the case as matured at rules, and as a pending suit, and a bill as present, which was so in fact. Now it cannot be that indorsements on the back of a bill, which are mere memoranda, are essential to show it to be a bill. I

do not see that they have any legal force, except for identification. The counsel relies with stress upon the fact that no rules were taken up and the case not set for hearing. The court treated it otherwise.

[5] In the first place, that bill was delivered to the clerk, and that is all that is required of the plaintiff. "A paper is said to be filed when it is delivered to the proper officer, and by him received, to be kept on file." *Bouvier's Law Dictionary*, 782; 3 *Words & Phrases*, 2764; *Beebe v. Morrell*, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288, and note. The cases of *Beverly v. Ellis*, 1 Rand. (Va.) 102, and *Horsley v. Garth*, 2 Grat. (Va.) 472, 44 Am. Dec. 393, are here apt authority. The taking of the rules is purely a ministerial, not a judicial, act. The omission to enter them cannot overturn proceedings. In *Shelton v. Welsh*, 7 Leigh (Va.) 175, it was held that a failure at rules to enter an inquiry of damages was a clerical error. In *Southern Express Co. v. Jacob*, 109 Va. 27, 63 S. E. 17, it is held by the Virginia court that: "Where plaintiff has done all that was required to entitle him to his office judgment, he could not be prejudiced by the failure of the clerk to enter the rules properly." See, for the same principle, *Digges v. Dunn*, 1 Munf. (Va.) 56, and *Shadrack v. Woolfolk*, 32 Grat. 715.

In connection with this point that no rules were taken up, I have to say that the claim is that Amy Francisco, widow, and Viola and Maggie Francisco, infants, were not served with process in the McCoy case. As to Amy Francisco, it is clearly proven that she was served with the summons, though she swears she was not, and the decree says that all the home defendants were served, and she and the infants were home defendants. [3] The argument is that the case was not set for hearing at rules, and an opinion drawn by me is cited from *Gallatin v. Davis*, 44 W. Va. 117, 28 S. E. 747, taking the position that it is error to decree, where a case was not set for hearing at rules. That was not an actual decision of the court. Probably it is correct in the case of an adult. It may be that he could say that, where the case was heard without being set for hearing at rules, it was a surprise upon him to hear the case without his appearance. But as to Amy Francisco, she had no estate in this land. A widow has no vested estate until dower assigned. "Upon the husband's death, the dower right of the wife loses its contingent character, and becomes 'consummate,' as it is called. It is not, however, yet an estate, but is merely a right in action, until the land in which the widow is to hold her dower is set off to her; this being termed the 'assignment of dower.'" 1 *Tiffany Mod. R. Prop.* § 198. See many authorities for this cited in *George v. Hess*, 48 W. Va. bottom page 535, 37 S. E. 564. Having no vested estate, her land is not taken by this decree. Moreover the decree of the court de-

clares that the case had been regularly matured and set for hearing at rules. The court must have so found upon evidence before it, and we cannot say that that judicial ascertainment is false. And moreover, still, that decree does not bar the right of dower, the only right in Amy Francisco, unless she is barred by the statute of limitations. So this point as to Amy Francisco is unsubstantial and not cause for annulling the decrees.

And as to those infants, Viola and Maggie Francisco, a guardian ad litem was assigned for them, and he filed an answer for them, as shown by the record, and that answer is filed as an exhibit in this case, and identified as a true answer, and the decree of sale recites that the case was heard upon the answer filed by the guardian ad litem. Now it is not necessary to serve process upon infants. And here the infants appeared in the only way in which they could appear, and, even if in the case of adults it would be error to hear the case without an order at rules, setting the case for hearing, it would not be so in the case of infants, because they can only appear by guardian ad litem, and the court protects their interests. Judge Robinson's opinion, in *McDermitt v. Newman*, 64 W. Va. 195, 61 S. E. 300, supports this view.

[4] It is objected that the case was not on the hearing docket. That will not invalidate the decrees. A hearing docket is merely a convenience for the court in the disposition of its business, and to fix the order of cases as between themselves, and is no part of the record of the case.

As to the objection that the widow's dower was not assigned. She did not ask it, although served with process, and it is proven that she knew of and talked about the suit, and had a witness summoned in the suit. She did not ask her dower. Moreover all appeal by her for this cause had been barred when this suit was brought. She cannot say the decree is void, even if it was erroneous in this respect. But she did not bring this suit. She is a defendant therein, and filed no answer or claim, and how can Viola Darnell avail herself of any error committed prejudicial to her mother? She cannot say the case is void as to her on any such account.

Another objection is that the land is not sufficiently described in the commissioner's deed. We think it is from the whole record; but this is a suit to set aside the decree as void, and we cannot see that the mere description of the land enters into this question.

Here is a proposition to annul decree after decree after the lapse of nearly seven years, and to deny the finding and the declarations of the decree as to the presence of process, bill, answer, and setting for hearing. It is hardly necessary to summon that line of cases, some of which have been given above, that every presumption exists in favor of judgments of courts of general jurisdiction,

and that they are presumed to be correct, and such presumption prevails, unless want of authority appears on the face of the record, and the burden of showing want of service of the process rests upon the party who asserts. *Hill v. Woodward*, 78 Va. 765; *Fergusson v. Teel*, 82 Va. 690. Indeed, we cannot deny the findings and declarations of decrees in such matters, in the absence of fraud. The record speaks verity in these matters, and we decline to overthrow the proceedings in the McCoy case and destroy the rights of people under a decree for a just debt. After courts of general jurisdiction have acted, some stability and verity must be attributed to their actions. So we find that these decrees are neither void nor subject to reversible error, but they are efficient to vest in Musick and those defendants claiming under him valid title. If the decrees were subject to reversal for error, the infants could effect them; but there is no reversible error in the decrees.

[6] Having found the decrees in the McCoy case effectual to vest title in the purchasers under the judicial sale, it becomes wholly unnecessary to discuss the case of Viola Darnell and Maggie McTuree against Musick to set aside the tax sale, because the parties in it, having no title, cannot affect that tax sale, even if it were voidable. *Despard v. Percy*, 65 W. Va. 140, 63 S. E. 871. But if this were not so, I remark that that tax title cannot be set aside.

[7] The only ground for setting it aside is that the sale list was not returned in time, and the affidavit to it is not signed or sworn to by the sheriff. This will not overthrow the deed. *Wilkinson v. Linkous*, 64 W. Va. 205, 61 S. E. 152; *Flemming v. Charnock*, 66 W. Va. 50, 66 S. E. 8. Failure to return the list in time matters not now, having been cured by statute. *Wellman v. Hoge*, 66 W. Va. 234, 66 S. E. 357; *Hogan v. Piggott*, 60 W. Va. 543, 56 S. E. 189.

Our decree is to reverse the decree of the circuit court and dismiss both bills.

(66 W. Va. 124)

**SPERRY & HUTCHINSON CO. v.
MELTON, Sheriff.**

(Supreme Court of Appeals of West Virginia.
April 11, 1911.)

(Syllabus by the Court.)

**1. LICENSES (§ 5*)—SELLING TRADING STAMPS
—POWER OF LEGISLATURE.**

The Legislature has power to select and tax the business of issuing and redeeming trading stamps.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 5.*]

2. LICENSES (§ 7*)—REASONABLENESS—PRESUMPTIONS.

Every presumption is in favor of the reasonableness of a tax laid by the Legislature;

only strong considerations can avail to overthrow the tax.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 7.*]

**3. CONSTITUTIONAL LAW (§ 230*)—DEALING
IN TRADING STAMPS.**

The license tax on the business of selling trading stamps to merchants, or of redeeming such stamps with money or goods, imposed by Code 1906, c. 32, §§ 2, 101, is not forbidden by any provision of the State Constitution or the Fourteenth Amendment to the Federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230.*]

Appeal from Circuit Court, Kanawha County.

Bill by the Sperry & Hutchinson Company against John J. Melton, Sheriff. Decree for defendant, and plaintiff appeals. Affirmed.

Chilton, McCorkle & Chilton and John Hall Jones, for appellant. T. C. Townsend and Wm. G. Conley, for appellee.

ROBINSON, J. [1] The Legislature has deemed it proper to prescribe that a license tax of five hundred dollars shall be paid on the business of selling to merchants "trading stamps, premium stamps, or stamps or certificates of like nature or character," and on the business of redeeming such stamps or certificates in money or goods. Code 1906, c. 32, §§ 2 and 101. The plaintiff is engaged in the business of redeeming trading stamps which it issues to merchants. It complains that this license tax assessed against it, for the county of Kanawha, prevents it from making any profit on the business which it conducts in the city of Charleston. It contends, therefore, that the tax is illegal and void. The plaintiff does not present a case showing that the tax is prohibitive of the trading stamp business. The case it does present merely shows that it cannot conduct the business in Charleston at a profit after paying the tax.

Has the plaintiff thus shown the tax to be an illegal one? In considering the question it is unnecessary to inquire whether the business of the plaintiff is within the police power and subject to regulation thereunder. A great part of the plaintiff's brief is devoted to that point. The trend of the decisions is that the trading stamp business is not one subject to control under the police power of the state. A recent review of the cases may be found in *State ex rel. Attorney General v. Sperry & Hutchinson Co.*, 110 Minn. 378, 128 N. W. 120. See, also, case notes, 1 Am. & Eng. Ann. Cas. 47, and 12 Am. & Eng. Ann. Cas. 521. But at the present time we need not express an opinion on this point. Though the business may not be within the police power, the state unquestionably has the right to tax it justly. The Legislature has prescribed a license tax for the carrying on of many lines of business that do not

directly relate to the public health, safety or morals. Such, for example, are the license taxes on vendors of patent rights, on junk dealers, on traveling vendors of sewing machines and musical instruments, and on the owners of trading houseboats. It is entirely legitimate to tax a privilege, business or occupation. Of course there must be reasonable classification, and no unjust discrimination. The tax must be equal and uniform in relation to all persons of the same class. But where a tax is imposed in compliance with these principles, no excuse for it need be sought under the police power.

The sole basis for the argument against the legality of the tax is that the plaintiff will not be able to carry on the business of issuing and redeeming trading stamps in the single city of Charleston, if it is compelled to pay the license tax which the officers of Kanawha county are seeking to collect from it under the statute we have mentioned. If the fact appeared that the tax has been fixed at such a large sum as to be absolutely prohibitive of the trading stamp business throughout the state, the case might call for a decision other than the one we shall announce. But as to such instance we do not decide. The record of this case does not warrant the claim that the statute is one intended to prohibit the business. Plainly the statute is not in terms one of prohibitory character, and nothing makes it appear to be such in fact. How can we say that this license tax was intended to prohibit, or even to control, the business in which the plaintiff is engaged? It is not disclosed that the business throughout the state is not a proper subject for the tax. It does not appear that the tax is even oppressive to such a line of business. The fact that the plaintiff cannot succeed in the business in one city of the state if it must pay the tax for the county of that city, surely cannot avail to overthrow the legitimacy of the legislative effort to provide a revenue. Though the plaintiff may not be able to succeed in the business under the tax, for all we are told there may be many other persons engaged in it that are making enormous profits, even in the city the plaintiff mentions. Yea, for all we can see from the record, it may be that the plaintiff cannot make profits because of the greater business success that has attended these other persons in the same city. Moreover, it may be that the plaintiff entered the local field too late, after others had established a lucrative hold under the tax, or that those others have better business intelligence and management than the plaintiff. Certain it is that the failure of the plaintiff to make profits cannot alone brand the tax as unjust and invalid. "The reasonableness or unreasonableness of a license tax cannot be determined by the extent of the business of a single individual. There may be competition, or negligence on his part, or other consid-

erations affecting the extent of the business of complainant." *Railway v. City of Atlanta*, 118 Ala. 362, 24 South. 450. We cannot overthrow the tax on mere assumption. We must speak by the record.

[2] Every presumption is in favor of this legislative act. The law-making body will be presumed to have proceeded in good faith, for the public good, and upon sound reasons. It is proper to assume that the Legislature had before it, at the time it fixed this tax, information as to the extent and profitableness of the trading stamp business in this state which justified its act in the premises. The act will be presumed to be reasonable, unless the contrary appears on the face of the law itself, or is established by proper evidence. *Gamble v. City Council*, 147 Ala. 682, 39 South. 353. Plainly, the face of the law itself does not show unreasonableness, unless facts that we know nothing about are assumed. As we have said, the record contains no showing of the unreasonableness of the tax, except as gauged by the improper standard of the plaintiff's failure to succeed under it. Here the words of Judge Cooley are applicable: "In every instance the highest consideration should be paid to the determination of the Legislature that a tax should be laid. It is not lightly to be assumed that its members have come to the examination of the subject with any other than public motives, or that they have failed to give it due investigation or reflection. The presumption on the other hand must always be that they have considered it with honesty and fair purpose, and that their action is the result of their deliberate judgment. And with all these presumptions tending to support the legislative action, it would seem but reasonable and proper that the courts should support it when not clearly satisfied that an error has been committed." 1 Cooley on Taxation (3d Ed.) 184.

The amount of the tax, judged in connection with what we may personally think about the opportunities and results in the trading stamp business, cannot properly be raised for decision. Yet on such assumption we must render decision against the validity of the tax if at all. It is unfair to impute to the Legislature a purpose to kill a business indirectly by tax. Rather shall we impute to it a purpose to raise revenue from a source that it investigated and found to be of such lucrative character as to warrant the tax applied thereon. In the words of the late Chief Justice Fuller: "The general legislative purpose is plain, and the intention to prohibit this particular business cannot properly be imputed from the amount of the tax payable by those embarked in it." *Williams v. Fears*, 179 U. S. 275, 21 Sup. Ct. 130, 45 L. Ed. 186.

The tax extends to all of a class. Every person in the particular vocation must pay it. So it has been made to conform to the

rule for reasonable classification, and for equality and uniformity. There is no semblance of discrimination in favor of one person engaged in the business as against another engaged in the same business. Trading stamp merchants, if such they may be called, or trading stamp dealers and redeemers, surely stand in a novel and distinct class by themselves. They do a business that is quite different from ordinary merchants. They are plainly distinguished from storekeepers who sell for cash or credit and deal in goods after the ordinary methods. So it has been held: "A city ordinance, imposing upon persons engaged in the business of furnishing trading stamps to merchants to be distributed among their customers for use in the purchase of other merchandise, a larger tax than that imposed upon merchants carrying on an ordinary mercantile business, is not violative of the constitutional provision requiring uniformity of taxation." *Gamble v. City Council*, *supra*. If these trading stamp dealers are advertising agents as claimed by the plaintiff, they indeed stand in a distinct class as such. They do not at all operate as advertising agents usually do, and are distinguishable from the ordinary class of that line as a class by themselves. Advertising agents do not ordinarily issue orders for merchandise and keep on hand merchandise for the redemption of those orders. The very description which the plaintiff gives of its business satisfies any mind that the business is in a class by itself—that there is none other like it. The rule for reasonable classification has been fulfilled by the act fixing the tax in question. "The power of the state to distinguish, select and classify objects of taxation has a wide range of discretion. Classification must be reasonable, but there is no precise application of the rule of reasonableness, and there cannot be an exact exclusion or inclusion of persons and things." 1 Cooley on Taxation (3d Ed.) 76.

[3] The Legislature had the power to select and justly tax the trading stamp business; and the presumption that it has placed a reasonable tax thereon has not been overthrown. The tax, as far as appears in this case, does not contravene any provision of the State Constitution or the Fourteenth Amendment to the Federal Constitution. Let the decree be affirmed.

CES N. C. 4)

HOUSTON v. DURHAM TRACTION CO.
et al.

(Supreme Court of North Carolina. April 19, 1911.)

ELECTRICITY (§ 19*)—INJURIES INCIDENT TO PRODUCTION—NEGLIGENCE.

In an action for the death of a servant of a contractor repairing a store, caused by an electric shock from a system of electric lighting in-

stalled by defendant on the application of the contractor, evidence held, by divided court, to justify a recovery against defendant.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 19.*]

Appeal from Superior Court, Durham County; W. J. Adams, Judge.

Action by B. R. Houston against the Durham Traction Company and others. Judgment for plaintiff, and defendants appeal. Affirmed by divided court.

Foushee & Foushee and Bryant & Brogden, for appellants. Bramham & Brawley and Guthrie & Guthrie, for appellee.

PER CURIAM. The court being evenly divided in opinion (MANNING, J., not sitting), CLARK and HOKÉ, JJ., voting to affirm and WALKER and BROWN, JJ., voting for new trial, the judgment stands affirmed.

On Rehearing.

CLARK, C. J. This is a petition to rehear this case, which was affirmed by an evenly divided court.

Plaintiff's intestate was a young man 19 years of age, working as a hand for contractors in the basement of a store which was being repaired by them for the owner in consequence of damages from fire. On the application of the contractors, the defendant traction company supplied them with three incandescent lights, swinging on cords 40 or 50 feet in length, so as to enable the workmen to move the lights from place to place as occasion required, in order to see how to perform their duties. The electric current for lighting these lights, together with the lights and cords, was furnished by the defendant. The plaintiff's intestate was killed on Monday, December 21st, and the new basement floor of cement had been put down on Thursday, December 18th, three days before his death. At the time of his death, this basement floor had not thoroughly dried out, and water was standing on it in some places, and it was damp all over. He was standing on this floor at the time of his death. There were no obstructions on the floor which could have caused him to fall. His tool box was in a corner of the room, and in going to the tool box the intestate had to pass the light under which his body was found. It was necessary for him to get some of these tools to perform his work, and he could not have seen how to get his tools without moving the light and carrying it with him. He had just resumed his work after dinner, and, handing a stepladder to his brother, who was also working in the building, plaintiff's intestate turned and walked towards his tool box. Two or three seconds after handing his brother the ladder, his brother saw deceased's body lying directly under the light, and the light was

swinging to and fro, hanging directly over him. Intestate did not speak after he fell to the floor. The light, before deceased went to it, was hanging upon the wall, still burning. When his body was discovered lying under it, the light was swinging to and fro. No one had been near it, or could have caused it to swing to and fro, except the intestate.

The electric light into which the incandescent glass globe screwed was a brass socket. There was place for two screws in the socket, which held the brass cap over the exposed wires in the interior of the socket. One of these brass screws was out of the socket and missing, and the cap on the socket was raised, so that the wiring inside the brass socket was pulled up. The wires inside the brass socket were exposed just under the cap, and these wires were touching the sides of the brass cap. The current for these artificial lights, as well as the sockets and cords attached thereto, was furnished by the defendant company. It was an alternating light, and the voltage in such currents is from 104 to 110 volts. Tests made on the voltage of this light, immediately after the death of plaintiff's intestate, showed that the voltage was between 260 and 280 volts. It is much more dangerous to stand on a wet floor than to stand on a dry floor when coming in contact with an electric current.

Dr. Graham, a medical expert, in reply to hypothetical questions, gave it as his opinion that the death of plaintiff's intestate was caused "by paralysis of the heart from the electric current." A member of the police force testified that he went to the spot immediately after the death of plaintiff's intestate, that he examined the socket as soon as he got there, found one of the screws loose and the other pulled out, and that he could see the inside of the brass lining. The intestate was young and in good health.

Upon the above evidence, which must be taken as true upon a motion to nonsuit, though there was some conflict in regard to some features of it, the motion to nonsuit was properly refused. There was evidence tending to show that the death of plaintiff's intestate was caused by the defective condition of the wires, with which he might have come in contact when he took up the movable light to see how to get his tools. There was no evidence tending to show death from apoplexy or heart disease, or any other cause. The matter was properly left to the jury. "If the circumstances be such as to raise more than mere conjecture, the judge cannot pronounce upon their sufficiency to establish the fact, but must leave them to be weighed by the jury, whose exclusive province it is to decide the effect of the testimony," as was said by Judge Battle in *Jordan v. Lassiter*, 51 N. C. 181. To the same effect: *McMillan v. Railroad*, 126 N. C. 725, 86 S. E. 129; *Williams v. Railroad*, 140 N. C.

627, 53 S. E. 448. And indeed our authorities are uniform.

The deadly current of electricity furnished by the defendant passes through the ether, imperceptible by any of the natural senses of man. In *Mitchell v. Electric Co.*, 129 N. C. 169, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735, the court said, speaking of this powerful agency which passes unseen, unheard, odorless, and without any warning of its dangerous presence: "In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." In this case the reading of their instruments showed negligence on their part in sending an excessive voltage over their wires. If directly after the death of the deceased the socket was in the condition described by the witness, and the voltage was excessive, as shown by their own meter, this, taken in connection with the evidence of the expert above quoted and the absence of evidence tending to show any other cause of death, was sufficient to submit the case to the jury. There was evidence that when the ground was wet, as was here, the voltage received by the intestate, if it passed through him, was double the voltage of 260 volts shown by the meter, and was sufficient to cause death. The evidence was sufficient to authorize a finding that the death of the intestate was not the "mere happening of a casualty."

The second assignment of error cannot be sustained. The court charged the jury: "If you find from the evidence that the defendant was employed by Houston & Christian to install lights, to be moved in the building from place to place for the convenience of Houston & Christian and their employees while engaged in repairing the building, that these lights were put in on December 19th, and that on December 21st the intestate was in the employ of Houston & Christian, and while in the prosecution of his work, and acting in the scope of his authority, took hold of the electric appliances so as to enable him better to perform his work, and that upon doing so the current of electricity was transmitted from the appliances to his body, and he was thereby killed, this would constitute prima facie negligence on the part of the defendant, and it would be incumbent on the defendant to rebut such prima facie evidence." This is not a charge that the burden of the issue was shifted to the defendant, or that there was any presumption of law in plaintiff's favor, but is merely an instruction that if the jury should find that state of facts it was incumbent upon the defendant "to go forward with its proof," in accordance with what was said by Mr. Justice Walker in *Stewart v. Carpet Co.*, 138

N. C. 56, 50 S. E. 562; *Cox v. Railroad*, 149 N. C. 117, 62 S. E. 884; *Winslow v. Hardwood Co.*, 147 N. C. 275, 60 S. E. 1130; *Dall v. Taylor*, 151 N. C. 285, 66 S. E. 135, 28 L. R. A. (N. S.) 949; *Marcom v. Railroad*, 126 N. C. 200, 35 S. E. 423; *Overcash v. Electric Co.*, 144 N. C. 572, 57 S. E. 377. In these last two cases the court said: "When a derailment is shown, a prima facie case is made out, and the burden is upon the defendant to show that the injury was occasioned by an accident." In *Shearman & Redfield on Negligence*, § 58, which is approved in *Dall v. Taylor*, supra, it is said: "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and a resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence to rebut the presumption."

The third error alleged is the failure to give the following prayer: "If you find from the evidence in this case that the wires, lights, and socket were in good condition when put in, then the defendant would not be responsible for any defect that might arise from the use or handling of the same by others." In *Electric Co. v. Letson*, 135 Fed. 969, 68 C. C. A. 453, the court said: "The contention of the company amounts to this: That if the wires were properly installed it cannot be held responsible for their being out of repair, unless it is proved that they got out of repair through its fault. But this loses sight of the duty of the company, not only to make the wires safe at the start, but to keep them so. They must not only be put in order, but kept in order. The obligation is a continuing one. The safety of patrons and the public permits no intermission. Constant oversight and repair are required and must be furnished. Customers who contract for a harmless current to light their houses are entitled to rely upon such inspection and repairs as will effectually guard them against a dangerous current. They cannot guard themselves. Any attempt to do so would expose them to immediate peril. They must take and use the current on trust, relying upon the protection of the company. In view of this, when a deadly current enters a customer's house and kills him, it is not too much to call upon the company to explain the existence of the defect which caused the tragedy."

In *Light & Power Co. v. Arntson*, 157 Fed. 540, 87 C. C. A. 1, the facts were almost identical with this. A laborer seeking to get his tools in a basement where he was doing some repair work was killed from a shock caused by an excessive current of electricity, and the verdict and judgment obtained in the United States Circuit Court was affirmed in the Circuit Court of Ap-

peals. In *Hoboken Co. v. Electric Co.*, 71 N. J. Law, 430, 58 Atl. 1082, the Supreme Court of New Jersey, in passing upon the contention, made also in this case, that the employes of the deceased were independent contractors, held: "An electric company, before sending its current for lighting purposes through the apparatus installed in a building by other parties, is bound, on its own responsibility, to make reasonable inspection of the apparatus to see whether it is fit for use." In *Electric Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39, the decision is to the same effect.

The fourth assignment of error is the refusal of the court to submit a fourth issue as to contributory negligence. It has been repeatedly held that this court will not sustain an objection to the issues, if they are such that every phase of the contention of the parties can be submitted to the jury. *Humphrey v. Church*, 109 N. C. 132, 13 S. E. 793, and cases there cited. Besides, if the intestate was killed by the excessive voltage caused by the negligent condition of the apparatus furnished him, which is the finding of the jury, there was no evidence tending to show contributory negligence on his part.

The fifth exception for permitting plaintiff to introduce certain rules and regulations in evidence was harmless, as the court in its charge withdrew the evidence of the rules from the consideration of the jury. *Wilson v. Mfg. Co.*, 120 N. C. 94, 28 S. E. 629, and cases cited thereto in the annotated edition.

The sixth assignment of error for permitting the medical expert to answer the questions put to him cannot be sustained. Every fact embraced in the hypothetical question had been shown in evidence, and it was admitted that Dr. Graham was a medical expert.

The seventh exception was to the evidence as to the socket having been approved by the National Board of Fire Underwriters. This evidence was withdrawn from the jury by the court.

After a careful review of the evidence, the charge, and the exceptions, we find no error.

Petition dismissed.

HOKE, J., concurs in result. WALKER and BROWN, JJ., dissenting.

(155 N. C. 47)

JOHNSON v. LASSITER.

(Supreme Court of North Carolina. April 26, 1911.)

1. **BILLS AND NOTES (§ 147*)—NONNEGOTIABLE INSTRUMENT.**

Under Revisal 1905, § 2151, defining a negotiable instrument as one payable to the order of a specified person, or to bearer, a note payable to a person named is nonnegotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 363; Dec. Dig. § 147.*]

2. BILLS AND NOTES (§ 170*)—NEGOTIABLE INSTRUMENTS—"INDORSEMENT."

The term "indorsement" in Revisal 1905, § 2151, providing that an instrument is payable to bearer when the only or last indorsement is an indorsement in blank, applies only to negotiable instruments, and a blank indorsement on a non-negotiable note does not thereby make the instrument negotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 368; Dec. Dig. § 170.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3561-3566; vol. 8, p. 7686.]

3. BILLS AND NOTES (§ 146*)—NEGOTIABLE INSTRUMENTS—STATUTES.

Code 1883, §§ 41, 50, relating to negotiable instruments and the liability of indorsers thereon, being omitted in Revisal 1905, are repealed by section 5453 thereof, repealing all laws not contained in the revisal, with certain exceptions and limitations.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 361; Dec. Dig. § 146.*]

4. BILLS AND NOTES (§ 275*)—BONDS (§ 78*)—NONNEGOTIABLE INSTRUMENTS—LIABILITY OF PARTIES—AS BOND.

The rights of the parties to a nonnegotiable note under seal, not subject to Revisal 1905, defining negotiable instruments and the liability of parties thereto, are governed by the common law, and the instrument is a nonnegotiable bond.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 738-741; Dec. Dig. § 275;* Bonds, Cent. Dig. § 75; Dec. Dig. § 78.*]

5. BILLS AND NOTES (§§ 275, 395*)—INDORSEMENT OF NONNEGOTIABLE INSTRUMENTS—LIABILITY.

An indorser of a past-due, nonnegotiable instrument, containing indorsements of partial payments, is liable as a guarantor of the payment thereof, and he is not entitled to notice of dishonor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 738-741, 990-1021; Dec. Dig. §§ 275, 395.*]

Appeal from Superior Court, Guilford County; Lyon, Judge.

Action by T. C. Johnson against W. B. Lassiter. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 25th of April, 1907, the plaintiff sold to the defendant, W. B. Lassiter, a tract of land for \$2,000, and accepted in part payment two notes under seal. One of these notes was for \$300 and executed December 20, 1902, payable six months from date to S. H. Carter, and the other was for \$200 and executed August 17, 1903, payable on demand to said Carter. The name of S. H. Carter was written on the back of each of said notes, on August 25, 1906, and the name of the defendant was written on the back of each of said notes, on the 25th day of April, 1907, the day he bought the land from the plaintiff. The following payments were made on the first note: \$25, January 8, 1905, and \$100, January 18, 1906; and on the second note, \$25, November 10, 1904. The defendant resisted a recovery upon the ground that no notice of dishonor was given him, and because the plaintiff had not prosecuted with diligence his claim against the makers of the notes. The judge presiding held that

the defendant was not entitled to notice, and that he was bound absolutely on his indorsement. The defendant excepted and appealed.

J. A. Spence, for appellant; Sapp & Williams, for appellee.

ALLEN, J. (after stating the facts as above). [1] The paper writings in controversy are nonnegotiable under the negotiable instrument law, because they are not payable "to the order of a specified person or to bearer." Revisal 1905, § 2151. This is the construction placed upon this section by Mr. Mordecai in his treatise on the negotiable instrument law, and it is strengthened by reference to sections 2158, 2276, and 2334 of the Revisal.

[2] They were not made negotiable by indorsement under section 2159 of the Revisal, providing that an instrument is payable to bearer (5) "when the only or last indorsement is an indorsement in blank." The term "indorsement" is frequently used to describe the act of writing on the back of a paper, without reference to the character of the paper, but strictly it applies only to negotiable instruments, and, as said in Norton on Bills, page 106: "It has its origin in and is confined to negotiable instruments." It is in this sense it is used in Revisal, § 2159. If a broader meaning is adopted and it applies to any nonnegotiable instrument, it must apply to all, as there is no qualification in the language used.

These two sections (2151 and 2159), in the exact language contained in our statute, were construed by the Supreme Court of Kentucky, in *Wettlauffer v. Baxter*, 137 Ky. 362, 125 S. W. 741, 26 L. R. A. (N. S.) 804. The court says: "The negotiable instrument act is not a new law. It is with few exceptions merely the codification of old laws that were in force and effect by virtue of judicial pronouncement or legislative enactment, and generally uniform. * * * If there is any doubt about the meaning of any of its provisions, and that doubt can be solved by a reference to the law merchant as it was theretofore administered, this law should be looked to, and the act, if practicable, given such a construction as will make it harmonize with the general principles of commercial law in force before its enactment. * * * "The usual form of negotiable paper is a provision for payment to "order" or "bearer." These or similar words are in general necessary to its negotiability, and are often required by statute, but a note which is nonnegotiable for want of such words is still a valid note and may be declared on as such. Bills payable to bearer were formerly held to be nonnegotiable, as being without words of transfer; but they are now recognized as negotiable and transferable by delivery. Making the instrument payable 'to the order of' a person named is the same as

to such person 'or order'; and in like manner to a person named, 'or bearer,' is the same in effect as 'to bearer.' * * * It will thus be seen that it was uniformly held that, in order to make a note or a bill negotiable, the words 'to order' or 'to bearer,' or equivalent words, must be used in the body of the note. It will be kept in mind, however, that the absence of these words do not affect the validity of a note, or render it nontransferable or nonassignable. Their only effect is to make the instrument negotiable, and thereby cut off defenses that the maker or either of the parties to the paper might have and make against a holder in due course, if the note was not negotiable. The negotiable instrument act does not apply to or affect the rights or liabilities of persons on paper that is not within its meaning negotiable. * * * This note, in our opinion, which was payable to Baxter alone, and did not contain the words 'to order' or 'bearer,' was not a negotiable instrument. * * * But the argument is further made that as Baxter indorsed the note in blank—that is, signed his name on the back of it without any other words—he thereby converted the note into a negotiable instrument. It is true that section 9 of the act provides that 'the instrument is payable to bearer * * * when the only or last indorsement is an indorsement in blank'; but this does not mean that the indorsement in blank converts a note nonnegotiable on its face and by its terms into a negotiable note. This construction would enable the person who last signed his name on the back of the note to change entirely the contract as entered into between the parties, and have the effect of making the maker, payee, and all prior indorsers liable upon a negotiable instrument when they intended to and only became liable upon a note that was not negotiable, and this, as can readily be seen, would be a most important and material change in the obligation assumed by them when they signed the paper. To give the act this construction would place it in the power of any indorser who chose to sign his name in blank to change by this act the entire character of the paper, as well as the rights and liabilities of the parties to it. It would make the character of the paper depend upon the manner of the indorsement, and not upon the terms expressed in the paper. Thus, if A. indorsed it in blank to B., it would be negotiable; but if B. indorsed it specially to C., it would be nonnegotiable. Manifestly it was not intended that the mere indorsement of the note by a remote or other indorser should have this effect. When a paper is started on its journey into the commercial world, it should retain to the end the character given to it in the beginning and written into its face. If it was intended to be a negotiable instrument, and was so written, it should continue to be one. If it was intended to be a nonnegotiable instru-

ment, and was so written, it should so remain. Then every one who puts his name on it, as well as every one who discounts or purchases it, will need only to read it to know what it is and what his rights and liabilities are. In our opinion section 9 was merely intended to describe or designate the conditions under which a note negotiable on its face might become payable to bearer, and was not intended to apply to a note not on its face or by its terms negotiable."

[3] Nor are they negotiable by indorsement under sections 41 and 50 of the Code of 1883, as construed in *Spence v. Tapscott*, 93 N. C. 246, because both of those sections are omitted in the Revisal of 1905, which went into effect on the 1st day of August, 1905, before the writings were indorsed, and section 5453 of the Revisal provides that "all public and general statutes not contained in this Revisal are hereby repealed, with the exceptions and limitations hereinafter mentioned," and these sections are not within "the exceptions and limitations hereinafter mentioned."

[4] The rights of the parties must therefore be determined at common law, which is in force, and the writings, being under seal, are bonds at common law and nonnegotiable. *Parker v. Latham*, 44 N. C. 138.

Originally promises to pay, whether under seal or not, were not assignable nor negotiable; the reason given being that the contract created a strictly personal obligation between the creditor and the debtor, and that to permit assignment or negotiation would encourage litigation. As trade advanced and mercantile transactions became enlarged, it was found that this rule eliminated one of the principal elements of value, and a custom gradually prevailed among the merchants of negotiating bills of exchange and promissory notes.

A dispute, however, arose between the merchants and the law courts, as to whether a note was within the custom of the merchants, and Lord Holt held, in *Clark v. Martin*, 1 Salk. 129, it was not. As a result, the Statute of Anne was passed, which made notes assignable and indorsable, and soon thereafter it was held that nonnegotiable notes, although not mentioned, were embraced in the statute. *Norton on Bills*, 6; *Birchell v. Sloarch*, 2 Ld. Ray. 1545; *Smith v. Kendall*, 6 Term, 123. It was also held that notice of dishonor need not be given to the indorser of a nonnegotiable paper. *Byles on Bills*, 447.

In this country there is much difference of opinion as to the effect of the indorsement in blank of a nonnegotiable paper.

In *Richards v. Warring*, *40 N. Y. 582, the court, speaking of this question, says: "When a party writes his name on the back of a note not negotiable, as there is no contract of indorsement, the courts endeavor to prevent the utter failure of the contract by giving it effect in some other way, as by

allowing the holder to overwrite the indorser's name with the real contract implied by law, or recover against him as a maker or guarantor of the note.

In *Sweetser v. French*, 13 Metc. (Mass.) 262, it was held that the indorsee was authorized to write above an indorsement in blank, "For value received, we promise to pay the money mentioned in the within note to T. Ames & Co.," and this case is affirmed in *Bank v. Lincoln*, 85 Mass. 192.

Billingham v. Bryan, 10 Iowa, 317, is to the same effect. The court says: "The question presented in this cause is whether the indorser of a nonnegotiable promissory note is liable to the holder, without demand upon the maker, and notice of nonpayment. We think this question has been fully settled by this court in the cases of *Wilson v. Ralph & Van Shaick*, 3 Iowa, 450; *Long v. Smyser & Hawthorne*, 3 Iowa, 266, and in *Hall v. Monahan*, 6 Iowa, 216, 71 Am. Dec. 404, the court in those cases following the authority as laid down in the case of *Seymour v. Van Slyck*, 8 Wend. (N. Y.) 421, in which it is held that such an indorsement is equivalent to the making of a new note, and is a direct and positive undertaking on the part of the indorser to pay the note to the indorsee, and not a conditional one to pay, if the maker does not, upon demand, after due notice." Also *Helfer v. Alden*, 3 Minn. 236 (Gil. 232); *Bank v. Falkenham*, 94 Cal. 144, 29 Pac. 866.

In those cases the indorsements were before the notes were due. The reason is stronger for holding the indorser liable, and for dispensing with notice to him, and diligence as against the maker, when the note is past due and already dishonored at the time of the indorsement.

[8] Under such circumstances, the indorser is held to be a guarantor of payment of the paper indorsed, and not entitled to notice of dishonor, and he is not discharged from liability by failure of the indorsee to proceed promptly against the maker. *Lane v. Levillian*, 4 Ark. 83, 37 Am. Dec. 769; *Foster v. Tolleson*, 13 S. C. 33; *Read v. Cutts*, 7 Greenleaf (Me.) 186, 22 Am. Dec. 188. As said in *Byles on Bills*, the indorsee is presumed to have acted on the credit of the indorser.

In *Lilly v. Baker*, 88 N. C. 154, it is decided that one who indorses a nonnegotiable instrument is a guarantor, and in *Jenkins v. Wilkinson*, 107 N. C. 707, 12 S. E. 630, 22 Am. St. Rep. 911, that the holder can sue at once upon a guaranty of payment, and in *Mudge v. Varner*, 146 N. C. 149, 59 S. E. 540, that the obligation of a guarantor of payment, as distinguished from one for collection, becomes absolute at once upon default of the principal. See, also, *Farrow v. Respass*, 33 N. C. 170, and *Cowan v. Roberts*, 134 N. C.

415, 46 S. E. 979, 65 L. R. A. 729, 101 Am. St. Rep. 845.

The question of the liability of an indorser of a nonnegotiable instrument did not arise in *Sutton v. Owen*, 65 N. C. 123, relied on by the defendant. In that case the payee, in a note under seal, wrote on the back of it, "I guarantee the payment of the within note to Junius La Rogue or bearer," and the only question decided was that the holder could not sue in his own name prior to the statute requiring the action to be brought by the real party in interest.

In the case under consideration, payments had been made on the notes prior to the indorsement, indicating that the holder had been endeavoring to collect, and at the time of the indorsement the defendant received a present consideration for the notes, and they had been long since dishonored. Why should he be notified of facts of which he had full knowledge?

We conclude that no error was committed on the trial, and this conclusion can work no hardship on indorsers, as it is provided in section 2846 of the Revisal that a surety or an indorser on any note, bill, bond, or other written obligation, except those held in trust or as collateral, may notify, in writing, the payee or holder, requiring him to bring suit and to use all reasonable diligence to collect, and, if the payee or holder fails to bring action within 30 days, the surety or indorser giving the notice is discharged. This affords ample protection to the indorser.

No error.

(88 S. C. 533)

WILLIAMS v. HAILE GOLD MINING CO.
(Supreme Court of South Carolina. May 1, 1911.)

APPEAL AND ERROR (§ 1207*)—PROCEEDINGS BELOW AFTER APPEAL.

A decree permanently enjoining pollution of a stream through discharges from a mining company's chlorination mill must be modified to restrict the injunction to discharge of tailings affected by the chlorinating process, where the question whether the company has acquired a prescriptive right to discharge other matter has been expressly left open by a former decision on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4696-4699; Dec. Dig. § 1207.*]

Appeal from Common Pleas Circuit Court of Kershaw County; Geo. E. Prince, Judge. "To be officially reported."

Action by Emma E. Williams against the Haile Gold Mining Company. Judgment for plaintiff, and defendant appeals. Modified.

J. Harry Foster and M. L. Smith, for appellant. E. D. Blakeney and Thos. J. Kirkland, for respondent.

HYDRICK, J. The sole point made by this appeal is that the perpetual injunction

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

granted by the circuit court exceeds the plaintiff's right of injunction as determined by this court on the former appeal.

The circuit court enjoined the defendant "from emptying any chlorinated water or any harmful and poisonous discharges from said chlorination mill into the waters of the said Mine branch and said Little Lynch's creek, and 'that the plaintiff have the right to have the waters of the streams flow through her lands unpolluted, so that the cattle in her pasture will drink thereof.'"

The effect of the decision of this court on the former appeal (85 S. C. 1, 66 S. E. 117, 1057) was to limit plaintiff's right of injunction to the tailings which had been affected by the chlorinating process. In disposing of appellant's contention that the circuit decree did not clearly define the scope of the injunction which it held should be granted, this court, after quoting from the circuit decree, said: "This language of the circuit decree, in view of the fact that the record shows that the real contest in the circuit court was as to the injurious effects of the tailings from the chlorination process, must be construed as enjoining only the discharge from the chlorination mill; and the questions whether the tailings which were not subjected to the chlorinating process were or were not injurious to the plaintiff's land, and whether the defendant has acquired a prescriptive right to discharge such tailings into the stream, are left open."

On the former appeal defendant contended that, as plaintiff's lands had been completely ruined for agricultural purposes, and as she had recovered full damages for all injury done to them up to the date of the verdict, the defendant should not be enjoined from further discharging the tailings in question into the streams, because all the damage that could be done had already been done, and plaintiff had been fully compensated for it. In response to that contention the court said: "Observation and experience teach us that nature is a wonderful restorer. It is altogether probable that in the course of years the plaintiff's lands, which have been so injured as to be thought by some of the witnesses to be ruined, will be restored to fertility by the process of nature. But, be that as it may, they belong to the plaintiff, and the defendant has no right to continue its trespass thereon. The plaintiff has the right to have the waters of the stream flow through her land unpolluted, so that the cattle in her pasture will drink thereof, and the testimony tends to show that stock will not drink of the water when polluted by the tailings in question."

Now the plaintiff contends that the last sentence above quoted warrants the injunction granted by the circuit court. But it does not; for it must be remembered that the language above quoted was used in dis-

posing of the defendant's contention above stated as to the legal rights of the parties under the facts then established by the verdict, and after it had been distinctly held that the questions as to the injurious effects of other tailings and the prescriptive right to empty them into the streams were left open. Moreover the last words of the last sentence, viz., "and the testimony tends to show that stock will not drink of the water when polluted by the tailings in question," show clearly that the court had in mind only the tailings from the chlorination mills which it had been determined defendant had no right to empty into the streams.

The order of the circuit court must be modified so as to enjoin defendant from emptying into the streams flowing through plaintiff's lands only tailings which have been affected by the chlorinating process, because, even if there are other tailings from defendant's mining operations which do pollute the waters, so that plaintiff's cattle will not drink thereof, the question whether defendant has acquired the right by prescription to discharge such tailings into the said streams has been expressly left open.

Modified.

GARY, A. J., and WOODS, J., concur.
JONES, C. J., did not sit in this case.

(86 S. C. 520)

STATE v. LUCAS.

(Supreme Court of South Carolina. April 29, 1911.)

1. CRIMINAL LAW (§ 761*)—INSTRUCTIONS—CHARGE ON MATTERS OF FACT—CONSTITUTIONAL PROVISIONS.

In a trial for housebreaking and larceny, an instruction that, "If the watchman was on the inside and the defendants on the outside as a part and parcel of the same scheme to loot this store," etc., did not violate Const. art. 5, § 26, approved December 4, 1895, providing that judges shall not charge juries in respect to matters of fact, but shall declare the law; the word "if" showing the court did not undertake to decide that the acts mentioned constituted a part and parcel of the scheme to loot the store.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1754-1764; Dec. Dig. § 761.*]

2. BURGLARY (§ 3*) — LARCENY — GUILTY KNOWLEDGE.

A scheme to loot a store necessarily implies guilty knowledge.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 24-27; Dec. Dig. § 3.*]

Appeal from Common Pleas Circuit Court of Georgetown County; G. W. Gage, Judge.
"To be officially reported."

Willie Lucas and another were convicted of housebreaking, and said Lucas appeals. Appeal dismissed.

J. Jenkins Hucks, for Moses Campbell. T. St. Mark Sasportas, for Willie Lucas. Solicitor Wells, for the State.

GARY, A. J. The defendant Willie Lucas and his codefendant, Moses Campbell, were convicted under an indictment charging them with housebreaking and larceny; and from the sentence imposed upon them Willie Lucas alone appealed.

[1] The first exception is as follows: "Because his honor, the circuit judge, erred in charging the jury as follows: 'If the watchman was on the inside, getting the goods, and the defendants on the outside, as a part and parcel of the same scheme to loot this store, the watchman doing one part and the men on the outside doing the other part, the law puts them in the same boat, brands them both as thieves because in that event each would have the guilty heart, the felonious purpose to steal, and each would do his part towards carrying out the unlawful enterprise'—in that such charge is in violation of section 26 of article 5 of the Constitution of South Carolina, approved December 4, A. D. 1895." The exception does not specify in what particular the charge was in violation of section 26, art. 5, of the Constitution. But, waiving such objection, the exception cannot be sustained, as the word "if" clearly shows that his honor, the presiding judge, did not undertake to decide that the acts therein mentioned constituted "a part and parcel of the scheme to loot the store," and that this question was left entirely to the jury.

[2] The second and third exceptions will be considered together, and are as follows: "Because his honor, the circuit judge, erred in charging the jury as follows: 'If the watchman was on the inside, getting the goods, and the defendants on the outside, as part and parcel of the same scheme to loot this store, the watchman doing one part, and the men on the outside, doing the other part, the law puts them in the same boat, brands them both as thieves'—in that in said statement of facts constituting the crime charged his honor failed to include a guilty knowledge, a criminal intent, as an essential element thereof; and, further, that such guilty knowledge, such felonious intent, must have been formed and existent in the mind of any defendant at the time that the defense was committed before a conviction of such defendant would be justified. Because in charging the jury as follows: 'If the watchman was on the inside, getting the goods, and the defendants on the outside, as part and parcel of the same scheme to loot this store, the watchman doing one part, and the men on the outside doing the other part, the law puts them in the same boat, brands them both as thieves, because in that event each would have the guilty heart, the felonious purpose to steal'—his honor erred, in that he charged as law, 'because, in that event, each would have the guilty heart, the felonious purpose to steal,' a conclusion of fact,

not necessarily following from the statement of facts given to the jury." In order to show that these exceptions cannot be sustained, it is only necessary to state that a scheme to loot a store necessarily implies guilty knowledge.

Appeal dismissed.

JONES, C. J., and HYDRICK and WOODS, JJ., concur.

(88 S. C. 512)

BOYD et al. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. April 29, 1911.)

TELEGRAPHS AND TELEPHONES (§ 27*)—RIGHT OF ACTION—WHAT LAW CONTROLS.

That a telegram was to be delivered to the sendee in another state would not prevent him from maintaining an action under the South Carolina mental anguish act for damages from nondelivery.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 27.*]

Appeal from Common Pleas Circuit Court of Anderson County; C. G. Dantzer, Judge.

"To be officially reported."

Action by J. P. Boyd and others against the Western Union Telegraph Company. From a judgment for defendant, plaintiffs appeal. Reversed, and remanded for a new trial.

See, also, 70 S. E. 409.

Martin & Earle, for appellants. Bonham, Watkins & Allen, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff Mrs. J. P. Boyd through the negligence, wantonness, and recklessness of the defendant in failing to deliver a telegram. The allegations of the complaint, material to the questions involved, are as follows: "That on Saturday, February 20, 1909, about 6 p. m., one S. M. McAdams filed with the agent of the defendant company, at Anderson, S. C., a telegram message, addressed to Mrs. J. P. Boyd, Statham, Ga., announcing the death of her brother, J. B. McAdams, and summoning her to come at once, said message reading as follows: 'J. B. McAdams is dead. Come at once via Calhoun Falls to Anderson.' That said message was not delivered to plaintiff, and she had no information as to its contents, until Tuesday morning, February 23d, about 10 a. m., too late for her to come to Anderson, S. C., in time to see her dead brother on earth or to attend his funeral services and his burial."

The following statement appears in the record: "After plaintiffs had closed their case, defendant's counsel made motion for nonsuit, upon the ground that the alleged tort was committed wholly without the borders of the state of South Carolina, and that

therefore plaintiffs had no cause of action, under the South Carolina mental anguish act. His honor granted defendant's motion." The plaintiffs appealed on the ground that said ruling was erroneous.

This question has undergone judicial investigation so recently that we deem it only necessary to cite the cases of *Brown v. Telegraph Co.*, 85 S. C. 495, 87 S. E. 146, and *Heath & Co. v. Telegraph Co.*, 87 S. C. 219, 69 S. E. 283, to show that the exceptions raising this question must be sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

STATE v. KELLY.

(Supreme Court of South Carolina. May 4, 1911.)†

CRIMINAL LAW (§ 1178*)—APPEAL—ARGUMENT—NECESSITY.

Exceptions not argued by appellant will not be considered.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

Appeal from Common Pleas Circuit Court of Sumter County.

"To be officially reported."

W. P. Kelly was convicted of an offense, and he appeals. Appeal dismissed.

John H. Clifton, for appellant. Solicitor Stoll, for the State.

HYDRICK, J. As appellant has not argued his exceptions, they will not be considered. *Nevils v. Railroad Co.*, 86 S. C. 570, 68 S. E. 657.

Appeal dismissed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(86 S. C. 401)

STATE v. BETHUNE.

(Supreme Court of South Carolina. April 20, 1911.)

1. CRIMINAL LAW (§ 981*)—APPEAL—REMAND—SUBSEQUENT PROCEEDINGS—RESENTENCE.

Where defendant was called on to show cause why he should not be resentenced after affirmation of his conviction, and pleaded that he was then insane, and that issue was ordered to be submitted to a jury, the court was not in error for failing to explain the indictment to him, or to ascertain whether defendant understood the nature of the offense of which he had been convicted; all questions as to his mental capacity being for the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2497, 2498; Dec. Dig. § 981.*]

2. CRIMINAL LAW (§ 1042*)—APPEAL—OBJECTIONS BELOW.

Where the question whether the issue raised by a plea of present insanity, made by defendant after affirmation of his conviction, when called on to show cause why he should not be resentenced, should be tried by the jurors then in attendance for the trial of civil and criminal causes, or by a commission in lunacy, was not raised in the trial court, it cannot be raised on appeal from the sentence after a finding by a jury that defendant was sane.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2650; Dec. Dig. § 1042.*]

3. JURY (§ 21*)—RIGHT TO JURY—PLEA OF INSANITY—SENTENCE.

In the absence of statutory regulation, the question of the sanity of a defendant, called up for sentence after affirmation of a conviction, is properly submitted to a jury.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 143; Dec. Dig. § 21.*]

4. CRIMINAL LAW (§ 1042*)—APPEAL—OBJECTIONS BELOW.

An objection to the form of submission to the jury of the issue of present insanity, or to the oath administered to the jurors, when not made below cannot be raised on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1042.*]

5. CRIMINAL LAW (§ 1162*)—APPEAL—HARMLESS ERROR.

Error not shown to be prejudicial is not ground for reversal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3085; Dec. Dig. § 1162.*]

6. CRIMINAL LAW (§ 48*)—DEFENSES—INSANITY.

The question of defendant's knowledge of right from wrong is necessarily involved in a plea of insanity.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 53-58; Dec. Dig. § 48.*]

Appeal from General Sessions Circuit Court of Clarendon County; R. W. Memminger, Judge.

"To be officially reported."

Willie Bethune was convicted of murder, and he appealed, and the judgment was affirmed. Upon petition that since conviction defendant had become insane, the Supreme Court stayed the remittitur, but thereafter the stay was revoked, with permission to the defendant to plead, when called upon to say why a new day should not be assigned for execution, that he was then insane. Thereafter he was called for sentence, and pleaded that he was insane, and the question being left to the jury they found against him, and he was resentenced. From the judgment, defendant appeals. Affirmed.

The following are the exceptions:

"(1) That his honor erred in not explaining to the defendant the indictment and the nature of the offense of which defendant had been convicted, and ascertaining in the proper manner if the defendant understood the same, before compelling him to be arraigned for sentence.

"(2) That his honor erred in ordering the defendant to submit the question of his then

sanity to the jury in attendance upon the regular term of court of general sessions for Clarendon county, in that the said jury had been summoned to try criminal cases and civil cases by consent, and that the question of defendant's insanity was improperly submitted to said jury over the protest of his counsel, in that such question was not one of criminal guilt, or involving a trial of the facts constituting a criminal offense, nor an action civil in its nature, and should have been referred to a commission in lunacy, to pass upon the sanity of defendant, and to have reported the conclusion of such commission to the court.

"(3) That his honor erred in overruling the motion of defendant's counsel that the question of defendant's sanity or insanity be referred to a board of physicians for determination, and in ordering that that question be submitted to the jury then in attendance upon the court of general sessions, for that is not the proper manner to determine the question of the sanity of one called upon to receive sentence, but such question should have been referred to the judge of the court of probate, an order appointing a commission of three appointed by the court of probate, and a jury of 24 summoned to try the question of the sanity or insanity of the defendant.

"(4) That his honor erred in forcing the defendant to submit the question of his sanity to a jury in said court, in that his counsel moved that the same be referred to a board of examining physicians, it was the duty of his honor to have referred the said question to the probate judge for determination in accordance with the terms of the act of the General Assembly, entitled 'An act to regulate the practice with reference to the appointment of a committee for persons non compos mentis,' approved February 26, 1910 (26 St. at Large, p. 754), in that the defendant was denied by the order of his honor the remedy provided by the terms of the said act.

"(5) That his honor erred in forcing the defendant to submit the question of his then sanity to the said jury, in that there is no provision of law of force in this state authorizing the question of a convicted defendant's sanity to be determined in the manner here employed, and that such manner is and cannot be reasonably calculated to ascertain the truth of sanity or insanity of a defendant, and that his honor should have had the defendant examined by physicians.

"(6) That his honor erred in forcing the defendant to trial upon said question in said manner, in that the proper method, other than the method provided for in the act of 1910, is upon an examination by two or more physicians under the direction of the probate court; such court having exclusive original jurisdiction of matters in lunacy, except where the defense of non compos

mentis is made at trial upon the merits of the case.

"(7) That the manner pursued by his honor, over defendant's counsel's objection, deprived defendant of his life and liberty without due process of law, in that such manner is not reasonably calculated to ascertain with any degree of definiteness the true condition of the mind of a person, or to afford a ground for the establishment of such condition with the precision ordinarily required in criminal procedure.

"(8) That his honor erred in submitting to the jury the following question, 'Whether the mental condition of the defendant is such that he can understand the meaning of punishment, and whether he be now sane, and a true verdict give according to the evidence, so help you God, whether he be now insane,' in that the question ordered and permitted to be submitted was, 'Whether he be now insane.'

"(9) That his honor erred in submitting the question to the jury as follows: 'Whether the mental condition of the prisoner at the bar is such that he can understand the meaning of punishment, and whether he be now sane; whether he be now insane'—in that he should have submitted to the jury (after having forced the defendant to trial) the following: Whether the defendant, by reason of a disease of the mind, is unable to understand the nature of the indictment upon which he was tried and convicted, his plea thereto, and the verdict thereon, when explained to him by the court, and is unable to comprehend his own condition in reference to such proceeding, and by reason thereof might make known to the court or his attorneys in charge of his defense the facts within his knowledge, if any, which would show that judgment should not be pronounced against him, especially in view of the fact that his counsel had stated that the defendant was precluded from communicating to him facts relating to after-discovered evidence.

"(10) That it appears by the record that his honor did not submit the same oath to all of the jury, in that it is stated that while the jury was being impaneled that his honor stated: 'I see that the Supreme Court says the prisoner has a right to plead that he was then insane, and so I have added to the oath, according to their statement, whether he be insane. Just swear the others with that additional oath, Mr. Clerk'—thereby depriving the defendant of a verdict or finding by the whole jury under the same oath.

"(11) His honor erred in ruling that the defendant had to establish his present insanity, in that the defendant having pleaded by his counsel his then insanity, as permitted by the order of the Supreme Court, it was incumbent upon the state to establish his sanity.

"(12) That his honor erred in asking the

witness Dr. Butler the following: 'When we called upon him this morning to hold up his right hand, and he held it up, and told him to put it down, and he put it down, do you think, or not, that the man could understand that if he would be sentenced to death what it meant?'—in that the presiding judge thereby stated as a matter of fact that the defendant had put up and put down his hand when told to do so, and thereby conveyed to the jury the impression that in the mind of the court that constituted an inference or fact showing sanity in defendant, calculated to prejudice the minds of the jury against the defendant by calling to their attention an act or acts of the defendant in the course of the trial.

"(13) That his honor erred in submitting to the jury the following question: 'Is the defendant herein insane and incapable of understanding the meaning of punishment?'—in that his honor added to the question authorized to be determined by the Supreme Court that court having permitted the defendant to interpose the question of his then insanity.

"(14) That his honor having submitted a question to the jury at the beginning of the trial he erred in enlarging the question in his charge to include a knowledge of right from wrong, in that the defendant was not advised of the fact that he would have to meet any issue other than if he was at that time insane.

"(15) It is submitted that his honor erred in charging the jury that the defendant must establish his insanity by the preponderance of the evidence, and that the defendant was presumed to be sane, in that it is incumbent upon the state to establish in a proceeding of this kind the sanity of the defendant beyond a reasonable doubt, for that if the defendant be insane he would be unable to establish a fact by any degree of proof, and his honor erred in so ruling and forcing the defendant to open the case and offer evidence of the insanity of the defendant in advance of any evidence of his sanity.

"(16) His honor erred in applying the terms of section 2284 to the defendant's case, in that that section relates by its terms to the proof required of a person, on trial on the merits of the case, being proved to be non compos mentis.

"(17) That his honor erred in charging the jury as follows: 'If a man is simply feigning insane or not, that is all entirely for you upon the testimony. You have to take all that into consideration'—in that his honor thereby conveyed to the jury the idea that the defendant was feigning insanity, and invaded the province of the jury to determine the issue upon the fact, including the demeanor of the defendant, and such statement was in effect stating that the testimony warranted the inference that the defendant was feigning insanity.

"(18) That the verdict of the jury and the judgment thereon are unsupported by the testimony, and there is no testimony to support the same."

John H. Clifton, for appellant. Solicitor Stoll, for the State.

GARY, A. J. The following statement is set out in the record: "The defendant was tried for the murder of G. B. Mims, before Gage, judge, Clarendon county, June, 1909. Defendant was convicted, and from the judgment thereon appealed, which judgment was affirmed on appeal [86 S. C. 143, 67 S. E. 466]. Upon petition and a showing in proper form, setting forth that since conviction the defendant had become insane, the Supreme Court stayed the remittitur. Thereafter, by order of the court, the stay of the remittitur was revoked, and defendant allowed to plead, when called upon to say why a new day should not be assigned for execution, that he was then insane. On June 8th defendant was called for resentence, and by his attorney, Mr. A. A. Manning, pleaded that he was insane. The indictment was not explained to the defendant, and he was not asked if he understood the nature of the same, but was put to the bar, and the indictment read. The question as formulated by his honor, Judge Memminger, being submitted to the jury, they found against him, and thereupon he was resentenced. From the judgment thereon, defendant served notice of appeal in due time."

The exceptions will be incorporated in the report of the case. We proceed to consider them.

[1] First exception:

After his honor, the presiding judge, ruled that the issue raised by the defendant's plea that he was then insane should be determined by the jury, it was not incumbent on him to assume that it was necessary to explain the indictment, or to ascertain whether the defendant understood the nature of the offense of which he had been convicted. All questions as to the mental capacity of the defendant were for the consideration of the jury.

[2] Second exception:

When the case was called, for the purpose of resentencing the defendant, his attorney, without objection, interposed the plea of insanity. As the question presented by this exception was not raised on circuit, it cannot be considered by this court.

[3] Third, fourth, fifth, sixth, seventh, and sixteenth exceptions:

"At common law a suggestion of insanity, made after verdict and sentence, did not give rise to an absolute right, on the part of a convict, to have such issue tried before the court and a jury, but addressed itself to the discretion of the judge. So if, after a regular conviction and sentence, a suggestion of then existing insanity is made, it is

not necessary, in order to constitute due process of law, under the constitutional guaranty, that the question so presented shall be tried by a jury. And a defendant who alleges his insanity at the time of his arraignment is not entitled, as a matter of legal right, to have a separate, independent, and preliminary trial of that question by a jury, specially impaneled for that purpose. If there is no apparent reason to suppose him insane, but, on the contrary, he appears to be quite capable of pleading to the indictment, there is no necessity for a preliminary trial, because every right to set up insanity, either when the offense was committed or at the time of the trial, still remains, and can be thoroughly tried by the jury which is to try the indictment." 16 Enc. of Law, 622.

"Where, when a person charged with crime is arraigned, or after he has been convicted, but before judgment and sentence, it is suggested or appears to the court that he may be insane, the question of his sanity may be inquired into and determined by the judge himself, or by aid of a jury, summoned and impaneled for the purpose; and so in the case of insanity, after judgment and sentence, and before execution thereof." 22 Cyc. 1215.

"The method of determining the preliminary question of insanity, where not the subject of statutory regulation, is largely within the discretion of the court, which may itself enter upon the inquiry, or adopt some other mode, without the aid of a jury. The usual and safest course is to have the matter settled by a jury, impaneled for the purpose." 10 Enc. of Pl. & Pr. 1220, 1221.

Section 2264 of the Code of Laws provides that: "Any judge of the circuit court is authorized to send to the State Hospital for the Insane every person charged with the commission of any criminal offense, who shall, upon the trial before him, prove to be non compos mentis; and the said judge is authorized to make all necessary orders to carry into effect this power." The act entitled "An act to regulate the practice, with reference to proceedings for the appointment of a committee, for persons non compos mentis," approved the 26th of February, 1910 (23 St. at Large, p. 754), has no application, as it is not necessary to appoint a committee for a person pleading insanity, when charged with a crime.

Whatever doubts may have been entertained as to the power of the judge to determine the issue raised by the plea of in-

sanity in a criminal case, there never has been any question as to the right to submit such issue to a jury, in the absence of a statutory enactment to the contrary. And there is no provision in section 2264 of the Code of Laws, nor any other statutory provision in this state, militating against the right of the judge to submit such question to a jury.

[4] Eighth, ninth, and thirteenth exceptions:

In the first place, objection was not interposed to the form in which the question of insanity was submitted to the jury. But, waiving such objection, it has not been made to appear that it was prejudicial to the appellant.

[5] Tenth exception:

It does not appear that objection was made to the form of the oath administered to the jurors, nor that there was prejudicial error.

Eleventh and fifteenth exceptions:

The plea of insanity is an affirmative defense, and must be established by the party interposing it by the preponderance of evidence. *State v. Stark*, 1 Stro. 506; *State v. Paulk*, 18 S. C. 514; *State v. Bundy*, 24 S. C. 439, 58 Am. Rep. 263; 10 Enc. of Pl. & Pr. 1217.

Twelfth exception:

This exception cannot be sustained, for the reason that the fact was not in dispute that the defendant had put up and put down his hand when told to do so; nor has it been made to appear that the question was prejudicial to his rights.

[6] Fourteenth exception:

The question whether the defendant had knowledge of right from wrong was necessarily involved in the plea of insanity interposed by him. *State v. Bundy*, 24 S. C. 439, 58 Am. Rep. 263.

Seventeenth exception:

There is not a single word in the charge set out in the exception tending to show in what light the presiding judge viewed the facts.

Eighteenth exception:

It is only necessary to refer to the testimony to show that this exception cannot be sustained.

It is the judgment of this court that the judgment of the circuit court be affirmed and that the case be remanded to that court, for the purpose of having another day assigned for the execution of the sentence.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(38 S. C. 555)

STATE v. WELDON et al.

(Supreme Court of South Carolina. May 14, 1911.)

CRIMINAL LAW (§§ 1098, 1099*)—APPEAL—EXCEPTIONS.

As a basis for exceptions charging that the proceedings resulting in a verdict of conviction were so improper or irregular that they did not constitute a fair trial, defendant should set out in the proposed case the facts relied on; and if the case as so made up be not agreed to, it should be submitted to the circuit judge for settlement.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 1098, 1099.*]

Appeal from General Sessions Circuit Court of Florence County; Geo. W. Brown, Special Judge.

Alex Weldon and another were convicted of murder, and appeal. Record referred to circuit judge, to report fully on all matters alleged in certain affidavits and exceptions.

W. F. Clayton and Willcox & Willcox, for appellants. Solicitor Wells, for the State.

PER CURIAM. The defendants were convicted of the murder of E. M. Moye, and sentenced to death. The record for appeal to this court contains the following exceptions:

"His honor erred in allowing a crowd, some of whom were bent upon killing the prisoners, to take possession of the courthouse and hold the same during the trial, occupying every available space, including the bar reserved for the lawyers, to such an extent that the jurors were entirely cut off from the view of counsel, and counsel had to request his honor on several occasions to cause the sheriff to clear away the crowd, that counsel might see the witness he was examining, thus in effect overawing the jury, and as such the accused did not have that fair trial awarded them under the Constitution and laws of the state

"That defendants have not had a fair and impartial trial, and have been convicted upon the testimony of Ham, an accomplice alone, whose testimony is, from the many contradictory statements, unworthy of belief. That defendants' counsel, hearing the reports upon the streets of lynching as he went to the courthouse, at the solicitation of the special judge, and seeing the unusual crowd in the courthouse, did not dare to ask for the three days allowed by law for fear of the murder of his clients. That from this fear he was unable to get up any testimony in behalf of his clients, and went into the trial without knowledge of his defense. That since the said trial defendants' counsel has obtained the affidavit of Sallie Weldon, the wife of Alex Weldon, which is incorporated in the case, tending to show an alibi for both of the defendants. That defendants' counsel knew nothing of this evidence,

nor could he have known of the same, unless he had insisted upon his three days, in which event counsel fully believes that he would have endangered the lives of his clients if he had demanded his three days, and by reason thereof defendants have not had a fair trial."

As a basis for exceptions charging that the proceedings resulting in a verdict of conviction were so improper or irregular that they should be held not to constitute a fair and legal trial, a defendant should set out in the proposed case the facts relied upon; and if the case as so made up be not agreed to, it should be submitted to the circuit judge for settlement. In this case the defendants' counsel has submitted to this court, in support of his exceptions, affidavits which have not been passed upon by the circuit judge, by motion for a new trial or otherwise. As the lives of the defendants are involved, the court will overlook all irregularities, and of its own motion refer the entire record to the circuit judge, so that he may report fully upon all the matters alleged in the affidavits and exceptions.

It is therefore ordered that the clerk of this court do transmit to Hon. Geo. W. Brown, the special judge who presided at the trial, a copy of the entire record, together with a copy of this order, to the end that he may forthwith certify to this court a statement of all the conditions surrounding the trial, and the facts connected with the trial, so far as they are germane to the exceptions above quoted, and the matters alleged in the affidavits appearing in the record.

(38 S. C. 545)

STATE v. BAXTER et al.

(Supreme Court of South Carolina. May 4, 1911.)

BAIL (§ 77*)—FORFEITURE PROCEEDINGS.

Accused entered into a recognizance, appeared at the court of general sessions, where he was convicted, and gave notice of appeal, and entered into another recognizance with the same sureties to abide the judgment of the Supreme Court, where the conviction was affirmed and rule issued for the sureties to show cause why the recognizance should not be forfeited. The rule recited the terms of the first recognizance, and the order to show cause recited the same, but also recited the conviction of accused and his appeal to the Supreme Court, and identified the second recognizance as that to which it was related by stating the amount, which was different from the amount of the first recognizance. Held to fully advise accused and his sureties to show cause why judgment should not be entered on the second recognizance.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 77.*]

Appeal from General Sessions Circuit Court of Georgetown County; Ernest Gary, Judge.

"To be officially reported."

Proceedings by the State to forfeit a recognizance. From a judgment against J. A.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Baxter and another, sureties, the surety named appeals. Affirmed.

T. St. Mark Sasportas, for appellant. Walter H. Wells, Sol., for the State.

WOODS, J. One Daniel Harley entered into a recognizance in the sum of \$200, with the defendant Baxter and G. E. Herriott as sureties, conditioned for his appearance at the court of general sessions for Georgetown county, to answer a charge of violating the dispensary law. Harley appeared according to his obligation, and was tried, convicted, and sentenced. Thereupon he gave notice of appeal, and entered into another recognizance, with the same sureties, in the sum of \$300, conditioned that he "shall abide by the judgment or order of the Supreme Court, and any judgment or order of this court made in pursuance thereof, and shall abide the sentence of this court, rendered in this case, provided the appeal shall be dismissed or overruled, and shall appear whenever required by order of this court." Afterwards a rule was issued against Harley and his sureties, reciting: "Whereas, Daniel Harley lately entered into recognizance in the penal sum of \$300, conditioned that the defendant would appear at the court of general sessions of the said county and state, to answer to a bill of indictment to be preferred against him," and requiring the parties to show cause "why the said recognizance should not be estreated and adjudged to be forfeited, and execution issued for the penalty of the same."

In addition to the rule above recited, an order was made by Judge Gary in these words: "It appearing to the court that Daniel Harley is under recognizance to appear in court of sessions on November 9, 1903, then and there to answer to a bill of indictment to be preferred against him for violation of the dispensary law, and to do and receive what shall be enjoined by this court, and not depart the court without license, in the above-stated case, and was convicted, and appealed to the Supreme Court, and the decision of this court was affirmed, and he has this day been called three times before the courthouse and failed to answer when called, on motion of Walter H. Wells, solicitor, it is ordered that Daniel Harley, and also his sureties, to wit, J. A. Baxter and G. E. Herriott, do show cause, on the first day of the next term of this court, why said recognizance should not be 'estreated and judgment entered against them for the sum of \$300, the amount fixed in such recognizance as the penalty thereof.' Let a copy of this order be served upon the makers of said recognizance, or either of them." The rule and order were duly served, and the surety Baxter made a return thereto. The appeal is from an order adjudging the return insufficient, and directing judgment to

be entered against Baxter and the estate of Herriott in the sum of \$300.

The ground of the appeal is that the rule and the order referred to the first recognizance for the appearance of Harley for trial, and did not notify Baxter that he was required to show cause why the second recognizance, given after his conviction, should not be forfeited. The point is too technical. It is true that the rule recites the terms of the first recognizance, and there are recitals of the same kind in the order of Judge Gary; but the order also recited the conviction of Harley and his appeal, and the decision of the Supreme Court on the appeal, and both the rule and the order further identified the second recognizance as that to which they related by mention of \$300, which was the amount of that recognizance, instead of \$200, the amount of the first recognizance. Considering these recitals, in connection with the fact that the surety Baxter, when he signed the recognizance conditioned that Harley should abide the result of the appeal, must have known that the first recognizance had been discharged by the appearance, conviction, and sentence of Harley, it seems perfectly clear that he was not misled by other recitals of the rule and order, and that he was fully advised by them that he was required to show cause why judgment should not be entered on the second recognizance.

The judgment of this court is that the judgment of the circuit court is affirmed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(88 S. C. 464)

ATLANTIC COAST LINE R. CO. v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina. April 25, 1911.)

1. EMINENT DOMAIN (§ 243*)—PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION—STATUTORY PROVISIONS.

The condemnation statutes in this state limit the inquiry thereunder to the ascertainment of the amount of compensation, and afford no means for determining the right to compensation; and hence a judgment in condemnation proceedings, assessing compensation, does not determine the right to condemn.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 627; Dec. Dig. § 243.*]

2. EMINENT DOMAIN (§ 198*)—PROCEEDINGS TO ASSESS DAMAGES—APPEAL—WAIVER.

Where a railroad, defendant in condemnation proceedings to assess compensation for a right of way claimed by another railroad, disputes the plaintiff's right to condemn, its participation in its selection of a jury in those proceedings cannot be considered as a waiver of the decision of a proper tribunal on the disputed question of right, since the object of the proceeding was only to try the question of compensation, and since the defendant's consent could not confer jurisdiction to determine the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

question of right where it was not conferred by the statute.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 525, 528, 529; Dec. Dig. § 198.*]

3. EMINENT DOMAIN (§ 198*)—PROCEEDINGS TO ASSESS COMPENSATION—APPEAL—REVIEW OF RIGHT TO TAKE—WAIVER.

Where a railroad company was notified by another railroad, on October 3d, of an intention to condemn a right of way, and, on October 29th, served a notice of a refusal of consent, following which, on November 4th, an ex parte order directed the impaneling of a jury to assess compensation, summoned to appear on November 12th, and the company, on November 5th, obtained an order to the other railroad to show cause why it should not be enjoined pendente lite from condemnation proceedings, and a temporary restraining order, and protested the jury's assessment of damages, the company did not waive its right to object as to the right of condemnation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 525, 528, 529; Dec. Dig. § 198.*]

4. JUDGMENT (§ 650*) — CONCLUSIVENESS — MATTERS NOT IN ISSUE—RIGHT TO CONDEMN PROPERTY.

Where a railroad company, after notice of an intention of another railroad to condemn a right of way across its tracks, disputes the right to condemn and applies for an injunction pendente lite, which is denied and as to which, on appeal, an order of supersedeas is refused, these orders do not dispose of the issues on the merits or adjudicate any rights against the company.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 650.*]

5. EMINENT DOMAIN (§ 169*)—RIGHT TO CONDEMN—CONDITIONS PRECEDENT.

Where a railroad obtains an order from the Railroad Commission, authorizing it to cross the right of way of another company, provided that such crossing be protected with an interlocking switch, and that the crossing and switch be subject to the approval of the Commission, and by another order, the Commission imposes conditions as to furnishing preliminary plans, and as to the method of construction and operation, the railroad has no authority or absolute right to condemn a right of way and to construct such crossing without a compliance with the orders of the Commission.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 169.*]

6. INJUNCTION (§ 137*)—PRELIMINARY INJUNCTION—GROUNDS FOR DENIAL—INJURY TO DEFENDANT—RIGHTS IN DOUBT.

Where a railroad company is in possession of its tracks and right of way, and another railroad has begun proceedings to condemn a crossing of its tracks, though without adjudicated right to condemn, a preliminary injunction, restraining the company in its use of its tracks and authorizing an invasion of its possession, and which disturbs the status sought to be preserved by an earlier order, is inequitable, and will be set aside and the status restored.

[Ed. Note.—For other cases, see *Injunction*, Dec. Dig. § 137.*]

Appeal from Common Pleas Circuit Court of Chesterfield County; R. C. Watts, Judge.

Action by the Atlantic Coast Line Railroad Company against the Seaboard Air Line Railway. From an order continuing a temporary restraining order, the defendant appeals. Order reversed.

See, also, 71 S. E. 39, 40.

Stevenson & Matheson and Lyles & Lyles, for appellant. Geo. B. Elliott, Willcox & Willcox, and W. P. Pollock, for respondent.

JONES, O. J. This appeal is from an order of injunction pendente lite granted by Judge Watts on December 30, 1910, upon return of defendant, to a rule to show cause with temporary restraining order, dated December 22, 1910.

The rule directed defendant to show cause why it "should not be restrained and enjoined from obstructing in any manner and from maintaining its side track over and across the right of way of plaintiff on Front street, in the town of Cheraw, and why it should not be enjoined and restrained from instituting any legal steps, whereby the plaintiff would be hindered or delayed in the use of its right of way."

After stating the corporate capacity of the plaintiff, defendant, and the town of Cheraw, the complaint alleged that plaintiff was granted a right to build a spur track along Front street, by ordinances of the town of Cheraw, adopted August 1, and December 16, 1910, followed by a deed conveying said right of way; that on November 12, 1910, the defendant wantonly trespassed upon and obstructed said right of way by the construction of a railroad track across the same; that plaintiff instituted condemnation proceedings to condemn the right of way across the track and right of way of defendant, where the same crosses Front street in Cheraw, and that such proceedings were completed on November 12, 1910, and that the jury of condemnation awarded \$25 damages against plaintiff for such right of way, which sum was deposited with the clerk of court at Chesterfield, and that no appeal has been taken from the finding in such proceeding; that on November 14, 1910, after the completion of the condemnation and deposit of the award, the defendant completed the construction of its side track across said right of way of plaintiff without plaintiff's consent, and thereby rendering said right of way useless and unfit for the purposes for which it was granted; that defendant has heretofore, by actions at law or equity, delayed and hindered plaintiff in the use of its right of way, and threatens to continue to hinder, delay, and defeat plaintiff in such use, both physically and by legal proceedings; that by reason of the foregoing plaintiff has been damaged \$10,000, and unless defendant be restrained from continuing said interference and obstruction irreparable damage will be done to plaintiff.

On December 23, 1910, the defendant intervened by petition, alleging that it owned a right of way across Front street for a double track and was exercising its right to maintain the side track in question for the service of its customers and the public; that de-

fendant in conjunction with the town of Cheraw had trespassed upon plaintiff's right of way and tracks at Front street, had torn up the side track, overpowered defendant's agents with an armed force, taken charge of defendant's engine, and have attempted to cut defendant's track and place in a crossing by violence; that the right of plaintiff to make such crossing is in litigation in another case (*Seaboard Air Line Railway v. Atlantic Coast Line Railway*, 71 S. E. 39, now pending in this court, and heard along with this case); that defendant is desirous of having such right finally adjudicated as speedily as possible; that, under the permission to make such crossing granted by the Railroad Commission, plaintiffs were required to put in an interlocking switch system, and that no provision for such interlocking switch system had been made, and that it will take a great while for the same to be established, and that plaintiffs are endeavoring to place the crossing by force and violence on the main line of defendant, without the safeguards under which they were permitted by the Railroad Commission to place same, etc.

Upon this petition Judge Watts, by his order dated December 26, 1910, required the Atlantic Coast Line Railroad Company and the town of Cheraw to show cause, on December 30, 1910, why they should not be restrained from interfering with the track of the Seaboard Air Line Railway and the crossing as now contemplated, and from interfering with defendant's possession of its property in any way, and in the meantime they be restrained from such interference; it being the intention of the order to maintain the status until the hearing set for December 30, 1910.

On December 30, 1910, defendant made its return, whereby it first demurred to the complaint upon the ground that it did not state facts sufficient on three grounds stated, and then as to the allegations of the complaint it in substance denied that plaintiff had acquired any right of way over the right of way and tracks of defendant across Front street, and alleged that defendant had the right of way of width necessary for two railroad tracks across Front street, which was acquired by the Palmetto Railroad Company by virtue of an act of the General Assembly of 1882, and an ordinance and deed of the town of Cheraw of 1886, and that defendant had acquired the right of the Palmetto Railroad Company; that the main line of defendant was built across Front street in 1887, and the said side track was built on the 12th and 14th of November, 1910, by virtue of this authority, for the purposes of accomplishing its business, and not to hinder or defeat the right of way claimed by plaintiff; that since the dates mentioned the Palmetto Railroad Company and defendant, as successor, had been in actual and peaceable possession of this right of way, main line, and side track.

The return set forth the two orders of the Railroad Commission, of date December 22d and December 28th, passed pursuant to section 2179 of the Code of Laws 1902, and giving the preliminary approval of the Commission to a crossing by the Coast Line at this point, under very minute and substantial conditions, to wit, that the crossing was to be protected with an interlocking switch, and that all preliminary plans for the crossing and interlocking switch were to be submitted before the work was attempted.

The return then set forth that on the 24th day of December, 1910, the plaintiff, without having in any wise complied with the order of the Commission, in that it had furnished and the Commission had approved no plans for the crossing and interlocking switch, and had made no arrangements for the installation of an interlocking switch, and, in utter violation of the order of Judge Watts, of December 22d, intended to maintain the status, had entered upon the right of way of defendant at Front street and torn up and destroyed the side track, and placed obstructions between the rails of the main line, taken forcible possession of defendant's engines and cars on the main line, and illegally arrested its employés in charge thereof.

The return and affidavits then further allege that the proposed crossing was not only a serious menace to the safety of all persons and property moving over the Seaboard, but that it would be a serious and substantial hindrance to the Seaboard in the use and enjoyment of its right of way, and that, therefore, under section 2195 of the Code, it was such a right of way as could not be condemned by plaintiff.

By way of reply and return, plaintiff contended that the alleged nuisance was placed by defendant on Front street after plaintiff acquired from the Railroad Commission the right to cross said street with its track, after plaintiff had condemned the crossing, after plaintiff had received permission from the town of Cheraw to use said street, and after Judge De Vore, in the action instituted by defendant against plaintiff, had refused the injunction sought by defendant against plaintiff; that the right of plaintiff to cross the track of defendant was complete after the permission of the Railroad Commission, the condemnation proceedings, the refusal of injunction by Judge De Vore, and the refusal of the Supreme Court to supersede the order of Judge De Vore; that the right of defendant to construct a "double track" across Front street did not warrant the building of the obstructive side track; that all questions of danger and inconvenience to the defendant by the proposed crossing were wrongfully passed upon and decided; that early on the morning of the 24th day of November the defendant unlawfully carried away the crossing frog which plaintiff designed to place in the crossing, and that in consequence plaintiff made a temporary crossing on December 24th; that

plaintiff never had intention to install a crossing at Front street without an interlocking plant and the supervision of the Railroad Commission; that after a hearing before the Railroad Commission on December 28th the Commission refused to reopen the question of the permission to make the crossing, and reaffirmed its permission granted on September 22, 1910, etc.

The following order was granted by Judge Watts: "On hearing pleadings, return and affidavits herein on rule to show cause why injunction should not be granted, and after argument of counsel, and it appearing that the plaintiff obtained an order from resident circuit judge and condemned the crossings referred to in the pleadings herein according to law, and obtained consent of the Railroad Commission of this state on two separate occasions. That the defendant attempted to obtain an injunction and restraining order from his honor, Judge De Vore, presiding in this circuit, which was refused, and applied for an order there, staying all proceedings until that appeal could be heard, which was refused. It appears to me that I have no authority to review these orders, and that plaintiff is entitled to put in the crossing under the terms and conditions as allowed by the Railroad Commission. It is therefore ordered, declared, and adjudged that the temporary restraining order granted herein be continued until the final hearing of this case herein, and that plaintiff enter into bond in the sum of \$250, before and to be approved by the clerk of court of this county, within 10 days, with surety. The said bond to be the usual injunction bond. That the plaintiff be allowed to put in its crossing over the right of way, side tracks, and main line of the defendant's railroad in accordance with the permission and instructions of the Railroad Commission in allowing the same. That the defendant, its agents, employees, and servants, be enjoined and restrained from in any manner interfering with plaintiff doing the same. It further appearing to my satisfaction that there has been considerable agitation, irritation, bad blood, and excitement over this matter between the parties to this suit, it is ordered that D. P. Douglass, as sheriff of Chesterfield county, see that this order is executed and enforced. R. C. Watts, Judge of Fourth Circuit. December 30, 1910."

The plaintiff has appealed from this order upon exceptions, alleging error: (1) In enjoining an alleged nuisance which had not been established at law. (2) In restraining defendant in the use and possession of its property, pending the determination of plaintiff's rights therein. (3) In restraining defendant from instituting any legal steps for the protection of its rights in the premises. (4) In going beyond the scope of the rule to show cause and relief demanded in the complaint, which related to the side track, by undertaking to deal with defendant's main line. (5) In holding that he had no authori-

ty to review the proceedings and orders referred to in his order, and that because of them plaintiff had the right to put in the crossing, whereas he should have held that there has been no adjudication of any right in plaintiff to make such crossing. (6) In not enjoining plaintiff from interfering with the right of way, side track, and main line of defendant, and in not protecting defendant in the possession thereof, pending the final determination of the right claimed by plaintiff. (7) In failing and refusing to order plaintiff to replace the side track and remove the obstruction placed on defendant's right of way and main line, and restore the status as it existed on December 22, 1910, when the restraining order was issued, which tied the hands of defendant. (8) In forcibly taking the property of defendant from its possession and placing same in the possession of plaintiff, through the sheriff, in the absence of any adjudication of plaintiff's right.

After the filing of the appeal return in this court, the defendant filed a petition, asking that plaintiff be restrained from further proceedings under the order of Judge Watts, pending the appeal, and on the — day of January, 1911, a rule to show cause, with restraining order, was issued by this court. The petition, among other things, shows that, since the order of Judge Watts appealed in this case, the Atlantic Coast Line Railroad Company applied to the Railroad Commission, at a meeting on January 2, 1911, to approve its plans for said crossing and for the interlocking switch contemplated by the order of the Commission; that the Commission took the same under consideration, and by an order, dated January 6, 1911, reached the conclusion that the grade crossing at Front street would be dangerous to the general public, and that it should not be allowed, but gave the Atlantic Coast Line Railroad Company the option of crossing at grade at Second street upon certain conditions, or crossing overhead at Front street; that, notwithstanding this rescission of the former orders of the Commission, the Atlantic Coast Line Railroad Company has entered upon petitioner's right of way under the protection of the sheriff, and has proceeded to tear up petitioner's main line track at Front street.

The action of the Railroad Commission was telegraphed to the officials of the Atlantic Coast Line Railroad Company on the morning of January 7, 1911, and was received by them, it is stated, after the placing of the crossing frog, but before the installation of the interlocking switch.

This court, by its order dated January 7, 1911, supplemental to its former restraining order and to be effective until the further order of the court, required: "That the Seaboard Air Line Railway do not interfere with the switch or crossing as now constructed across its right of way and track at Front street, in the town of Oheraw, S. C., by the

Atlantic Coast Line Company. That the Atlantic Coast Line Railway Company do refrain from crossing or in any wise using the said track or switch constructed by them, and from entering at said point on the right of way of the Seaboard Air Line Railway Company."

We have not undertaken to give in detail all the contents of the mass of papers and affidavits presented in this case; and we have laid no stress on angry and belligerent conduct of the parties in the assertion of their supposed rights, as the decision of this case will not be influenced or controlled by such matters.

After most careful consideration, we have reached the conclusion that the order of Judge Watts was erroneous. The fundamental error was in assuming that the right of plaintiff to make the crossing in question had been determined.

[1] Many cases in this state, following *Railway Co. v. Riddlehuber*, 38 S. C. 308, 17 S. E. 24, have determined that the condemnation statutes furnish no means for determining the *right* to compensation and that the inquiry thereunder is limited to ascertaining the *amount* of compensation. It follows that the judgment in condemnation could not determine the question of plaintiff's right to make the crossing.

[2] It must also follow that the participation of defendant in the selection of the jury in the condemnation proceedings could not be construed as a waiver of the decision of a proper tribunal on the disputed question of right, because the object of the proceedings was not to try the question of right, and consent, even, could not confer jurisdiction over a subject-matter not conferred by the statute.

[3] It may be that, if one denying the right of condemnation should not take timely action to invoke the proper tribunal, a court might hold that there was a waiver of the question of disputed right; but in this case it appears that plaintiff served intention to condemn on October 3, 1910, and on October 29, 1910, defendant served notice of refusal of consent; that on November 4, 1910, plaintiff secured an ex parte order from Judge Watts, directing the impaneling of a jury of condemnation, which jury was drawn on the 7th and summoned to appear on the 12th; that on Saturday, November 5th, defendant procured an order to show cause why plaintiff should not be enjoined pendente lite from proceeding with the condemnation proceedings, with a temporary restraining order, which were served on Monday, November 7th, the day on which the jury were drawn. At the hearing on November 11th, Judge De Vore refused injunction pendente lite. The jury met on November 12th, over the protest of defendant, and proceeded to make the assessment. As stated, appeal is pending from the order of Judge De Vore, refusing injunction. We cannot see anything in these pro-

ceedings from which an inference could be made that defendant had waived or abandoned its dispute as to plaintiff's right of condemnation.

[4] Nor can it be said that the order of Judge De Vore, refusing injunction pendente lite, adjudicated any right in plaintiff, as such an order does not dispose of the issue on the merits. *Alston v. Limehouse*, 60 S. C. 559, 39 S. E. 188; *Wright v. Columbia*, 77 S. C. 416, 57 S. E. 1096. Likewise the order of this court, refusing order of supersedeas in the appeal from order of Judge De Vore, could not be regarded as affecting the merits, any more than the order of Judge De Vore did.

[5] It is very clear, also, that orders of the Railroad Commission of September 22d and December 28th gave plaintiff no absolute right to make the crossing. The order of September 22d declared: "After due consideration the consent of this Commission is hereby given to the Atlantic Coast Line Railroad Company to cross the main line track of the Seaboard Air Line Railway on Front street, in the town of Cheraw, S. C., with its track at grade, provided that said crossing be protected with an interlocking switch; said crossing and interlocking switch to be subject to the approval of this Commission." The order of December 28th provided: "That the permission granted to the Atlantic Coast Line Railroad Company to cross track of the Seaboard Air Line Company on September 22, 1910, contemplated the furnishing of this Commission all preliminary plans of the interlocking switch and crossing and the proper erection of the same, subject to the approval of this Commission. That all necessary material for the completion of the interlocking switch and crossing as ordered be assembled before any work on same is begun, and that the work of erection be carried on to completion simultaneously. That no engine or train be operated over said crossing until the same has been inspected by the official engineer and accepted by this Commission."

No plans of an interlocking switch crossing were ever submitted to the Railroad Commission until January 2, 1911. Hence any attempt to put in the crossing previous to January 2, 1911, was a violation of the orders of the Commission, and, inasmuch as the Commission did not approve the plans submitted on January 2, 1911, but disapproved them, the attempt to put in the crossing thereafter was unauthorized by the Commission.

Whether the Railroad Commission had authority under the statute to revoke its former consent to the crossing upon conditions, either with or without notice to the plaintiff, is not necessarily involved, and as the Commission is not a party to these proceedings we will not undertake to adjudge that matter. It is sufficient for the purposes of this case to state that no authority from the

Railroad Commission to make the crossing at the date of Judge Watts' order of injunction existed, for want of compliance with the conditions precedent upon which the alleged consent was based.

[8] There being no adjudicated right of plaintiff to the crossing and the defendant being in possession of its right of way and tracks to be affected thereby, the effect of the order appealed was to disturb defendant in its possession pending the litigation contrary to the rule that the object of a preliminary injunction is to preserve the status until plaintiff's right is established. *Pelzer v. Hughes*, 27 S. C. 415, 3 S. E. 781. The order not only failed to preserve the status existing on December 22, 1910, when the preliminary restraining order was granted, though the court was urged by defendant in its intervening petition so to do, but authorized plaintiff to invade defendant's possession and tied defendant's hands, even against taking legal proceedings to protect its possession.

We do not deem it important or necessary to consider all the exceptions in detail, as the foregoing considerations are sufficient to justify reversal of the order under consideration. We regard it also proper to provide for the restoration of the status as it existed on December 22, 1910, when plaintiff secured the restraining order against defendant, as it was inequitable to leave plaintiff free to disturb the status after tying defendant's hands. 1 High on Inj. (4th Ed.) § 5a; 10 Enc. Pl. & Pr. 1104; *Railway Co. v. Taylor*, 134 Ill. 603, 25 N. E. 588.

The judgment of the circuit court is reversed, and plaintiff is hereby ordered forthwith to restore the status as it existed on December 22, 1910.

(88 S. C. 477)

SEABOARD AIR LINE RY. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. April 25, 1911.)

1. APPEAL AND ERROR (§ 854*)—REVIEW—MATTERS OF EVIDENCE CONSIDERED—PLEADINGS.

Where an application for an injunction is refused without stating any reason, the only question arising on appeal is whether, upon the complaint and its supporting affidavits, and upon the return and its supporting affidavits, there is a prima facie showing warranting an injunction.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3403, 3404, 3408-3430; Dec. Dig. § 854.*]

2. INJUNCTION (§ 136*)—RIGHT TO TEMPORARY INJUNCTION.

A temporary injunction should be granted when it appears prima facie that such injunction is necessary to preserve the right asserted by the plaintiff.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

3. EMINENT DOMAIN (§ 198*)—COMPENSATION—STATUTORY PROVISIONS.

The condemnation statute is limited to the ascertainment of the amount of damages, and affords no method for determining the right to condemn.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 525, 528, 529; Dec. Dig. § 198.*]

4. EMINENT DOMAIN (§ 169*)—PROCEEDINGS TO TAKE PROPERTY AND ASSESS DAMAGES—CONDITIONS PRECEDENT.

A railroad company cannot lawfully condemn a crossing of the right of way of another, unless it appears that such crossing would not be an unreasonable hindrance of the right of way already dedicated within Civ. Code 1902, § 2195, and unless the consent of the Railroad Commission to such crossing is obtained, as provided by section 2179.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 461; Dec. Dig. § 169.*]

5. EMINENT DOMAIN (§ 274*)—REMEDIES OF OWNER—INJUNCTION—STAY UNTIL DETERMINATION OF RIGHT TO CONDEMN.

An injunction to stay condemnation proceedings to assess damages for a proposed crossing by one railroad of the right of way of another should be granted where it is not shown that there has been a performance of a condition precedent to the plaintiff's right, imposed by the Railroad Commission.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 753, 765, 768; Dec. Dig. § 274.*]

Appeal from Common Pleas Circuit Court of Chesterfield County; J. W. De Vore, Judge.

Appeal by the Seaboard Air Line Railway, from an order refusing an injunction pendente lite, to restrain the Atlantic Coast Line Railroad Company from maintaining condemnation proceedings. Order reversed, and condemnation proceedings enjoined pendente lite.

See, also, 71 S. E. 34, 40.

Stevenson & Matheson and Lyles & Lyles, for appellant. Geo. B. Elliott, Willcox & Willcox, and W. P. Pollock, for respondent.

JONES, C. J. This is an appeal from an order of Judge De Vore passed on November 11, 1910, refusing injunction pendente lite to restrain condemnation proceedings to assess damages for the proposed crossing of plaintiff's right of way by a spur track of the defendant at Front street, in the town of Cheraw, S. C.

[1] The order refused injunction without stating any reason; hence the only question properly arising is whether, upon the complaint and supporting affidavits, and upon the return and the supporting affidavits, there was a prima facie showing warranting injunction.

[2] The rule is well established that temporary injunction should be granted when it appears prima facie that such injunction is necessary to preserve the right asserted by the plaintiff. *Marion County Lumber Co. v. Tilghman Lumber Co.*, 75 S. C. 220, 55 S. E. 387.

[3] That the condemnation statute affords no machinery for determining the *right* to condemn and is limited to the ascertainment of the *amount* of damages has been frequently declared. Georgia, etc., Ry. Co. v. Riddlehuber, 38 S. C. 308, 17 S. E. 24; Water Co. v. Nunamaker, 73 S. C. 550, 53 S. E. 996.

It would be an anomaly to have a judgment fixing the amount of compensation to be awarded in condemnation proceedings in advance of a determination whether the right to condemn exists, upon which depends the duty to pay the compensative damages. Such a judgment presupposes the ascertainment of the right upon which it is based. Hence it is essential to stay proceedings, so that there be no such judgment until the right thereto has been established.

[4] Before a railroad company can lawfully condemn a crossing of the right of way of another, it must appear that such crossing would not be an unreasonable hindrance of the right of way already dedicated within section 2195, vol. 1, Civil Code 1902, and the consent of the Railroad Commission to make such crossing must be obtained, as provided in section 2179, Civil Code 1902; vol. 1.

Subject to review in a proper case, with the proper parties before the court, the question of hindrance, which involves also the question of public safety, must first be considered by the Railroad Commission as a preliminary of granting their consent to allow the crossing. If consent is granted upon certain conditions precedent, there is no consent until the performance of such conditions.

[5] In this case it appears from the proceedings and the undisputed facts existing at the time of the condemnation proceedings that the consent of the Railroad Commission to permit the crossing was on the condition that the crossing at grade should be protected by an interlocking switch, plans of which were to be first submitted to and approved by the Commission. There was no showing that the condition had been performed; in fact, it is not disputed that plans of such switch had not been approved by the Commission. We need not refer to the fact developed at the hearing of this appeal that the Railroad Commission has not only not approved any plan of an interlocking switch, but has actually determined that there shall be no crossing at grade at the point where the right of way is sought to be condemned.

The action of plaintiff to stay condemnation proceedings was brought in due time, before judgment in condemnation was rendered, and we find nothing in the facts which warrants a conclusion that plaintiff has waived, or is estopped to assert, the claim that no right to condemn exists. The situation was such that it was error to refuse to stay the condemnation proceedings.

The order appealed from is reversed, and the condemnation proceedings enjoined pendente lite.

(33 S. C. 430)

TOWN OF CHERAW v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina. April 25, 1911.)

1. MUNICIPAL CORPORATIONS (§§ 697, 700*)—STREETS—OBSTRUCTION—CRIMINAL RESPONSIBILITY.

An obstruction of a public street is a public nuisance, and the remedy is by indictment, unless the party instituting proceedings on the civil side of the court can show special or peculiar damages differing in kind from those to which all others in common with him are exposed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1495, 1503, 1508; Dec. Dig. §§ 697, 700.*]

2. MUNICIPAL CORPORATIONS (§ 697*)—STREETS—OBSTRUCTION—ABATEMENT OR INJUNCTION.

A municipality, because of its peculiar duties and liabilities in respect to the maintenance of its streets for public use, may bring a civil action to prevent or remove a threatened or continued obstruction constituting a nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.*]

3. MUNICIPAL CORPORATIONS (§ 697*)—STREETS—OBSTRUCTIONS—ACTION FOR INJUNCTION.

An injunction, at the suit of a municipality against a railroad for obstructing a street, should not be granted where there is a prima facie showing that a side track used and claimed by the railroad was constructed within a right of way granted by the municipality, and where the existence of any nuisance is doubtful and has not been established by law, and where there has been an injunction in a suit between the defendant and a third party claiming to derive its rights from the municipality over the same obstruction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.*]

Appeal from Common Pleas Circuit Court of Chesterfield County; R. O. Watts, Judge.

Action by the Town of Cheraw for an injunction against the Seaboard Air Line Railway. Temporary injunction granted, and defendant appeals. Reversed.

See, also, 71 S. E. 34, 39.

Lyles & Lyles and Stevenson & Matheson, for appellant. Willcox & Willcox, Geo. B. Elliott, and W. P. Pollock, for respondent.

JONES, C. J. The town of Cheraw authorized an attorney to take such proceeding as was necessary against the Seaboard Air Line Railway to compel it to allow the Atlantic Coast Line Railroad Company to cross its track on Front street, such proceeding to be done without cost to the town. Accordingly, on December 22, 1910, at the time of the commencement of the action by the Atlantic Coast Line Railroad Company against the Seaboard Air Line Railway, with refer-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ence to this same crossing, in which the judgment of this court has just been rendered, the present action was commenced to enjoin defendant from obstructing said Front street by side track across the same constructed on the 12th and 14th days of November, 1910, alleging that the obstruction rendered the street unfit for the purposes of the street and for the purposes for which a right of way had been granted to the Atlantic Coast Line Railroad Company along said street, alleging, further, that since said time, in order more completely to obstruct said street, defendant placed a car or cars on the said side track so unlawfully constructed, and threatens to continue said obstruction.

A rule to show cause and a temporary restraining order was granted by Judge Watts. Defendant made return on December 30, 1910, and first demurred to the complaint as not stating facts sufficient to constitute a cause of action: (1) In that it only charges an invasion of its right and an obstruction of a public highway, and the only remedy therefrom is by indictment. (2) In that it appears on the face of the complaint that the purpose of the action is to enforce an alleged right of the Atlantic Coast Line Railroad Company, and is not brought to enforce the rights of the town. (3) In that, if the town has suffered injury peculiar to it, giving it the right to bring an action for an alleged public nuisance, no injunction can be granted till the right which is in dispute is determined by law, and no such right is alleged.

The return further states that the plaintiff is not the real party in interest, but the suit is at the expense and for the benefit of the Atlantic Coast Line Railroad Company. The return also states, among other matters, that the construction and use of the side track was not unlawful, and was upon its right of way. The right of way here referred to was that granted pursuant to ordinance by the town of Cheraw October 26, 1886, to the Palmetto Railroad Company, to whose rights defendant succeeded, to build "a railroad with such embankments and cuttings as may be necessary for the construction of a double track railroad through and over the following described right of way across Front street, * * * provided that all crossings of any of said streets be so arranged as not to hinder or impede the free use of the same by the public; and if the track or tracks of said railroad do not cross any of the above-mentioned streets on a level that the same be so graded as least to interfere with the public travel over said streets."

Counsel have agreed that the record in the case of Atlantic Coast Line Railroad Co. v. Seaboard Air Line Railway, 71 S. E. 34, on appeal from the order of Judge Watts, dated December 30, 1910, and the record in the case of Seaboard Air Line Railway v. Atlantic Coast Line Railroad Co., 71 S. E. 39, on the appeal from the order of Judge

De Vore, dated November 11, 1910, shall be considered as incorporated into this case. On hearing the return, Judge Watts granted an order enjoining defendant, until final hearing of the case, from in any manner obstructing or interfering with the streets described in the pleadings, "except as to a double track provided for in the deed of plaintiff to the Palmetto Railroad in 1886."

Defendant appeals on exceptions, assigning error: (1) Because the alleged wrong, if anything, is a public nuisance, and the sole remedy is by indictment. (2) Because there was no prima facie showing of injury to plaintiff different from that suffered by the general public. (3) Because the existence of the alleged nuisance was in dispute and had not been established at law. (4) Because there was no prima facie showing of any unlawful obstruction. (5) Because it appeared that defendant had acquired the right of way across Front street wide enough for two railroad tracks, with power to make such cuts and embankments as might be necessary. (6) Because it appeared that the purpose of the action was to enforce an alleged right of the Atlantic Coast Line Railroad Company, and not any right in plaintiff, who was not the real party in interest. (7) Because the effect of the injunction was to take property in the possession of defendant and place it in the possession of the Atlantic Coast Line Railroad Company, the right to which was in dispute. (8) Because the status of the property as it existed on December 22, 1910, when the restraining order was issued, should have been restored. (9) Because having found that defendant had a right of way across Front street of a width necessary for two railroad tracks, his honor should have further held that the construction of the side track was lawful and proper, and constituted no obstruction to be enjoined by a court of equity pendente lite. (10) Because it appeared by undisputed proof that such side track had been torn up by the act of plaintiff and the Atlantic Coast Line Railroad Company, when the order of injunction was granted.

[1] The obstruction of a public street is a public nuisance, and the remedy is by indictment, unless the person instituting proceedings on the civil side of the court can show special or peculiar damages differing in kind from those to which all others in common with him are exposed. *McMeekin v. Power Co.*, 80 S. C. 515, 61 S. E. 1020, 128 Am. St. Rep. 885.

[2] But a municipality, because of its peculiar duties and liabilities in reference to the maintenance of its streets for public use, may bring a civil action to prevent or remove a threatened or continued obstruction constituting a nuisance. *State v. Water Power Co.*, 82 S. C. 191, 63 S. E. 884, 22 L. R. A. (N. S.) 435, 129 Am. St. Rep. 876.

[3] Waiving the question that the suit by plaintiff was not really in the interest of the

public, but was in the interest of the Atlantic Coast Line Railroad Company for the purpose of enabling it to effect a crossing of the defendant's right of way at Front street, we think the injunction should not have been granted, because the prima facie showing made was that the side track of the defendant was constructed within the right of way granted by the plaintiff. The existence of any nuisance was so doubtful that the court should not have disturbed the status until the legal rights of the parties had been determined. *Kennerty v. Etiwan Phosphate Co.*, 17 S. C. 417, 43 Am. Rep. 607.

The order of the circuit court is reversed.

(39 S. C. 122)

McJIMPSEY v. SOUTHERN RY., CAROLINA DIVISION.†

(Supreme Court of South Carolina. May 1, 1911.)

CARRIERS (§ 320*)—CARRIAGE OF PASSENGERS—INJURY TO PASSENGER—ACTION—SUFFICIENCY OF EVIDENCE.

In an action against a carrier for injuries to a passenger, refusal of a directed verdict for defendant *held* proper by a divided court.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; J. W. De Vore, Judge.

"To be officially reported."

Action by Ed McJimpsey, by his guardian ad litem, against the Southern Railway, Carolina Division. Judgment for plaintiff, and defendant appeals. Affirmed by a divided court.

Sanders & De Pass, for appellant. Nicholls & Nicholls and C. P. Sims, for respondent.

JONES, O. J. The plaintiff recovered judgment for personal injuries alleged to have been sustained August 5, 1906, while a passenger on defendant's train between Biltmore, N. O., and Asheville, N. O.

At the conclusion of all the testimony, defendant moved the court to direct a verdict for defendant on the following grounds:

(1) Because no actionable negligence has been shown on the part of the defendant company.

(2) That, if any such has been shown, the evidence shows that the plaintiff was guilty of contributory negligence such as would defeat his recovery.

(3) That this suit is brought against Southern Railway, Carolina Division, while the evidence shows that the plaintiff was injured while on a train of the Southern Railway Company.

These same grounds are now urged against the court's refusal of the motion. We notice the third ground first. Unless contained in defendant's answer hereafter noticed, there was no testimony whatever that the injury

occurred upon any railroad operated, leased, or owned by the defendant. The testimony offered was all to the effect that the injury occurred on a train operated by the Southern Railway upon a railroad from Spartanburg, S. C., to Asheville, N. C. The court knows judicially that the Spartanburg & Asheville Railroad Company was incorporated in this state under the act of February 20, 1873 (15 St. at Large, p. 347), and was authorized to construct a railroad from Spartanburg to the North Carolina line in the direction of Asheville or Rutherfordton, N. O.; that this railroad company with others consolidated and merged into a new corporation known as "Southern Railway, Carolina Division," and on June 30, 1902, this last-named company executed a lease of its railroad property and franchise to the Southern Railway Company. Acts 1902 (23 Stat. p. 1152); Act 1904 (24 Stat. p. 665). If, therefore, the injury had occurred in this state, there would have been evidence tending to show liability as lessor, but the injury occurred in North Carolina, and there was no testimony offered to show that the defendant was authorized to operate any railroad in North Carolina, and no testimony to show that it owned or actually operated any railroad in that state, except the inference to be deduced from the pleadings. The complaint alleged that defendant was successor of the Spartanburg & Asheville Railroad Company, and owner of its franchise, rights of way, tracks, locomotives, and passenger cars, said tracks extending from Spartanburg, S. C., to Asheville, N. C., and that plaintiff became a passenger on the cars of defendant at Biltmore, N. O. The answer did not specifically deny these allegations, but stated: "It denies every material allegation of the complaint." It is extremely doubtful whether this constitutes a good general denial, because of the qualification, leaving it uncertain what the defendant considered "material" (1 Eng. Pl. & Pr. 782), but passing that by, as no motion to make the answer definite was made, we notice the third allegation in the answer: "Defendant further alleges that the plaintiff in getting out on the step of one of its cars and in attempting to jump from the train while in motion and in holding onto the handholds while the train was in motion assumed all the risks incident to his so doing." Here we have a statement by defendant, that the injury occurred on the cars of defendant, and whether we view this as an admission, or as warranting an inference that the allegation of the complaint in this matter was not considered material by the defendant and therefore not intended to be denied, we cannot hold that there was such a total failure of evidence on this point as to warrant direction of verdict for defendant.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† Rehearing denied June 16, 1911.

Was there error in not directing a verdict on the ground of total failure of evidence to show negligence of defendant? The question is to be determined by the law of North Carolina, where the alleged tort occurred. Taking the view of the evidence most favorable to plaintiff, it appears that plaintiff, a negro boy between 14 and 15 years old, boarded the defendant's train at Biltmore, N. C., as a passenger for Asheville, N. C. Before reaching Asheville, a porter passed through the train calling, "All out for Asheville!" and soon thereafter the train slowed down and stopped, and, if it did not stop, it was moving so slowly as hardly to be noticed. Thereupon the plaintiff, supposing he had reached the station, went out upon the platform, when there was a jerk of the train, which threw him off the platform and under the cars, to his great injury. The station at Asheville is a large brick building surrounded by a fence, with gates for entrance and exit of passengers. The injury occurred in the daytime, and, according to plaintiff's testimony, some 200 yards from the station. The slowing down of the train was explained by the testimony for defendant, which was not disputed. Between Biltmore and Asheville there was a construction crossing of the track where a flagman was stationed, and it was the duty of the engineer to come to a stop, or slow down and await the signal of the flagman before crossing. On this occasion the train was slowed down, and, upon the signal of the flagman, started forward. The defendant's witnesses testified that the train was moving four or five miles an hour at the time of the injury, and that it occurred about three-fourths of a mile from the station, but for the purpose of this motion we must accept the plaintiff's version that the motion of the train was not perceptible, and that the injury occurred about 200 yards from the station. There was no evidence that persons were accustomed to get off and on the train at this point, and there was no evidence that the engineer, conductor, or any employé of the company charged with the management of the train had any knowledge or notice that plaintiff was on the platform when the train moved forward with a jerk. Nor was there any evidence that any employé of defendant invited plaintiff to go upon the platform or to alight, unless, as contended for plaintiff, such invitation should be inferred from the call of the station and the slowing down and stopping of the train. The statute law of North Carolina, which was introduced in evidence by defendant, is section 2628 of the Revisal of 1905, as follows: "In case any passenger on any railroad shall be injured while on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside its passenger cars then in the train, such com-

pany shall not be liable for the injury, provided said company at the time furnish room inside its passenger cars sufficient for the proper accommodation of its passengers." It was in evidence, without contradiction or dispute, that in the car occupied by plaintiff there was posted in a conspicuous place a notice, "Passengers must not stand on the platform;" and on the outside of the door of that car there was another notice, "Passengers must not stand on the platform." It was also shown that at the time of the injury there was sufficient room inside the passenger cars for the proper accommodation of the passengers. Defendant offered in evidence also the following decisions of the Supreme Court of North Carolina: *Burgin v. Railway*, 115 N. C. 673, 20 S. E. 473; *Denny v. Railway*, 132 N. C. 340, 43 S. E. 847; *Morrow v. Railway*, 134 N. C. 92, 46 S. E. 14; *Shaw v. Railway*, 143 N. C. 312, 55 S. E. 713. If the only inference of which the evidence is susceptible is that the train was in motion when plaintiff went upon the platform, then under the statute and the decision in *Shaw v. Railway*, supra, construing it, there should have been a nonsuit. The court in that case said: "It is a very simple and easy matter by observing outside objects or the earth itself to tell when a train is at a standstill, and it imposes no hardship upon a passenger to require him to be certain as to that before entering upon the platform. The carrier owes no duty to be upon the lookout for passengers who violate the printed rule and go on the platform when prohibited, and the engineer and those in charge of the train have the right to suppose that passengers will remain in the car until it comes to a full stop, and they have a right to act accordingly. The statute contains no exception to its general provisions, and in plain terms relieves the company from liability in the case of a passenger injured while on the platform of a moving train, when the company as in this case has complied with its terms. In *Denny v. Railway*, 132 N. C. 340, 43 S. E. 847, it is held that a passenger who voluntarily goes upon the platform of a moving train for the purpose of alighting at the station and is injured by reason of a jerk in the train is not entitled to recover therefor, and Mr. Justice Connor, speaking of the duty of the engineer, says: "He cannot be supposed to know or anticipate that passengers in defiance of the rules have gone upon the platform and are standing upon the step of the car while in motion." The testimony for the plaintiff, however, is that the train was at a standstill when he went upon the platform, or, if there was any motion of the train, it was not perceptible, and it was proper to submit the case to the jury upon this theory of the testimony. The *Shaw* Case just cited quotes approvingly from *Smith v. Railroad*, 88 Ala. 538, 7 South. 119, 7 L. R. A. 323, 16 Am. St. Rep. 63, as follows:

"The mere announcement of the name of a station is not an invitation to alight; but, when followed by a full stoppage of the train soon thereafter, is ordinarily notification that it has arrived at the usual place of landing passengers. Comparing all the cases we deduce that when the name of the station is called, and soon thereafter the train is brought to a standstill, a passenger may reasonably conclude that it has stopped at the station, and endeavor to get off, unless the circumstances and indications are such as to render manifest that the train has not reached the proper and usual landing place." There was some testimony that the jerk of the train occurred just as plaintiff got upon the platform on the opposite side from the station, and before there was opportunity to notice whether the station had in fact been reached. If, therefore, the plaintiff went upon the platform while the train was at a standstill, and had no time to retire therefrom if he had then discovered that he was not at the station, he was upon the platform, after the call of station and stoppage of the train, as one under an implied invitation to be there, and a jerk of the train so violent as to throw one from the platform would tend to show negligence. In such a situation the imperative rule of the statute does not apply, and the passenger is subject to the rule of the prudent person.

The testimony stated also shows that it was proper to submit to the jury the question of plaintiff's contributory negligence. There are a number of exceptions to the instructions given the jury by the court. Defendant requested the following instruction: "If the jury find from the evidence that the plaintiff was out on the platform before the train reached the station, and the train was still in motion, and that it gave a jerk, and that this jerk was incident to the moving forward of the train, and that this was the cause of his being thrown and injured, then he cannot recover." To which the court responded: "I charge you that is the law of North Carolina as I understand it, and in connection with that I charge you this: Unless he was out on the platform, if you conclude he was out there, by the invitation of the defendant company." Defendant also requested this instruction: "If plaintiff was out on the platform and was attempting to alight from the train while in motion, and was thrown by a jerk of the train which was incident to its moving forward, while it was some distance from the station, he cannot recover." To which the court responded: "I charge you that and in connection with it I charge you this: That if it was some distance from the station, and there was any announcement given by any of the employes or servants of the railroad company, acting within the scope of their agency, that would lead a person of ordinary reason and care

and prudence to believe that the train had reached the station, or was moving very slowly in connection with any announcement that may have been given, such announcement and the slow moving of the train, or the speed of the train, rather, would indicate to a person of ordinary reason, prudence, and care that the train had arrived at the station, then if he came out on the platform at the invitation of the defendant company, and he was injured as a direct and proximate cause of their negligence, under those circumstances, he would be entitled to recover." There were other portions of the charge which applied the rule of the prudent person to the conduct of the plaintiff, even though the train was in motion, and had not reached the station. We do not think the charge as a whole was in accordance with the law of North Carolina, as shown in evidence. It appears that the law of that state is that the rule of the statute quoted applies to persons going upon the platform while the train is in motion, and that the rule of the prudent person does not apply in such a case. The mere call of the station and slowing down of the train implies no invitation to alight, except at the station or when the train stops. Under the theory of the defendant's testimony and the requested instruction to meet that theory, the train was not at a station, and had not stopped when plaintiff went upon the platform. The case of *Shaw v. Railway*, supra, expressly holds over a vigorous dissent by Chief Justice Clark and Justice Hoke that, under the statute mentioned, a railroad company is not liable for injuries to a passenger who, after the porter called out the name of the station at which she intended to alight, and while the train was still moving, went upon the car platform in violation of the printed regulations so posted, and was injured by the sudden jerking of the train, though she went upon such platform in the bona fide belief that the train had come to a full stop, and though a reasonably prudent person under the same circumstances would have so believed and acted.

My conclusion is that the judgment of the circuit court should be reversed, and the case remanded for a new trial.

HYDRICK, J., and GARY, A. J. When the charge is considered as a whole and read in the light of the testimony, we are satisfied that, even if it be conceded that the modifications of defendant's request were slightly erroneous, the error was not misleading or prejudicial, and did not affect the result. Therefore we think the judgment of the circuit court should be affirmed.

The court being equally divided, the judgment of the circuit court is affirmed.

WOODS, J., concurs in the opinion of the CHIEF JUSTICE.

(38 S. C. 549)

STATE v. PENDARVIS.

(Supreme Court of South Carolina. May 4, 1911.)

1. JURY (§ 113*)—CHALLENGES—CHALLENGE OF STATE—TIME.

The rule that the state's right of challenge should be exercised before a juror is accepted by accused is not statutory, being entirely a matter of practice.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 499; Dec. Dig. § 118.*]

2. CRIMINAL LAW (§ 1166½*)—APPEAL—HARMLESS ERROR—TIME OF CHALLENGES.

A conviction should not be set aside for a technical violation of the rule of practice requiring the state to challenge before the juror is accepted by accused, where his right of challenge or other substantial right is not thereby affected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3117; Dec. Dig. § 1166½.*]

3. CRIMINAL LAW (§ 1152*)—APPEAL—DISCRETION OF TRIAL COURT.

The trial court's discretion as to the time when jurors may be challenged will not be disturbed unless clearly abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3053-3057; Dec. Dig. § 1152.*]

4. CRIMINAL LAW (§ 413*)—PROSECUTION—ADMISSION OF EVIDENCE.

In a prosecution for homicide, in which the defense was self-defense, and it did not appear that wounds on accused were self-inflicted, and the evidence tended to show that his life was endangered thereby, evidence of a physician who made a physical examination of accused shortly after the killing as to what the examination showed, offered to show that accused was then suffering from cuts and wounds, was admissible, not being objectionable as a self-serving declaration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.*]

5. CRIMINAL LAW (§ 721*)—APPEAL—ARGUMENT—IMPROPER REFERENCES.

The state solicitor stated in his argument in a homicide case, "I am not going to comment on the fact that the defendant did not take the stand, but I have often thought that, if I were being tried on a charge like this, that I—" when the court stated, on objection, that the solicitor had better not make such comments, whereupon the solicitor said, "I guess that hurt." Held, that the remark of the solicitor was improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.*]

6. CRIMINAL LAW (§ 761*)—INSTRUCTIONS—CHARGES ON FACTS.

A charge in a homicide case, in which it was claimed that accused used opprobrious language to decedent before the killing, that the rule was that the plea of self-defense is not available to one who uses language so opprobrious and insulting that a man of ordinary prudence would expect it to bring on a physical encounter, where it did, in fact, bring on a physical encounter, was not objectionable as a charge on the facts, and, withdrawing from the jury's consideration the question of what brought on the difficulty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1754-1764; Dec. Dig. § 761.*]

Appeal from General Sessions Circuit Court of Dorchester County; B. H. Moss, Special-Judge.

"To be officially reported."

John W. Pendarvis was convicted of manslaughter, and he appeals. Reversed and remanded for new trial.

The exceptions are as follows:

"(1) The record discloses the following: During the impaneling of the jury West O. Hutto was examined upon his voir dire as follows: 'His Honor: Are you related by blood or marriage to John Pendarvis or C. O. Wimberly? Juror: Not that I know of. His Honor: Have you formed or expressed any opinion as to the guilt or innocence of the defendant? Juror: No, sir. His Honor: Are you conscious of any bias that would prevent you from rendering a true verdict in this case after hearing the testimony? Juror: No, sir.' When the above juror was called to the book to be sworn, the state did not ask that he be put on his voir dire. The state not making the customary request, as had been done with the other jurors, he was accepted by the defense. Upon his acceptance by the defense the state then asked that he be put on his voir dire, and he was so sworn, after being accepted by the defense. After the voir dire proceedings were had the state objected. 'Mr. Wolfe: Your honor, we accepted this juror before he was placed on his voir dire, and we think that we are entitled to have him sworn. His Honor: I think that is right. As I remember, the solicitor did not ask that the juror be placed on his voir dire, and when he was formally presented you accepted him. Mr. Hildebrand: I was not noticing, your honor. I was leaving this matter to my friend here, and we did not know that the juror had been presented. His Honor: I think that Mr. Wolfe accepted him when he was presented, and before you asked that he be put on his voir dire. Mr. Hildebrand: He is not a juror before he is sworn your honor, and we have the right to object to him. We will rest our case on that. (The juror is objected to by the state under the ruling of the court.) Mr. Wolfe: Will your honor note the exception to your ruling.' It is respectfully submitted that the court erred in allowing the juror West O. Hutto to be examined upon his voir dire and finally peremptorily challenged by the state under these circumstances, after he had been duly presented and accepted as a juror by the defendant.

"(2) The court erred in excluding the proffered testimony of the witness for the defense, Dr. Carlisle Johnson, such testimony, being intended to show the physical condition of the defendant directly after the fatal encounter, and to show that the defendant was at the time of such physical examination by Dr. Carlisle Johnson suffering from several cuts or incised wounds in his body

inflicted by Wimberly; and it is respectfully submitted that the exclusion of this testimony was especially prejudicial to the defendant in view of the fact that the state by its testimony contended that Wimberly was not armed with a knife and did not cut the defendant, but that defendant had cut his coat and collar after the rencounter himself; whereas, testimony of Dr. Johnson would have established the fact that the defendant had been cut and wounded in and upon his body, and it would have then been for the jury to say in the light of all of the testimony whether the cuts upon the garments and the wounds upon the body of defendant were self-inflicted or had been received in the rencounter with Wimberly.

"(3) The court erred in allowing the solicitor over and against the protest of counsel for defendant, and despite the ruling of the court sustaining such objection, to continue to comment upon the failure of the defendant to take the stand and testify as is shown by the record.

"(4) The court erred in charging the jury: 'The rule is that the plea of self-defense is not available to one who uses language so opprobrious and insulting that a man of ordinary prudence would expect the same to bring on a physical encounter, and which did bring on a physical encounter,' because this was a charge on the facts, and took from the jury the consideration of the question as to what did really bring on the difficulty between the defendant and Wimberly, and clearly indicated that the opprobrious language alleged to have been used by Pendarvis did bring on the difficulty."

Wolfe & Connor, for appellant. P. T. Hildebrand, Sol., for the State.

GARY, A. J. The following statement appears in the record: "The appellant was tried before Hon. B. H. Moss, special circuit judge, at the fall term of the circuit court for Dorchester county in the year 1910 for murder. In exception 1 is fully set out the circumstances surrounding the presenting acceptance, voir dire, examination, and rejection of the juror West O. Hutto. The jury rendered a verdict of 'Guilty of manslaughter,' whereupon he was sentenced to 12 years at hard labor in the state penitentiary." Defendant appealed upon exceptions, which will be reported.

First exception:

[1-3] The case of *State v. Harding*, 70 S. C. 395, 50 S. E. 11, shows that this exception cannot be sustained. In that case the rule is thus stated: "The rule that the solicitor should exercise the state's right of challenge before the juror is accepted by the defendant has no statutory sanction, but is based entirely on the practice of the court. *State v. Haines*, 36 S. C. 504, 15 S. E. 555. The defendant's right of challenge is a right of rejection, not of selection. *State v. Kel-*

ley, 46 S. C. 55, 24 S. E. 60. It is therefore manifest that a verdict should not be set aside for a mere technical violation of the rule, which has not impaired the defendant's right of challenge, or any other substantial right." It is further said that "the discretion of the circuit judge in adjusting such matters will not be disturbed, unless abuse of discretion clearly appears."

Second exception:

[4] The record shows that this question arose as follows: "Q. Did you make an examination of John Pendarvis, the defendant, soon after this trouble? A. Yes, sir. Q. Do you remember when it was? A. I do not remember the date. It was on Saturday evening. Q. It was the same of the difficulty? A. Yes, sir. Q. When was it? A. About night. Q. In jail? A. Yes, sir. Q. Tell us what you found when you examined him? Mr. Hildebrand: That question is not competent, and we object that would be a self-serving declaration. The doctor cannot tell what condition he found this man in so long a time after this thing happened. His Honor: I think the objection should be sustained. You could have some one to corroborate. You could put up the defendant, and let the doctor corroborate him." It did not appear that the wounds were inflicted by the defendant. The testimony tended to show that the life of the defendant was endangered by the wounds; and it should have been left to the jury to find whether they were self-inflicted. This exception is sustained.

Third exception:

[5] The question presented by this exception arose as follows: "During the argument of the solicitor the following language was used: 'I am not going to comment on the fact that the defendant did not take the stand, but I have often thought that, if I were being tried on a charge like this, that I—' Mr. Wolfe: We object, your honor. His Honor: I think you are right, Mr. Wolfe. You had better not comment on that, Mr. Solicitor. Mr. Hildebrand: I guess that hurt. Mr. Wolfe: No, sir; it did not hurt. I ask the stenographer to note the remark—'It hurts!'" While the remark made by the solicitor was not proper, it is not reasonable to suppose that it may have influenced the verdict.

Fourth exception:

[6] This exception cannot be sustained, for the reason that his honor, the presiding judge, merely announced a proposition of law, and there are no words showing that he undertook to say how the difficulty occurred.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(88 S. C. 428)

DICKS v. NIMMONS.**NIMMONS v. DICKS et al.**

(Supreme Court of South Carolina. April 21, 1911.)

AGRICULTURE (§ 15*)—LIENS FOR ADVANCEMENTS—ENFORCEMENT.

Civ. Code 1902, § 3063, provides that, when any person has secured a lien on crops for advances, a magistrate may issue a warrant to seize said crops, etc. Section 3064 provides for motion to vacate the attachment. Section 3067 provides that the tenant may recover possession by giving bond. *Held*, that section 3067 gives the tenant only the right to possession by giving bond, and excludes any remedy by claim and delivery, in which action the affidavit must state that the property was not seized under execution or attachment against the property of the plaintiff.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. § 15.*]

Appeal from Common Pleas Circuit Court of Barnwell County; S. Sease, Geo. E. Prince, and J. S. Wilson, Judges.

"To be officially reported."

Actions by R. W. Dicks against William Nimmons, and William Nimmons against R. W. Dicks and F. H. Creech, as Sheriff. From an order holding that the Sheriff violated his duty in turning over crops to Nimmons, and reference to a master to ascertain their value, and from a judgment against the Sheriff for the value of the crops, the Sheriff appeals. Affirmed.

B. T. Rice, for appellant. Bates & Simms, for petitioner. Davis & Best, for respondents.

JONES, C. J. On October 14, 1907, R. W. Dicks began a special proceeding first entitled above to foreclose an agricultural lien for advances upon the crops of William Nimmons, which was in all respects regular, directed to F. H. Creech, the appellant, as sheriff of Barnwell county, under which proceeding the sheriff seized the crops of Nimmons. After seizure Nimmons, in the case second entitled above, brought an action of claim and delivery against the sheriff and R. W. Dicks, for the possession of said crops, in which action the sheriff took a bond from Nimmons and turned over the crops to him. Afterwards, upon a rule to show cause issued against the sheriff, Judge Prince, after hearing, made an order holding that the sheriff violated his duty in turning the crops over to Nimmons and was liable for the value of the same, and referred to the master to ascertain the said value. Upon the coming in of this master's report, Judge Sease rendered judgment against the sheriff for \$240.33, the net value of the crops. The sheriff appeals from both orders.

The controlling question is whether the sheriff breached his duty in turning over to Nimmons in the claim and delivery action the crops seized in the proceedings to en-

force the agricultural lien. We agree with Judge Prince that the sheriff acted without authority.

According to the facts stated in the record, the bond said to have been taken by the sheriff was not given pursuant to section 3067, vol. 1, Civ. Code, which alone gives the lienor the right to give bond to recover the immediate possession of the crops seized. This remedy excludes any remedy by the action of claim and delivery in behalf of the lienor. The affidavit in claim and delivery must state that the property was not seized under execution or attachment against the property of plaintiff, and it is manifest that a lienor whose property is seized and in the hands of the sheriff under a warrant of attachment could not proceed by that remedy. Whether a third party claiming the property could proceed by an action to recover possession is a different question. *Railway Company v. Sarratt*, 58 S. C. 104, 36 S. E. 504. The statute (section 3063) provides how the lienor shall proceed in case he disputes the amount claimed. Section 3064 provides for motion to vacate the attachment, and section 3067 provides how immediate possession may be obtained by giving bond.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(88 S. C. 541)

SMITH v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. May 2, 1911.)

CARRIERS (§ 261*)—PASSENGERS—WRONGFUL TAKING OF MILEAGE BOOKS—LIABILITY.

Where a railway company had no right to forfeit a passenger's mileage book, taken up and retained by a conductor, the passenger could recover the value of the book, with interest from the date of the taking.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1034; Dec. Dig. § 261.*]

Appeal from Common Pleas Circuit Court of Edgefield County; R. C. Watts, Judge.

Action by H. A. Smith against the Southern Railway Company. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

Thurmond & Nicholson, for appellant. B. L. Abney and N. G. Evans, for respondent.

HYDRICK, J. The facts out of which this case arose are fully stated in the opinion in the case of *Bessie D. Smith v. Same Defendant*, 70 S. E. 1037, recently filed. This plaintiff seeks to recover damages for alleged abusive language of defendant's conductor to him on the occasion in question, and for taking up and refusing to return to him his mileage book. At the close of plaintiff's

testimony, defendant moved for a nonsuit on two grounds: (1) Because there was no evidence upon which punitive damages could be awarded. (2) Because the evidence showed that plaintiff had violated the terms of his contract by using the coupons from his mileage book to purchase a ticket for his wife, and therefore, by the terms of the contract, the mileage book was subject to forfeiture. The motion was granted.

A careful examination of the evidence discloses nothing in the language or conduct of the conductor toward this plaintiff which would warrant a verdict for punitive damages. There was, therefore, no error in granting the nonsuit on that cause of action. But the principles upon which the case of Bessie D. Smith was decided are conclusive of the proposition that, under the circumstances, the defendant did not have the right to forfeit plaintiff's mileage book. Therefore plaintiff should have been allowed to recover the value of his mileage book, with interest thereon from the date it was taken from him, and for that purpose the judgment is reversed, and the case remanded. Reversed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(88 S. C. 572)

MAYBANK & CO. v. ROGERS.

(Supreme Court of South Carolina. May 5, 1911.)

1. GAMING (§ 48*)—CONTRACT IN FUTURES—PLEADING.

Under Civ. Code 1902, § 2310, making void contracts to sell cotton in the future unless the parties bona fide intend actual delivery in kind at the future time specified, a complaint, for breach of contract to deliver alleging such intent is sufficient to show a cause of action.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 96-99; Dec. Dig. § 48.*]

2. SALES (§ 418*) — BREACH BY SELLER — RIGHTS OF BUYER.

Ordinarily, when a seller fails to deliver, the buyer can recover the difference between the contract price and the market value at the time and place of delivery without buying articles to replace those contracted for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

Appeal from Common Pleas Circuit Court of Florence County; Ernest Gary, Judge.

"To be officially reported."

Action by Maybank & Co. against F. M. Rogers. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

J. W. Ragsdale and R. E. Whiting, for appellant. Willcox & Willcox and Henry E. Davis, for respondent.

JONES, C. J. The appeal herein is from an order overruling a demurrer to the complaint upon two causes of action for the

recovery of damages aggregating \$17,187.50 for alleged breach of contracts for the sale and delivery of cotton.

The complaint on the first cause of action alleged substantially: (1) That plaintiff is a domestic corporation engaged in the business of buying and selling cotton for profit. (2) That defendant agreed in writing on June 23, 1909, to sell to plaintiff 500 bales of cotton to be delivered at Florence, S. C., between September 15 and December 30, 1909, at the price of 10½ cents per pound for Maybank 5's with deductions and additions for other grades according to Maybank & Co.'s differences in effect on the day of delivery. (3) That delivery of said cotton was to be made during the time specified at seller's option. (4) That at the time of making said agreement of sale it was the bona fide intention of both parties that the cotton so agreed to be sold should be actually delivered in kind by the defendant, and that plaintiff was, during the period of delivery, to be ready and willing to receive the cotton in kind. (5) That plaintiff was ready and willing during said time to accept the cotton and pay for the same; but defendant failed to deliver said cotton or any portion thereof. (6) That on December 31, 1909, cotton of the grade and at the point of delivery agreed upon was worth on open account 15½ cents per pound. (7) That a commercial bale of cotton as contemplated by the parties contains 500 pounds, and that the failure of defendant to deliver said cotton damaged plaintiff \$11,562.50, the difference between the value of 250,000 pounds of cotton at the contract price of 10½ cents per pound and the value of said cotton at 15½ cents per pound, the market price at the end of the period of delivery.

The second cause of action was upon a similar contract made July 17, 1909, to sell 500 bales of cotton to be delivered at Florence, S. C., between September 15 and December 1, 1909, at the price of 11½ cents per pound; the damages claimed for breach being \$5,625, the difference between the value of the cotton at contract price and the value of the cotton at the market price at 18½ cents per pound on December 2, 1909. In other respects the allegations upon each cause of action are the same.

The demurrer was upon the ground that the complaint failed to state a cause of action: (1) Because it appears that the parties did not intend an actual delivery of the cotton, and that the transactions were mere wagers as to the rise and fall of the price of cotton. (2) Because it appears that plaintiff seeks to recover profits by reason of the rise in the price of cotton and demands payment of the difference between the contract price and the market price at the time fixed for executing the contract, and there is no allegation that plaintiff was compelled

to purchase, or that it did purchase cotton to replace that contracted for by said agreements, or that plaintiff suffered any loss by the failure of defendant to deliver said cotton, other than that occasioned by the loss of speculative profits. (3) Because the complaint does not show that there was any difference between the contract price and the market price at the time fixed for executing said contracts, the limit of delivery being December 30, 1909, on the first contract, whereas the allegation was as to market price on December 31, 1909; and on the second contract the limit of delivery was December 1, 1909, whereas the allegation was as to market price on December 2, 1909.

[1] The demurrer was overruled by Judge Ernest Gary. Appellant by his exceptions renews the grounds of demurrer except as to the third ground, which is abandoned. We hold that the demurrer was properly overruled.

Section 2310 of the Civil Code of 1902, vol. 1, provides that: "Every contract, bargain or agreement, whether verbal or in writing, * * * for the sale or transfer at any future time of any cotton, * * * shall be void * * * unless it is the bona fide intention of both the parties to the said contract, bargain or agreement, at the time of making same, that the said cotton * * * so agreed to be sold and transferred shall be actually delivered in kind by the party contracting to sell and deliver the same, and shall actually be received in kind by the party contracting to receive the same at the period in the future mentioned and specified in the said contract, bargain or agreement for the transfer and delivery of the same." The cases construing this section hold that a complaint, which alleges that it was the bona fide intention of both parties at the time of making said contract that the cotton should be actually delivered and received in kind at the future period mentioned, states a cause of action. *Gist v. Tel. Co.*, 45 S. C. 364, 23 S. E. 143, 55 Am. St. Rep. 763; *Riordan v. Doty*, 50 S. C. 537, 27 S. E. 939; *Riordan v. Doty*, 56 S. C. 118, 34 S. E. 68; *Barr v. Satcher*, 72 S. C. 35, 51 S. E. 530.

Such is the allegation of the complaint in this case. The allegation of intention is an allegation of fact which stands admitted by the demurrer. The averment of bona fide intention is not inconsistent with other facts stated in the complaint, or with any presumption arising from such facts. It is true that the statute (section 2311) places the burden of proof on the plaintiff to establish the bona fide intention of the parties at the time of making the contract; but it is not necessary to state in the complaint the evidentiary matter by which such intention may be established.

[2] We find nothing in the second ground of demurrer which needs to be considered,

since it appears that the allegations as to the contract are sufficient against a general demurrer. The ordinary rule is that, when the vendor fails to deliver goods sold, the vendee is entitled to recover the difference between the contract price and the market value of the goods at the time and place of delivery. *Ellison & Co. v. Johnson & Co.*, 74 S. C. 202, 54 S. E. 202, 5 L. R. A. (N. S.) 1151; *Leesville Mfg. Co. v. Iron Works*, 75 S. C. 349, 55 S. E. 768; *Brooke v. Milling Co.*, 78 S. C. 200, 58 S. E. 806, 125 Am. St. Rep. 790.

This rule does not contemplate that the vendee, to avail himself of it, shall buy upon the market articles to replace those contracted for. Proof of the contract price and the market price at the time and place of delivery establishes a basis for *certain*, not *speculative*, profits, if the market price be higher than the contract price.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(88 S. C. 553)

CORY v. CITY OF COLUMBIA.

(Supreme Court of South Carolina. May 4, 1911.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS OF FACT.

There being some evidence tending to support the circuit court's conclusions of fact, they are not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. MUNICIPAL CORPORATIONS (§ 763*)—STREETS—REPAIRS—EXTENT OF DUTY.

The rule governing the duty of a city in the repair of its streets is ordinary care.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1612; Dec. Dig. § 763.*]

3. MUNICIPAL CORPORATIONS (§ 803*)—DEFECTIVE SIDEWALKS—DUTY OF PEDESTRIAN.

Even if a city must so guard gratings in a sidewalk, reasonably necessary for adjoining buildings, that one wearing a small-heel shoe, or using a cane or crutch, may not be endangered by a fall, from the heel, cane, or crutch going into one of the small openings, a corresponding duty must devolve on such pedestrians to exercise due care to avoid such danger.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1673; Dec. Dig. § 803.*]

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by E. E. Cory against the City of Columbia. Judgment for defendant. Plaintiff appeals. Affirmed.

A. M. Lumpkin and O. T. Cunningham, for appellant. Christie Benet, for respondent.

JONES, C. J. Plaintiff recovered judgment against the defendant municipality in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a magistrate's court for \$100, as damages alleged to have been sustained through the negligence of defendant in permitting to remain in a defective and unprotected condition a certain hole about three inches in diameter, a broken-out disk in one of the cellar lights on the sidewalk on Washington street near the rear of the Carolina National Bank Building, whereby plaintiff, a cripple with one leg and compelled to use a crutch, while passing along the sidewalk going towards Main street on the night of April 28, 1909, was violently thrown to the ground and injured, by his crutch going through said hole, without fault on his part.

The circuit court, Judge Memminger, reversed the judgment of the magistrate and rendered judgment for the defendant based upon the following conclusions: "After hearing the pleadings, testimony, report of magistrate, and exceptions and arguments of counsel, I am of opinion that the defect alleged is not of such a dangerous character as to charge the defendant with liability for the action. The hole is not dangerous, nor liable to cause accident or injury to an ordinary pedestrian, nor to any one save a person walking with a crutch, and there being an adequate safe way on the pavement, free of such defects, where even a person with a crutch could walk with safety, it was incumbent on a person with such infirmity to use due care and caution in avoiding such places as, while not dangerous to an ordinary pedestrian, might cause him to fall, especially as it appeared that the defendant was familiar with the locality and had been drinking at the time of his injury."

[1] There is some evidence tending to support the conclusions of fact by the circuit court, and hence under the well-established rule these conclusions must be accepted as final, and are not reviewable.

[2] The rule governing the duty of the city in the repair of its streets is ordinary care. *Berry v. Greenville*, 84 S. C. 122, 65 S. E. 1030.

There was no allegation nor proof that the city authorities had notice of the alleged defect, and there is nothing in the facts found by the circuit court to show that the sidewalk was not reasonably safe for ordinary use.

[3] Even if it should be held that a city must so guard the cellar lights or gratings reasonably necessary for the buildings fronting on the street that one wearing a small heel shoe, or using a walking cane or crutch, should not be endangered by a possible fall arising from the heel or cane or crutch going into one of the small openings, then a corresponding duty must devolve upon such pedestrians to exercise due care to avoid such danger.

The judgment of the circuit court is affirmed.

(38 S. C. 543)

CITY OF ANDERSON v. GIST.

(Supreme Court of South Carolina. May 4, 1911.)

DISORDERLY HOUSE (§ 17*)—EVIDENCE—SUFFICIENCY.

Evidence in a prosecution for keeping a bawdyhouse or house of ill fame held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see *Disorderly House*, Dec. Dig. § 17.*]

Appeal from General Sessions Circuit Court of Anderson County; G. W. Gage, Judge.

"To be officially reported."

Mamie Gist was convicted of the offense of keeping a bawdyhouse or house of ill fame, and she appeals. Affirmed.

A. H. Dagnall, for appellant. P. A. Bonham, Sol., and Hood & Sullivan, for respondent.

WOODS, J. The defendant was convicted before the mayor of the city of Anderson of the offense of keeping a bawdyhouse or a house of ill fame. The appeal to the circuit court was on the ground that there was no evidence of guilt, and the same question is made on the appeal to this court.

[1] Analysis and argument are not necessary to show that the following evidence appearing in the record tended strongly to establish the guilt of the accused:

W. F. Edwards, sworn, says: "I know the defendant. She lives on East Market street near Jefferson avenue. I have noticed her house for some time on Saturday night for six or seven weeks. White men continually go there. Saw seven men knock at her door one night, but she did not admit them. One night a white man was in there. I don't know his name. Don't think anybody else lives in same house. One night I saw four women there. I have seen white men go there four or five different Saturday nights. Defendant keeps the house. She lives there. She rents from Monroe Hanks. The place has a bad reputation. This is in the city of Anderson. I am policeman of the city of Anderson. There are three rooms in the house. She has been arrested twice to my own knowledge."

E. B. Geer, sworn, says: "I am an extra policeman. I went with Mr. Edwards the night the women came out of the house. Two men and three women were in a buggy. Saturday night last we heard men in the house. Bell and I found men on the inside of Mamie Gist's house. I don't know general reputation of house. Many buggy tracks around house. She told me when I arrested her that she did not see why the city was any harder on her than other women; that other women had just as many men as she did."

W. N. Scott, sworn, says: "I went to her house on Thanksgiving day, and found two

other women in the house. The reputation of the house is very bad. It was about 3 o'clock in the afternoon of Thanksgiving day that I saw the women. I saw no men there that day. I know defendant lives there."

A. R. Jaynes, J. W. Samons, and A. J. Freeman, policemen, sworn, say that the general reputation of Mamie Gist's house is bad.

The judgment of this court is that the judgment of the circuit court be affirmed.

JONES, C. J., and GARY, A. J., and HYDRICK, J., concur.

(88 S. C. 525)

REYNOLDS v. PRICE.

(Supreme Court of South Carolina. May 1, 1911.)

1. MORTGAGES (§ 300*)—DISCHARGE—TENDER.

One designing to make a tender of a mortgage debt with the purpose of insisting, in case of refusal, that the mortgage lien is discharged, must act in a straightforward way, and distinctly make known his true purpose, and allow reasonable opportunity for intelligent action by the holder of the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 876-888; Dec. Dig. § 300.*]

2. MORTGAGES (§ 300*)—DISCHARGE—TENDER.

To have the effect of stopping the running of interest or of discharging the lien of a mortgage, a tender of payment must be kept good, and, if made the basis of a plea of tender or for affirmative relief, the money must be brought into court.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 876-888; Dec. Dig. § 300.*]

3. MORTGAGES (§ 300*)—DISCHARGE—TENDER.

If a mortgagee refuses a tender, not arbitrarily or for a wrongful purpose, but in good faith, under the honest belief, based on reasonable grounds, that more is due him than has been tendered, such refusal will not discharge his lien.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 876-888; Dec. Dig. § 300.*]

4. MORTGAGES (§ 306*)—EXTENSION OF TIME—CONSIDERATION.

An agreement without consideration for the extension of time of payment of a mortgage is not enforceable.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 890-896; Dec. Dig. § 306.*]

5. MORTGAGES (§ 300*)—PAYMENT—TENDER—GOOD FAITH.

Though it is contrary to public policy to allow an attorney to charge fees for his professional services in his own case, a charge of \$10 by a mortgagee, who, as his own attorney, had prepared summons and complaint in foreclosure, was not so unreasonable as to necessarily show that his demand of such sum as a condition precedent to satisfying the mortgage was not made in good faith.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 890-896; Dec. Dig. § 300.*]

Appeal from Common Pleas Circuit Court of Sumter County; Geo. W. Gage, Judge.

"To be officially reported."

Action by Mark Reynolds against Margaret O. Price. From the judgment, plaintiff appeals. Reversed.

R. O. Purdy and R. W. Shand, for appellant. L. D. Jennings and Geo. D. Levy, for respondent.

HYDRICK, J. This action was brought to foreclose a mortgage given by defendant to plaintiff to secure her bond, dated December 19, 1905, for \$600, payable one year thereafter, for the balance of the purchase money of the lot mortgaged. The mortgage secured the payment of all reasonable attorney's fees, costs, and charges, in case it should be placed in the hands of an attorney for collection or foreclosure, or was collected by legal proceedings, and all other debts due and owing to the mortgagee by the mortgagor. The defendant pleaded tender. The circuit court held that the tender was sufficient to cover the amount actually due, and, under the authority of *Salinas v. Ellis*, 26 S. O. 337, 2 S. E. 121, held the lien of the mortgage discharged. Plaintiff had judgment for the amount found due by the master at the date of tender, but was denied the right to judgment of foreclosure.

To a correct understanding of the case, a brief statement of the circumstances under which the tender was made and refused is necessary. A custom prevails at the Sumter bar to charge what is called a renewal fee of \$2 for extending the time of payment of a loan for any definite period beyond the date of maturity. The circuit decree says that it was stated at the bar that such charge is always made and always paid. This loan was so renewed at maturity in 1906, and again in 1907; the defendant having agreed to pay the renewal fees. In the early fall of 1908, plaintiff notified defendant, who resided in Columbia, that he would require payment of the loan at maturity. He received no response until December 28th, when defendant's husband—who acted as her agent throughout the transaction—wrote him, asking a few days' indulgence. Thereafter he wrote plaintiff several letters, excusing the delay in paying the debt, and asking further indulgence. In the meantime several persons had seen plaintiff, at defendant's request, with the view of taking up the debt. Finally, on February 3, 1909, Mr. Geo. D. Levy, a member of the Sumter bar, called upon plaintiff, who is also a member of that bar, and told him that he represented the defendant, and wanted to take up her mortgage debt. At that time it was Mr. Levy's intention to pay plaintiff the amount due him, and take an assignment of the bond and mortgage to himself, until new papers could be executed to him by defendant. He informed plaintiff of his intention, and plaintiff told him it would be agreeable to him. Whereupon, at his request, plaintiff gave him a statement of the amount due, which contained an item of \$4 for two renewal fees, and one of \$10 for attorney's fee.

At that time plaintiff had already prepared the summons and complaint in foreclosure, which he had signed in his own name, as attorney for plaintiff, and so informed Mr. Levy. Looking at the statement, Mr. Levy called plaintiff's attention to the item of \$10, and told him he thought it unusual to make that charge. Plaintiff replied: "Well, that is my charge. If you want the papers, you will have to pay it." On the next day Mr. Levy took the amount due, according to plaintiff's statement, less one renewal fee of \$2 and the attorney's fee of \$10, and went first to the office of Mr. Harby, another attorney, where they counted the money, and taking Mr. Harby, as a witness to the tender, they went to plaintiff's office, and Mr. Levy told plaintiff that he had come "prepared to take up the mortgage," but that he was instructed by his client to refuse to pay the \$2 renewal fee and \$10 attorney's fee. Plaintiff replied: "Well, sir; you can't get it." Mr. Levy then said: "I desire to comply with the law and stop interest on this money, and I herewith tender you the amount of your statement, less \$12." The tender was refused. It appears from the testimony that Mr. Levy had no authority from the defendant to make the tender, and that she had not instructed him to refuse to pay the renewal fee, or the attorney's fee, although she subsequently ratified his acts. About a week after refusing the tender, and after the summons and complaint had been served, plaintiff went to Mr. Levy's office, and offered to accept it. Mr. Levy then told him that he thought the lien of his mortgage was discharged, but that he would consent for him to have judgment for the debt. Plaintiff testified that he did not refuse the tender arbitrarily or with the view to oppress the defendant, but in good faith, under the honest belief that he had a legal right to collect the fees claimed. As evidence of his good faith and of his desire to save the defendant needless expense, he said that he knew that he could have secured a much larger fee by placing the bond and mortgage in the hands of a brother attorney for collection, when the fee collectible would have been probably not less than \$85—10 per cent. of the amount due—but he had the summons and complaint prepared in his own office and signed his own name thereto, as plaintiff's attorney, to save her the greater expense.

The abandonment of the intention originally announced to the plaintiff of asking him to assign the bond and mortgage, and the subsequent tender, made with the statement that it was made to comply with the law and stop interest on the money, but really made with the different intention, afterwards avowed and now claimed for it, of thereby discharging the lien of plaintiff's mortgage, is a piece of finesse which does not commend itself to the favorable consideration of a court of conscience.

[1] The law is that "one designing to make a tender with the purpose of insisting, in a case of refusal, that the mortgage lien is discharged, is bound to act in a straightforward way, and distinctly and fairly make known his true purpose without mystery or ambiguity, and allow reasonable opportunity for intelligent action by the holder of the mortgage. * * * But, if a mortgagee acting in good faith refuses a tender through mistake as to his legal rights, the lien of the mortgage is not discharged." Jones on Mortgages, § 893, p. 955; 27 Cyc. 1406, 1407; 20 A. & E. Enc. L. (2d Ed.) 1062. In *Potts v. Plaisted*, 30 Mich. 149, the court said: "In view of the serious consequences to the holder of a mortgage, upon the refusal of a tender—consequences which may often amount to the absolute loss of the entire debt—and in view of the strong temptation which must exist to contrive merely colorable or sham tenders, not intended in good faith, we think the evidence should be so full, clear, and satisfactory as to leave no reasonable doubt that the tender was so made, that the holder must have understood it at the time, to be a present, absolute, and unconditional tender, intended to be in full payment and extinguishment of the mortgage, and not dependent upon his first executing a receipt or discharge, or any other contingency." Being under the impression that the purpose of the negotiations with him was to get from him an assignment of the bond and mortgage, and knowing that defendant had no legal right to demand an assignment, plaintiff might have concluded that he was strictly within his legal rights in refusing the tender, even if it should have the effect of stopping interest—the avowed purpose for which it was made—and he might have been satisfied to take his chances as to that consequence, when he might have pursued a different course, if he had been fairly and unequivocally informed of the real purpose of the tender.

[2] The case of *Salinas v. Ellis* established the rule in this state that refusal of a tender of the mortgage debt discharges the lien of the mortgage, without regard to any equities arising out of the circumstances under which the tender may be made or refused; and, also, that the tender need not be kept good. While the common-law doctrine of mortgages does not prevail in this state, the rule in question grew out of the rigor of that doctrine, and was originally designed to prevent the great injustice and hardship which resulted from it. A rule intended to prevent hardship and injustice should not be applied by a court of equity so that it will work what it was intended to prevent. Consequently, in those jurisdictions where the rule prevails, it has been so limited and modified in its application as to prevent its becoming the means of injustice. Among other limitations, it is universally held that the

mortgagee is entitled to reasonable time and opportunity to ascertain if the tender is sufficient and to decide whether he will accept it. He is not required to act without time for consideration. Having had such time and opportunity, if he arbitrarily and without adequate excuse refuses the tender, he may well be said to be the author of his own injury, if he thereby loses his lien. But, where there is an honest difference between mortgagor and mortgagee as to the amount due, the law does not require the mortgagee to act at his peril—at the peril, on the one hand, of giving up part of what he believes, in good faith, to be due him, or, on the other, of losing his lien. Such an application of the rule would be most inequitable and unjust. Questions frequently arise between mortgagee and mortgagor as to the amount of the debt, growing out of the date and application of payments, the method of calculating interest, and many other matters, which will readily suggest themselves, which require judicial determination. They may be, and frequently are, so complex and difficult that they are answered differently by the courts in different jurisdictions, and by able and learned judges in the same jurisdiction. The law is not so unreasonable as to require a mortgagee to decide such questions for himself and at his peril, but gives him the right to have them adjudicated without losing his lien for the amount justly due him.

[3] Therefore, if a mortgagee refuses a tender, not arbitrarily or for a wrongful purpose, but in good faith, under the honest belief, based upon reasonable grounds, that more is due him than has been tendered, refusal of the tender will not operate to discharge his lien. The result of the decisions in the different states is stated in a note to *Parker v. Beasley*, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231, as follows: "In all the states the tender must be absolute and unconditional, and the mortgagee must be given a reasonable time to compute the amount due in order to discharge the lien, and if he refuses the tender in good faith, even though the tender is sufficient, the lien will not be discharged." To the effect that a tender, though in fact sufficient, if refused in good faith, under the honest but mistaken belief that it is insufficient, will not discharge the lien of the mortgage, see *Renard v. Clink*, 91 Mich. 1, 51 N. W. 692, 30 Am. St. Rep. 458; *Union Mutual L. Ins. Co. v. Union Mills Plaster Co.* (O. C.) 37 Fed. 286, 3 L. R. A. 90; *Hartley v. Tatham*, 2 Abb. Dec. (N. Y.) 333; *Id.*, *40 N. Y. 222; *Moore v. Norman*, 51 Minn. 83, 53 N. W. 809, 18 L. R. A. 359, 38 Am. St. Rep. 526; 27 Cyc. 1408, 1409; 1 *Jones on Mortgages* (6th Ed.) § 893, p. 955. In *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.*, *supra*, the court said: "A tender of the whole sum which was in fact due, having been made, is the mortgage security as to the sum so tendered lost by the refus-

al to accept? It is the rule undoubtedly that a tender discharges the security. *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468; *Caruthers v. Humphrey*, 12 Mich. 270; *Potts v. Plaisted*, 30 Mich. 149. But to produce such serious and heavy consequence the refusal must have been unqualified, and unaccompanied by any bona fide claim of right, which was supposed by the party to justify his refusal. The claim of right may have been one that could not be supported as matter of law; still if it was believed in, and was not wantonly put forward as a cover to a wrong purpose, it is sufficient to prevent the forfeiture of the security."

The question, therefore, is not whether the plaintiff's claim to the renewal and attorney's fee can be sustained in law, but, rather, whether it was made in good faith. The testimony shows that it was. The contention of respondent that the charge of a renewal fee would make the contract usurious, because it already provided for the highest rate of interest allowed by the statute, would be sound, if the renewal fee was charged as interest. But suppose it was made in good faith, as a reasonable charge, for the service of making the necessary and proper entries on the bond and mortgage, and in plaintiff's books, and as a consideration for the extension. Is the mortgagee bound to interrupt or suspend his business to perform these services for the mortgagor without consideration?

[4] Again, it is well settled that an agreement for the extension of time, without consideration, cannot be enforced. The mortgagor may and probably would want the agreement to be of such nature that the mortgagee could not arbitrarily violate it and bring suit before the extension agreed upon had expired; but, to make it such, there must be some consideration for it. These suggestions are thrown out, not for the purpose of intimating any opinion as to the validity of plaintiff's claim for the renewal fees, because that is not put in issue by the appeal, and because, as has been shown, it is not necessary that the mortgagee sustain his contention in the subsequent litigation. All he need show is that it was made in good faith, and that it was not so unreasonable as to induce a contrary conclusion.

[5] It is contrary to public policy to allow an attorney to charge fees for his professional services in his own case; but it cannot be said, under the circumstances of this case, that the plaintiff's charge of a small fee for his services in preparing the summons and complaint, and his contention that he was entitled to collect it, was so unreasonable as necessarily to induce the belief that the claim was not made in good faith. In *Barry v. Guild*, 126 Ill. 439, 18 N. E. 759, 2 L. R. A. 334, it was held that the plaintiff, a mortgagee, who signed the bill pro se,

was entitled to recover a solicitor's fee provided for in the mortgage, in the absence of allegation or proof that in the litigation he was not represented by other counsel. By reference to a number of cases cited in the notes in 27 Cyc. 1785, it will be seen that the claim by an attorney, representing his own interests, to a fee was sustained in the circuit courts; and while it was disallowed on appeal, on the principle above stated, the fact that it was sustained by the circuit courts shows that it cannot be said that it is so unreasonable that it could not have been made in good faith.

We think, also, the weight of authority and reason favors the rule that to have the effect of stopping the running of interest, or of discharging the lien of the mortgage, the tender must be kept good; and, if made the basis of a plea of tender or for affirmative relief, the money must be brought into court. 27 Cyc. 1409; 1 Jones on Mortg. § 893.

To the extent that the views herein announced are inconsistent with the case of *Sallnas v. Ellis*, that case is overruled.

The judgment of the circuit court is reversed.

JONES, C. J., and GARY, A. J., concur.

WOODS, J. (concurring in the result). While I concur in holding that there has never been any legal tender of the mortgage debt, and that the plaintiff is entitled to a judgment of foreclosure, I am unable to resist the conclusion that the legal propositions laid down in the majority opinion are opposed to the former decisions of this court and contrary to the statute law of the state. The importance of the question seems to require a statement of my reasons for this conclusion.

In this action to foreclose a mortgage executed by the defendant to the plaintiff on real estate in the city of Sumter, the defense set up was discharge of the lien of the mortgage by tender of the amount due thereon. Upon the report of the testimony taken by the master, the circuit court held that the defendant, by her attorney, Mr. Geo. D. Levy, had tendered to the plaintiff the full amount of principal and interest due under the bond, that the plaintiff had refused to accept the sum offered, and had thereby lost the lien of his mortgage.

The facts, as established by the testimony, are these: When the principal sum, together with one year's interest, became due on December 18, 1908, the defendant was evidently unable to pay the debt, and negotiations were begun with the plaintiff, Mr. Reynolds, a member of the Sumter bar, to secure an extension of time for payment. In January, 1909, one W. T. Andrews, in behalf of the defendant, went to Mr. Levy, also an attorney of Sumter, and asked him to assist in negotiating a loan on the property covered by the mortgage. The agree-

ment between Andrews and Mr. Levy, as testified to by the latter, was that Levy should advance the money to pay the debt and take an assignment of the bond and mortgage from Mr. Reynolds as security until a new bond and mortgage could be executed. Accordingly, Mr. Levy, with this end in view, approached the plaintiff on February 3, 1909, and told him that he represented the mortgagor, Margaret O. Price, and wished to take up the mortgage debt. Mr. Reynolds replied that it would be agreeable to him, and on the same day furnished Levy with a statement of the amount claimed, consisting of the principal and interest to date, a "renewal fee" of \$2, and an attorney's fee of \$10, a total of \$688. Upon Mr. Levy's calling the plaintiff's attention to the \$12 charge for fees, he replied: "Well, that is my charge. If you want the paper, you will have to pay it." On the next day Mr. Levy, taking with him \$656 in currency, and accompanied by Mr. Horace Harby, another attorney, went to Mr. Reynolds' office and offered him this sum, stating that he had come "to take up the mortgage," but had been instructed by his client to refuse to pay the \$2 renewal fee and the \$10 collection fee. Mr. Reynolds' answer was: "Well, sir; you can't get it." Mr. Levy then said: "Mr. Reynolds, I desire to comply with the law and stop interest on this money, and I herewith tender you the amount of your statement, less the \$12, in currency." Mr. Reynolds replied: "I won't take it." It appears from Mr. Levy's own statement that W. H. Price, the husband and agent of the mortgagor, Margaret O. Price, who resided in Columbia, did not come to Sumter or communicate with Levy until February 5th, the day after this occurrence, and that Levy had never been advised by either the defendant or her agent, by letter or otherwise, to refuse to pay the disputed amount of \$12. It is admitted by plaintiff's attorneys that he had no legal right to claim the additional amount.

The question is whether there was a legal tender discharging the lien of the mortgage. The law of this state, as established by the decisions of this court, we think is perfectly fair to debtor and creditor and makes it impossible for either to obtain any advantage over the other.

Section 2375 of the Civil Code provides: "Any person who shall have received full payment or satisfaction, or to whom a legal tender shall have been made, of his debts, damages, costs and charges, secured by mortgage of real estate, shall, at the request of the mortgagor, or of his legal representatives, or of any other person being a creditor of said debtor, or a purchaser under him, or having an interest in any estate bound by such mortgage, and on tender of the fees of office for entering such satisfaction, within three months after such request made, enter satisfaction in the proper

office, on such mortgage, which shall forever thereafter discharge and satisfy the same."

The first contention of plaintiff's counsel, sustained in the majority opinion, is that even under this statute a tender of the amount really due will not defeat the lien, if there is a bona fide dispute on reasonable grounds as to the amount due. It is true that some decisions in other jurisdictions hold this to be the common-law rule. *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37; *Renard v. Clink*, 91 Mich. 1, 51 N. W. 692, 30 Am. St. Rep. 459; *Union Mut. L. Ins. Co. v. Union Mills Plaster Co. (C. C.)* 37 Fed. 286, 3 L. R. A. 90. Even if the statute be left out of view, the doctrine seems to me clearly unsound. There can be no dispute that the definition of "tender" is the unconditional offer of a debtor to his creditor of the amount of his debt. This does not mean that the offer must be of an amount beyond reasonable dispute, or of the amount claimed by the creditor, but of the real amount as fixed by the law. It would be a great hardship on the debtor to require that, in order to have any benefit of the law of tender, he must not only prove that he tendered the amount actually due, but must go further and prove that the creditor had no reasonable ground to claim any more. Indeed, the purpose of the entire law of tender is to enable the debtor to relieve himself of interest and costs and to relieve his property of incumbrance by offering to his creditor all that he has any right to claim.

As said by Chancellor Harper in *Wistar, Siter & Price v. Robinson*, 2 Bail. 274, there is generally a dispute as to the amount when the question of tender is involved. In *Baker v. Gasque*, 3 Strob. 25, it was held that it is enough for the debtor to offer to perform his contract and tender to the creditor everything that he is entitled to. The case negatives the idea that it is necessary to a good tender that the debtor should offer not only the sum actually due, but all that the creditor bona fide with show of reason, but unjustly, claims to be due.

The other position that the defense of tender in discharge of the lien of a mortgage is unavailing, unless it be pleaded and proved that the tender was kept good, seems to me also unsound. In sustaining this position the court has overruled several cases heretofore decided. At common law there can be no doubt that tender has no greater effect on a debt than to stop interest, unless the tender be kept good by bringing the money into court; while the tender alone of the amount due on a mortgage discharges the lien, although the tender be not kept good. *Coke on Littleton*, 207a, § 335. *Black v. Rose*, 14 S. C. 278; *Lynch v. Hancock*, 14 S. C. 66; *Salinas v. Ellis*, 26 S. C. 337, 2 S. E. 121; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Security Bank v. Waterman Lodge*, 85 Neb. 255, 122 N. W. 992;

Murray v. O'Brien, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998. Numerous authorities to the same effect are collated in the note to *Parker v. Beasley (N. C.)* 33 L. R. A. 231, and *Moynahan v. Moore (Mich.)* 77 Am. Dec. 489. It is true that in the case of *Walker v. Walker*, 17 S. C. 329, the court, by Judge Fraser, without drawing any distinction between the effect of tender on the debt and the lien, lays down the general rule that tender to avail the debtor must not only be made, but must be kept good. This remark, however, is merely a dictum; for the court held that much more was due on the equitable mortgage involved than had been tendered, and that was conclusive that the defense of tender had failed. But, even if on the general proposition the case could be regarded as authority, it cannot be doubted that it was overruled by the later case of *Salinas v. Ellis*, supra.

But, if there were any doubt as to the law announced by the courts in the cases cited on the two questions we have discussed, it seems to me to be dispelled by the words of the statute above quoted. The tender which entitles the debtor to satisfaction of his mortgage within three months by the terms of the statute is not tender of the amount bona fide claimed, but tender of the real debt, damages, costs, and charges secured by the mortgage. Further, to produce such right of satisfaction, the only requirement with respect to tender is that it shall be made. There is no requirement in the statute that it shall be kept good. It will hardly be denied that tender is one thing, and keeping a tender good is another. When the statute provides that a tender of the amount due shall discharge a mortgage, the courts cannot interpolate the provision that the mortgage shall not be discharged by the tender if there be a bona fide dispute of the amount due, or if the tender be not kept good.

In view of these considerations, it seems to me that the conclusion of the court in the case of *Salinas v. Ellis*, supra, was thoroughly sound. It is true that, in the course of the discussion, Mr. Justice McGowan does intimate that, even if the tender had been made on condition that the mortgage involved in the dispute should be immediately canceled, nevertheless the mortgage would have been discharged. This proposition is not opposed to other decisions of this court, nor to the provisions of the statute if limited to the cases where there is no dispute as to the amount due on the mortgage. In that case there was no dispute as to the mortgage debt; but the creditor refused to accept the tender and to cancel the mortgage unless the debtor at the same time paid a debt entirely separate from the mortgage debt. So, also, in *Spears v. Fields*, 72 S. C. 395, 52 S. E. 44, where it was held that the debtor had a right to demand the cancellation of debt. In *Sparks v. Green*,

85 S. C. 109, 67 S. E. 230, there was no dispute as to the mortgage and note, there was no dispute as to the amount due on one of the papers, and the court held that, if the tender of the amount claimed on that paper had been conditioned on the surrender of that paper only, the demand would not have affected the validity of the tender. This distinction is recognized in *Wistar, Siter & Price v. Robinson*, 2 Ball. 274.

The case of *Salinas v. Ellis* has been supposed to lay down a rule very harsh to the creditor, in placing him in a position where he runs the risk of losing his entire debt if he should refuse to accept as full satisfaction that which he believes to be less than his debt. That no such hardship is placed on the creditor, and that the rule laid down in the case is just and fair, is made manifest when the case is viewed in connection with the nature of the act which constitutes tender. The rule, established by unbroken authority, is that an offer to a creditor of the amount due him is not a good legal tender unless it be unconditional. And this rule makes perfectly safe the rights of both creditor and debtor. If the debtor accompanies his offer to pay with the condition that the mortgagee should presently give up his contest by canceling or surrendering his mortgage or by giving a receipt in full, in case of a difference or a dispute as to the amount, it is no tender. The utmost that the debtor can exact in such case is a receipt on account, or a written acknowledgment that so much money has been paid on a certain debt. The creditor, on the other hand, who accepts a legal tender made by the debtor—that is, money offered without condition—incurs no risk whatever with respect to his debt in accepting it. If it be the full amount, then the debtor is free of his debt, and the creditor can recover nothing more; and, if he sues, the costs fall on him. If it be not the full amount, the creditor holds his claim for the remainder, and may sue and recover it, together with his interest and costs.

This rule, established beyond all controversy in this state, has the great advantage of being simple as well as just. The creditor loses no right by accepting any sum unconditionally offered him, and the debtor, in case of a difference or dispute, effects nothing in his own favor if he couples his offer to pay with any condition beyond a request for a receipt showing the amount paid. In *Wistar v. Robinson*, Chancellor Harper thus states the rule: "It is argued that a party, who offers to pay all that is really due, is entitled to a receipt in full, and, if the creditor refuses to give it, it ought to be at his own risk. I do not think this the fair or reasonable view of the subject. If there be ground of doubt as to the amount really due, the creditor has the right to try the question. It is imposing a hardship on him to say that he must either ac-

cept what is offered and give up his claim for more; or refuse the money and lose the use of it, interest and costs, if he should prove to be wrong. If he receives the money, he litigates at his own risk, with respect to costs, and I do not see that he ought to be subjected to greater risk than this. No harm is done to the debtor in such case. If he tenders all that is really due, a receipt on account will discharge. If his right be the clearest possible, he suffers not the slightest hardship or prejudice. A contrary rule would enable debtors to coerce in some degree their creditors to abandon doubtful claims." The rule is reaffirmed in *Doty v. Crawford*, 39 S. C. 1, 17 S. E. 377, and recognized in *Jones on Mortgages*, § 900. It is also laid down, in the leading case of *Kortright v. Cady*, 21 N. Y. 843, 78 Am. Dec. 145, in *Moore v. Norman*, 52 Minn. 83, 53 N. W. 809, 18 L. R. A. 359, 38 Am. St. Rep. 526, and the numerous authorities cited in those cases and the note to *Moynahan v. Moore*, 77 Am. Dec. 476.

The only modification in this state of this rule is that provided by the statute above quoted in allowing a mortgagor who has made tender or payment of the amount due to require the mortgagee to enter satisfaction of his mortgage within three months after such request has been made; that period, no doubt, being considered a reasonable time for the mortgagee to investigate fully and determine whether the entire debt has been paid or tendered. Imposing the condition on the debtor, therefore, that to discharge the lien of a mortgage he must tender not only the amount really due, but any additional amount which the creditor may bona fide and with show of reason demand, and that he must in addition keep this tender good, is not only without judicial authority in this state, but is contrary to the express provision of the statute.

Applying to the evidence adduced in this case the principles of tender which I have set out as those which I understand to be established in this state, the conclusion seems irresistible that no tender was made to the mortgagee. Confessedly, Mr. Levy approached Mr. Reynolds for the purpose of paying his own money on the mortgage and taking an assignment of it. In the second interview, when he offered to Mr. Reynolds the real sum due on the mortgage, Levy's proposition, according to his own statement, was "to take up the mortgage." Construing this language in the light of the intention declared in the first interview to have the mortgage assigned to himself, and in the light of the fact that it was his own money that he was offering to the mortgagee, and that he had not a particle of security from the mortgagor, there cannot be the least doubt that the money offered was intended as the consideration of an assignment of the mortgage to be held by Levy as his security, and not as a payment discharging.

the mortgage and leaving Levy with no security. The offer of the money was therefore an offer of the full amount due on the mortgage as the consideration of an assignment, and not a tender of payment on behalf of the mortgagor. Levy had no other lien and no equity which entitled him to demand of Reynolds an assignment of the mortgage, and certainly his offer of money for the purchase of the mortgage was entirely unavailing as evidence of a tender.

On this ground I concur in reversing the judgment of the circuit court.

(88 S. C. 565)

SINGLETARY v. SEABOARD AIR LINE RY. RECEIVERS.

(Supreme Court of South Carolina. May 5, 1911.)

1. CARRIERS (§ 320*)—INJURY TO PASSENGERS—QUESTION FOR JURY.

In a railroad passenger's action for personal injuries received in alighting, whether the absence of a stool under the car step and of proper station lights existed and operated concurrently to produce the injury *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

2. CARRIERS (§ 320*)—PASSENGERS—INJURIES—ACTIONS—JURY QUESTION.

In a railroad passenger's action for personal injuries in alighting, whether there was a stool on the platform at the place of alighting, and the conductor was there, *held* a jury question.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

3. NEGLIGENCE (§ 117*) — CONTRIBUTORY NEGLIGENCE—PLEADING—NECESSITY.

Contributory negligence should be pleaded.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 195-197; Dec. Dig. § 117.*]

4. CARRIERS (§ 347*)—PASSENGERS—INJURIES—ACTIONS—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In a railroad passenger's action for personal injuries in alighting, evidence *held* not to show contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 347.*]

5. CARRIERS (§ 320*)—PASSENGERS—INJURIES—ACTIONS—JURY QUESTION—NEGLIGENCE.

In a railroad passenger's action for injuries in alighting from the train, by failure to have a footstool on the platform and to properly light the premises, the question of defendant's negligence *held* for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

6. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—SUBMISSION OF CASE.

Even if, under Code Civ. Proc. 1902, § 283, permitting the court to instruct that if the jury render a general verdict they shall find upon particular questions of fact, the special findings of fact should precede the general verdict based thereon, it is not prejudicial error to instruct the jury to find a general verdict, and then to make their special finding, especially where the general verdict and special findings are consistent, even though the special finding was requested with the view of deter-

mining the ultimate liability between defendant and another, who might be liable to it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

7. CARRIERS (§ 321*)—PASSENGERS—INJURIES—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where the only negligence alleged, in a railroad passenger's action for personal injuries in alighting, was the absence of a footstool on the platform and of proper station lights, instructions as to the duty of the conductor to render other assistance to alighting passengers than the placing of the footstool and having proper lights were inapplicable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1336; Dec. Dig. § 321.*]

8. TRIAL (§ 194*)—PASSENGERS—INJURIES—INSTRUCTIONS—CHARGES ON FACT.

In a railroad passenger's action for personal injuries in alighting, by failure to have a footstool at the steps and proper station lights, the court charged that a railroad company must render reasonable assistance to a female passenger, if feeble or incumbered in alighting, and that when a passenger reasonably needed assistance in alighting the carrier should furnish it, and that if it was obvious that the passenger from any cause, such as sickness or having baggage, needs assistance in alighting the carrier should furnish it, and exercise such additional degree of care as the circumstances require. *Held*, that the instructions were not erroneous as charging on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. § 194.*]

9. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in a railroad passenger's action for personal injuries in alighting, claimed to have been caused by the absence of a footstool and poor station lights, the special findings show conclusively that the verdict for plaintiff was based upon the negligence alleged in the complaint, an instruction requiring the conductor to render other assistance than the placing of a footstool, etc., could not have prejudiced defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

10. TRIAL (§ 295*)—INSTRUCTIONS — CONSTRUCTION AS A WHOLE.

The correctness of instructions should not be determined from an isolated sentence therein, but they should be considered as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

11. TRIAL (§ 199*)—INSTRUCTIONS—QUESTION OF LAW.

An instruction, in a passenger's action for injuries in alighting, claimed to have been caused by the absence of a footstool, that, if it was necessary and proper that the company furnish a stool for the purpose of alighting, it was negligent for failing to do so, did not submit a question of law to the jury, but correctly states the rule of law to be applied by it to the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 467-470; Dec. Dig. § 199.*]

Appeal from Common Pleas Circuit Court of Orangeburg County; T. S. Sease, Judge.

"To be officially reported."

Action by Alice Singletary against the receivers of the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendants appeal. Affirmed.

Moss & Lide and Lyles & Lyles, for appellants. Wolfe & Berry and Raysor & Summers, for respondent.

JONES, C. J. The complaint alleged that on July 3, 1908, while a passenger on defendant's train from Fairfax, in Barnwell county, to Denmark, in Bamberg county, S. C., she sustained personal injuries, while attempting to alight from the train at her destination, as the result of defendant's negligence in failing to light the station grounds and in failing to provide the stool or bench usually placed for the use of passengers in alighting from the train.

Plaintiff testified: "It was very dark, and I went down the steps to alight from the train spacing my step to reach that stool to alight from the train, and the stool was not there, and I came near precipitating myself and my baggage. The conductor caught me by the arm, and said—I suppose it was the conductor—and said, 'You came near having a bad fall,' and I said, 'Yes, I did; I expected to find the stool there, and it was not there,' and then I started to limp off."

The plaintiff testified as to the extent of her injury, as to spraining her knee and having her leg swollen and somewhat stiff, and as to her pain and suffering therefrom. This occurred at night, about 3:45 a. m., and plaintiff stated that it was cloudy and very dark, and that there was no light, except from the operating room, which intensified the darkness at the landing place, that while the coaches were lighted the blinds were down and no light was cast from the coaches. The plaintiff testified most positively, also, as to the absence of the stool. There was testimony as to the height of the platform step from the ground, and the conductor testified that he always used the stool to help passengers on and off that train. The conductor, however, testified that he did not remember anything about the alleged occurrence.

At request of counsel for defendant, the court directed the jury to make special findings upon the following questions submitted to them: "(1) Is this injury of which plaintiff complains in her complaint the direct and proximate result of a fall from the train at Denmark, on July 3, 1908? (2) If so, was such fall due to any negligence for which the defendants are liable? (3) If so, was such negligence the failure to place a bench or stool? (4) Was such negligence the failure to have adequate and suitable station lights? (5) Or was the injury due to both the failure to provide the bench and to furnish suitable lights? The jury answered, 'Yes,' to the first, second, and fifth questions, and found a verdict in favor of plaintiff for \$2,000."

[1] It is manifest from the foregoing statement that the court committed no error in refusing to charge defendant's eighth request to the effect that the undisputed evi-

dence shows that the absence of the bench was not the proximate cause of the injury, and could not be taken into consideration by the jury. It is true the plaintiff testified that she could have alighted safely, if there had been good lights, as she would then have discovered the absence of the bench and governed her steps accordingly; but she also testified in substance that she alighted in the belief that the bench was placed as usual. It was properly left to the jury to say whether the absence of the bench and of proper lights both existed and operated concurrently to produce the injury.

For the same reason there was no error in refusing to charge defendant's tenth request to the effect that the jury should find for the defendant on the ground that there was no evidence that any negligence of defendant caused plaintiff's injury.

[2] Likewise it was not error to refuse the motion for new trial, based upon the claim that the undisputed evidence shows that the stool or bench was placed, and the conductor stationed, at the place where passengers were invited to alight. It is suggested in argument that plaintiff alighted at a place, other than the usual and proper place; but that is a mere conjecture against the positive testimony of the plaintiff.

[3,4] The contention that the motion for new trial should have been granted, because the evidence clearly shows that plaintiff's failure to exercise ordinary care in looking where she was stepping when alighting is without merit. There was no plea of contributory negligence, and if there had been there was nothing in the evidence to show contributory negligence so conclusively as to warrant a court in so finding as matter of law.

[5] Nor is there ground for contention that defendant was conclusively shown to be free from negligence, and that plaintiff's sole negligence caused her injury. This is not the case of one stepping into a dangerous place or in a dangerous way, when the exercise of ordinary care would have shown a safe place or a safe way, but the case of a passenger alighting in the night at the spot where she was invited by the carrier to alight, with every reason to expect all due safe ground for a safe landing. The foregoing remarks require that the first, second, and eighth exceptions be overruled.

[6] In submitting to the jury the question for special finding, the court instructed the jury to find their general verdict, and then the special findings of fact. The third exception complains of this as reversing the proper order. Section 283, 2 Code of Laws, authorizes the jury, in actions for recovery of money only, or specific real property, to render a general or special verdict, and provides that the court "in all cases may instruct them, if they render a general verdict, to find upon the particular questions of fact, to be stated in writing,

and may direct a written finding thereon."

It may be true that logically the special findings of fact should precede the general verdict based thereon, but to reverse the order could not be a matter of any consequence or prejudice, especially when the general verdict and the special findings are perfectly consistent. It is suggested by the testimony that the Southern Railway and the Seaboard Air Line Railway are using the station at Denmark under some joint arrangement which requires the Southern Railway to light the station, and that the only object in requesting the special findings was with a view to adjust ultimate liability as between the two railroads. Whatever the reason, there was no prejudicial error in the manner of the submission.

The fourth, fifth, and sixth exceptions charge error in giving the following instructions at plaintiff's request: "(3) A railroad company is bound to render reasonable assistance to a female passenger, if feeble or incumbered with heavy baggage or other impediments, in boarding or alighting from its train. (4) When it is reasonably apparent that a passenger needs assistance in alighting from a train, then it is the duty of the carrier to furnish such assistance." "(6) I further charge you that where it is obvious that a passenger from any cause, such as sickness, infirmity, or being burdened with baggage or other impediment, needs assistance in alighting, then the railroad company is bound to afford such assistance and exercise such additional degree of care, as the circumstances may require."

[7] These instructions, if they were intended to refer to assistance, other than by placing the stool and having light, were foreign to the case made by the pleadings, as the only negligence charged in the complaint was the absence of the stool and of proper station lights, and in other portions of the charge the jury were repeatedly instructed to confine themselves to a consideration of the negligence alleged in the complaint.

[8] Appellant, however, assumes that the instructions were relevant, and claims error in that the instruction was a charge on the facts, and in that a conductor is not bound to render assistance to a passenger, unless the circumstances are such as to give the conductor knowledge of the need of assistance. The charge was clearly not in violation of the rule prohibiting charges in respect to matters of fact, and, construing the charge as a whole, it conformed to appellant's view of the law and to the rule delivered in *Horn v. Railway Company*, 78 S. C. 70, 58 S. E. 963. The court was particular to impress upon the jury that the whole law could not be stated in a single sentence, and that they must consider his charge as a whole.

[9] Moreover, the special finding of the

jury shows conclusively that they based the verdict upon their conclusions with respect to the allegations of negligence in the complaint.

Under the seventh exception, contention is made that the charge: "If the jury conclude from the evidence, applied to the law as charged, that the railroad company is guilty of negligence, that the jury must award the plaintiff such damages as she has sustained"—was erroneous, because it did not confine the inquiry as to negligence to the two matters alleged in the complaint, and the inquiry as to injuries to such as were the proximate result of negligence as alleged.

[10] It is not fair to judge a charge by an isolated sentence. The whole charge shows most conclusively that the jury were instructed not to consider negligence of the defendant, not alleged in the complaint, and that if they found negligence as alleged to give any such damages as they concluded proximately resulted therefrom. The question of punitive damages was withdrawn from the jury.

[11] The ninth and last exception contends that a question of law was submitted by the court to the jury in the following charge: "If it is necessary and proper that the railroad should furnish a stool or step for the purpose of alighting from its trains, then the railroad must not only furnish such appliance, but must see that it is properly and safely placed, and in failing to do this would be guilty of negligence." The exception is without merit. The charge states a correct principle of law, to be applied by the jury to the facts as determined by them.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(155 N. C. 145)

McWHIRTER v. McWHIRTER et al.

(Supreme Court of North Carolina. May 8, 1911.)

1. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR — INSTRUCTIONS — CONFLICTING INSTRUCTIONS.

In an administrator's action to sell land, which defendant claimed was held by intestate under a resulting trust, the court instructed that, the deed to intestate being absolute in form, defendant must establish the trust by clear, strong, and convincing proof, but afterwards instructed that the trust could be established by a preponderance of the evidence. *Held*, that error in the last instruction was reversible, as it could not be determined which of the conflicting instructions the jury followed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219-4224; Dec. Dig. § 1064.*]

2. TRUSTS (§ 89*)—RESULTING TRUST—ESTABLISHMENT—SUFFICIENCY OF EVIDENCE.

A resulting trust must be established by clear, strong, and convincing evidence, where the

deed upon its face conveys the whole title to the grantee absolutely.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 134-137; Dec. Dig. § 89.*]

3. TRUSTS (§ 79*)—RESULTING TRUST.

Where land purchased with money of one person is conveyed to another, the grantee is trustee for the person advancing the money to the extent of the amount advanced, without any express agreement.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 111, 112; Dec. Dig. § 79.*]

4. TRUSTS (§ 90*)—RESULTING TRUST—ESTABLISHMENT—JURY QUESTION.

It is for the jury to determine whether the evidence to establish a resulting trust is clear, strong, and convincing.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 138; Dec. Dig. § 90.*]

Appeal from Superior Court, Mecklenburg County; Long, Judge.

Action by John McWhirter, administrator, against T. A. McWhirter and others. From a judgment for defendants, plaintiff appeals. Reversed, and new trial ordered.

Maxwell & Keerans, for appellant. McCall & Smith, for appellees.

WALKER, J. This action was brought by the plaintiff, as administrator of W. C. McWhirter, for the purpose of having sold certain land, which is described in the complaint and alleged to belong to his estate, for the payment of debts. The defendant Mrs. R. J. McWhirter answered the complaint, and averred that the land did not belong to W. C. McWhirter, although he had the legal title thereto, for that he had bought the same with her money and for her benefit, and he, therefore, held it in trust for her. An issue was submitted to the jury as to the existence of the alleged trust, express or resulting, and the verdict was in favor of Mrs. McWhirter; the jury finding that W. C. McWhirter had purchased the lands with her funds and held the legal title in trust for her, having taken a deed for the land to himself, instead of to her, as he should have done. Judgment was entered upon the verdict, and the plaintiff brings the case here by appeal, to review the rulings of the court, which he deems erroneous.

[1, 2] It is necessary to discuss but a single question, as there is an error in the charge of the court which entitles the plaintiff to another trial. The court at first charged the jury correctly that as the deed to W. C. McWhirter was absolute in form, and upon its face conveyed the legal and equitable title to him, the defendant must establish the trust by clear, strong, and convincing proof. *Lehew v. Hewett*, 138 N. C. 6, 50 S. E. 459; *Taylor v. Wahab* (at this term) 70 S. E. 173; *Cobb v. Edwards*, 117 N. C. 253, 23 S. E. 247. If the learned judge

had stopped there, the charge in this respect would have been free from error; but he afterwards told the jury, when instructing them again upon the quantum of proof required to establish the trust, that a preponderance of the evidence in favor of it is sufficient. These two instructions were conflicting, and the jury are not supposed to be capable of deciding, as between them, which is the correct one; and we must, therefore, assume that they were influenced in coming to a verdict by the erroneous one. *Edwards v. Railroad*, 132 N. C. 99 (Anno. Ed.) 43 S. E. 585; *Cresler v. Asheville*, 134 N. C. 314, 46 S. E. 738; *Williams v. Haid*, 118 N. C. 481, 24 S. E. 217; *Tillett v. Railroad*, 115 N. C. 662, 20 S. E. 490; *Edwards v. Railroad*, 129 N. C. 78, 39 S. E. 730; *Jones v. Insurance Co.*, 151 N. C. 56, 65 S. E. 602. For this error a new trial is ordered.

[3] As to the trust, the law is well settled. "Where land is bought with the money of one person and is conveyed to another, the latter is trustee for the lender to the extent of the money so paid, without any express agreement to that effect." *Holden v. Strickland*, 116 N. C. 185, 21 S. E. 684. But in *Clements v. Insurance Co.* (at this term) 70 S. E. 1076, we said that there is a strong presumption in favor of the correctness of a deed or other instrument as written and executed, and this fair and reasonable presumption will prevail, unless the party who alleges that it does not express the truth overcomes the presumption, and shows the contrary by satisfactory evidence which is clear, strong, and convincing.

[4] It is for the jury to say whether the evidence is of this character. *Lehew v. Hewett*, supra. The rule which calls for that kind of evidence in such a case was adopted and was necessary for the safety of titles, and that contracts, deeds, and other solemn instruments should not be lightly set aside or changed. The doctrine, as we have seen, has been extended and applied to a case in which it is attempted to show a parol trust, and thus virtually to nullify the deed, or, if the entire beneficial interest is not claimed, to amend or reform it in some way.

The error of the court as to the quantum of proof is to be found in the defendant's third prayer for instructions, which was given to the jury. The judge modified the first and second prayers in this respect, and stated the correct rule, but inadvertently, we suppose, failed to amend the third prayer. However this is, the jury were left with two conflicting instructions, and may have been misled by them.

There are other errors assigned by the plaintiff; but we will not discuss them, as they may not be presented again.

New trial.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

(188 N. C. 63)

UNITYPE CO. v. ASHCRAFT BROS.

(Supreme Court of North Carolina. April 26, 1911.)

1. SALES (§ 38*) — PUFFING — FRAUDULENT REPRESENTATIONS.

While expressions of opinion by a seller amounting to mere commendation of his goods, though extravagant, are not generally fraudulent in law, yet assurances of value seriously made and intended to be accepted, and reasonably relied on as statements of fact inducing a contract, may be considered in determining whether the making of a contract has been induced by fraud.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.*]

2. SALES (§ 53*)—FRAUDULENT REPRESENTATIONS—QUESTION FOR JURY.

Where false statements are made by a seller in the form of opinion or estimates to induce the purchase of goods, and there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of fact to be regarded as material, the question is for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 145-151; Dec. Dig. § 53.*]

3. FRAUD (§ 9*)—DECEIT—CAUSE OF ACTION—REQUISITES.

To create a right of action for deceit there must be a statement made by defendant, or for which he is answerable, which is untrue in fact, with knowledge of its falsity, or with reckless and conscious ignorance whether it is true or not, made with intent that plaintiff should act thereon, or in a manner apparently fitted to induce him to act upon it, and plaintiff must act thereon to his injury.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. § 9.*]

4. FRAUD (§ 23*)—FALSE REPRESENTATIONS—OPPORTUNITY FOR ASCERTAINING THE TRUTH.

A false representation of a fact which materially affects the value of a contract, and which is peculiarly within the knowledge of the person making it, and as to which the party deceived, in the exercise of proper vigilance, has no equal opportunity of ascertaining the truth, is actionable.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 20-23; Dec. Dig. § 23.*]

5. FRAUD (§ 13*)—DECEIT—KNOWLEDGE—PRESUMPTION.

Where false representations as to the condition and capacity of a typesetting machine sold to defendant were made by the inventor of the machine, it would be presumed that he was fully informed as to its qualities, and that the representations were made with knowledge of their falsity.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3-5; Dec. Dig. § 13.*]

6. SALES (§ 347*)—QUALITY—FALSE REPRESENTATIONS.

Defendants being about to purchase certain typesetting machines, plaintiff sent an expert machinist and the inventor of the machine sold to defendants, and he induced defendants to purchase it by representations that the machine sold was an improvement on a former one, did not have its imperfections, was constructed so as not to break type in setting or distributing the same, and also as to the capacity and life of the machine, all of which representations were false. Held, that defendants were entitled to plead such false representations in defense

to a suit on installment notes given for the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 962-972; Dec. Dig. § 347.*]

7. EVIDENCE (§ 434*) — PAROL EVIDENCE — WRITTEN CONTRACT — FRAUD.

Evidence of false representations urged as a defense to a suit to recover the balance of the purchase price of certain machines under a written contract of sale was not objectionable as tending to vary or contradict the contract; its effect being not to change the contract, but to nullify it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

8. CORPORATIONS (§ 423*)—ACTS OF AGENTS—FALSE REPRESENTATIONS.

Where a corporation manufactured and sold typesetting machines, and sent out its expert machinist to sell certain machines to defendant, and he to induce the sale made certain false representations on which defendant relied in purchasing the machines, the corporation was responsible therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1692-1695; Dec. Dig. § 423.*]

Appeal from Superior Court, Union County; W. R. Allen, Judge.

Action by the Unitype Company against Ashcraft Bros. Judgment for defendants, and plaintiff appeals. Affirmed.

This action was brought to recover the amount of eight notes, each for \$25, given in part payment of the purchase price (\$1,750) promised by the defendants to be paid to plaintiff for a Simplex typesetting machine No. 2. C. H. Lombard, an expert machinist and inventor of this machine, was sent by the plaintiffs to close the contract with the defendants, who were printers and publishers of a newspaper at Monroe, N. C. He represented to them, as defendants allege and there was evidence to prove: "(1) That Simplex No. 2 was an improvement on Simplex No. 1, and did not have its imperfections, because of which No. 1 had proved to be a failure and had been taken off the market by the plaintiff. (2) That it was so constructed as not to break type in setting or distributing same. (3) That with the assistance of two men it would set from 5,000 to 6,000 ems per hour, or three times as much as hand composition, and with the same economy as hand composition. (4) That said machine was so constructed that the life of the type used in it was the same as when used in hand composition." Defendants further alleged, and introduced evidence to prove, that the representations, each and all of them, were knowingly false, and were fraudulently made, with the intent and purpose to induce the defendants to buy the machine, and that they were misled thereby, while in the exercise of due care and judgment on their part, and induced to buy the machine; that it was impossible to discover the falsity of the representations and the radical defects in the machine, save by the long use of the same, and that the

machine was so defective as to cause them great loss and damage, and that plaintiff, by reason of the fraud and damage, was not entitled to recover any part of his alleged claim. Issues were submitted to the jury, which, with the answers thereto, are as follows:

"(1) Did the defendants execute the contract introduced in evidence? Answer: Yes.

"(2) Did defendants execute the notes introduced in evidence? Answer: Yes.

"(3) Did the plaintiff represent and warrant to the defendants that the machine sold to them was an improvement on machine No. 1, that it would not break the type, and that type could be used with it as economically as by hand? Answer: Yes.

"(4) If so, was such representation and warrant false? Answer: Yes.

"(5) If so, did the plaintiff know it was false? Answer: Yes.

"(6) If so, did defendants rely thereon and were they induced thereby to execute said notes and contracts? Answer: Yes.

"(7) If so, what damage, if any, have defendants sustained thereby? Answer: \$1,100, with interest from date of notes."

Judgment was entered upon the verdict that the defendants go without day and recover their costs. Plaintiff, having entered exceptions to the rulings of the court, appealed to this court.

Redwine & Sikes, for appellant. Williams, Lemmond & Love and Adams & Armfield, for appellees.

WALKER, J. [1, 2] There have recently been several cases of this kind before the court, and we have held that while expressions of opinion by a seller, amounting to nothing more than mere commendation of his goods, "puffing" his wares, as it is sometimes called, or extravagant statements as to value or quality or prospects, are not, as a rule, to be regarded as fraudulent in law, yet "when assurances of value are seriously made, and are intended and accepted and reasonably relied upon as statements of fact, inducing a contract, they may be so considered in determining whether there has been a fraud perpetrated; and, though the declarations may be clothed in the form of opinions or estimates, when there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of facts to be regarded as material, the question must be submitted to the jury. 14 A. & E. p. 35; 20 Cyc. p. 124; Morse et al. v. Shaw, 124 Mass. 59." Whitehurst v. Insurance Co., 149 N. C. 273, 62 S. E. 1067; Cash Register Co. v. Townsend, 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349.

[3] We also held in the Whitehurst Case, approving what is said upon the subject in Pollock on Torts (7th Ed.) 276, that to create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with

regard to that statement all the following conditions must concur: (a) It is untrue in fact. (b) The person making the statement, or the person responsible for it, either knows it to be untrue or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not. (c) It is made with the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it. (d) The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage.

[4] What is still more to the point, we further held that the false representation of a fact which materially affects the value of the contract and which is peculiarly within the knowledge of the person making it, and in respect to which the other party, in the exercise of proper vigilance, had not an equal opportunity of ascertaining the truth, is fraudulent. Thus false and misleading representations made by a vendor to a purchaser of matters within his own peculiar knowledge, whereby the purchaser is injured, are a fraud which is actionable. Where facts are not equally known to both sides, a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Smith on the Law of Fraud, § 3; Modlin v. Railroad, 145 N. C. 218, 58 S. E. 1075; Ramsey v. Wallace, 100 N. C. 75, 6 S. E. 638; Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382; Kerr on Fraud and Mistake, p. 68. The principles relating to this question are so fully and clearly stated by Justice Hoke in Whitehurst v. Insurance Company, supra, and so applicable to the facts of this case in its every phase, that no other authority would seem necessary to sustain the ruling of the court upon the question of fraud.

[5] It appears in this case that the false statements were made by the inventor of the machine, who must be supposed to have been fully informed as to its good and bad qualities, and who must, therefore, have made the representations knowing them to be false. It was so expressly held in Peebles v. Guano Co., 77 N. C. 233, 24 Am. Rep. 447. The plaintiff in this case is a corporation and the manufacturer of the machine, and therefore what is said in the Peebles Case is clearly pertinent to the facts as presented in the record: "It is said that the jury have not found that the representations were fraudulent, but only that they were false, and without fraud the action cannot be maintained. If we consider the action as for the deceit, this objection would be unanswerable, if the defendant was the seller only, and not also the manufacturer of the article. It is difficult to conceive how a manufacturer of guano can make a representation concerning the substances of which it is composed, which is false, and not also

fraudulent, in the sense that it was knowingly false. If his servants employed in the manufacture on any occasion by negligence, or willfully, omitted to put in the valuable ingredients without the knowledge or connivance of the manufacturer, it would free his false representation from immorality, but he must in law be held equally liable for the acts of his servants, and he cannot be held innocent of a moral fraud, if after being informed of the omission he seeks to take advantage of it by demanding for a spurious and worthless article the price of the genuine one. We think that on the facts found by the jury the plaintiff was entitled to damages."

[6] The representation which Lombard, plaintiff's agent, made to defendants, was of such a nature as to mislead them and induce them to purchase a worthless machine instead of the improved and perfect one they had the right to think was being sold to them. It was well adapted to accomplish the purpose for which it was made, namely, to deceive the defendants as to the true quality of the machine. He lauded its merits, if it had any, but willfully concealed its demerits, and, having no knowledge or means of acquiring knowledge themselves, they were easily duped, as any intelligent and careful man would have been, and were practically at his mercy. The representation was substantially like that made in *Audit Co. v. Taylor*, 152 N. C. 272, 67 S. E. 582, which we held to be sufficient as the basis for a charge of deceit. The representation in our case was as to the mechanical construction of the typesetter, and it proved by actual use to be mechanically defective. It was not a mere expression of opinion or commendation, but the false statement of a hidden or concealed fact, which was material because it was the main inducement to the purchase. *Machine Co. v. Feezer*, 152 N. C. 516, 67 S. E. 1004; *Savings Bank v. Chase*, 151 N. C. 108, 65 S. E. 745.

[7] The plaintiff contends that the evidence tended to vary or contradict the written contract of sale, and relies upon *Etheridge v. Palin*, 72 N. C. 216, but the case does not apply here. It was attempted in *Etheridge v. Palin* to vary the contract by adding a warranty, but that is very different from an attack upon the contract as having no validity because induced by fraud. It does not change the contract, but nullifies it, and is competent for that purpose, as we held in *Tyson v. Jones*, 150 N. C. 181, 63 S. E. 734; *Whitehurst v. Insurance Co.*, supra.

[8] The exception that there was no evidence of the agency of Lombard other than his own acts and declarations is not meritorious. He was sent out by the plaintiffs to make the contract and install the machine, and there was other competent and sufficient evidence of his agency. The declarations were made by him dum ferret opus, and his principal must be considered as

bound by them, as much so as if it could have made them, and had made them itself. "Qui facit per alium facit per se." In this connection we may revert to the case of *Peebles v. Guano Co.*, supra, where it is said: "There is no reason that occurs to us why a different rule should be applicable to cases of deceit from what applies to other torts. A corporation can only act through its agents, and must be responsible for their acts. It is of the greatest public importance that it should be so. If a manufacturing and trading corporation is not responsible for the false and fraudulent representations of its agents, those who deal with it will be practically without redress, and the corporation can commit fraud with impunity." In *Manufacturing Co. v. Davis*, 147 N. C. 267, 61 S. E. 54, 17 L. R. A. (N. S.) 193, the present Chief Justice says: "The plaintiff company is liable for the fraudulent representations of its salesman and agent, which were made to defendant to his injury. This would be so whether the agency of Guy were general or special. *Huntley v. Mathias*, 90 N. C. 105, 47 Am. Rep. 516; *Peebles v. Patapsco Co.*, 77 N. C. 233, 24 Am. Rep. 447; 1 A. & E. Enc. (2d Ed.) 1143." See, also, *Savings Bank v. Chase*, supra.

Whether the machine was in fact defective, as alleged by the defendants, was a question for the jury, and so were the other matters involved in the issues. We think the delay of defendants in discovering the defect and the fraud, and in asserting their rights in respect of it, is sufficiently explained by the proof. There was evidence to support the verdict of the jury, and we are not privileged to review their findings. The judgment thereon was correct. *McClenahan v. Cotten*, 88 N. C. 338.

Upon a careful review of the whole case, no error has been discovered.

No error.

ALLEN, J., did not sit.

CLARK, C. J. (concurring). There was no error in this appeal which was by the plaintiff. This was an action begun before a justice of the peace upon eight notes for \$25 each, being part of the purchase price (\$1,750) for a typesetting machine. On the trial in the superior court, on appeal, the defendant's counterclaim for damages on account of false representations and breach of warranty in the sale was fully investigated, and the jury found that the defendant was entitled to recover therefor the sum of \$1,100 and interest from the day of sale. By reason of several decisions of this court, the defendant could not recover judgment for the difference, \$900, and interest thereon. Yet, if the jury had the right to consider the alleged counterclaim and upon the conflicting evidence and under the charge of the court to find that the plaintiff was indebted to the defendant in the sum of \$1,100, it is

surely illogical to hold that the court could not render judgment for the amount which the jury were authorized to find that the plaintiff owed the defendant. The judge had jurisdiction upon the trial and investigation up to and including the reception of the verdict. By what process of reasoning did his jurisdiction stop there? Besides, it will be an inconvenience and often lead to a denial of justice, if the defendant, as in this case, must practically remit all of his counterclaim above the amount which he owes the plaintiff. In this case, should the plaintiff sue upon his other notes for the balance of the purchase money, the defendant will be debarred from using the other \$900 of his counterclaim against such notes.

It is true that we have decisions to that effect. But they are not bottomed on the reason of the thing, and the court should not hesitate to overrule them. The courts are very slow, and justly so, to overrule a decision, however erroneous, when it has become a rule of property. But this is merely a question of practice and procedure. It is true, also, that it has been held that this is a question of jurisdiction and therefore settled by the Constitution. But clearly this is not so. The Constitution does prescribe that the justice of the peace has jurisdiction as to contracts only when the principal sum does not exceed \$200. But, when the case has been carried by appeal into the superior court, it is no longer a question of the jurisdiction of the justice of the peace, but of the jurisdiction of the superior court.

When the superior court becomes seized of jurisdiction of a case, it has it fully, with full power of amendment, in all cases. It can make no difference whether the case has been brought into the superior court by the service of summons, or by appeal from the clerk, or by an appeal from a justice of the peace. The summons is nothing but a notice to appear in the superior court. The notice of appeal from the clerk or from the justice of the peace has exactly the same effect. By either process, the superior court is vested with the same jurisdiction. If the defendant had been brought into court by a summons upon a contract for \$201, the court could permit an amendment making it any other amount. The same power of amendment exists in all cases because the jurisdiction of the superior court confers the same powers upon the judge, even though the case is brought into its jurisdiction by appeal from the clerk or a justice of the peace. Preconceived opinions and former decisions being set aside, there is nothing in the Constitution which denies power to the judge to enter up judgment for any amount which the jury under his instructions has legally found to be due. The decisions to the contrary should be disregarded.

There was formerly the same inconvenience and difficulty on appeals from the clerk

to the superior court. But this has now been cured by the act of 1887, now Revisal 1905, § 614, which provides, "whenever any civil action or special proceedings begun before the clerk of any superior court shall be for any ground whatever, sent to the superior court, before the judge, the judge shall have jurisdiction," and authorizes him "to hear and determine all matters in controversy in such action." The decisions hold that the judge may make any amendment whatever, and that this is so, even though the proceeding before the clerk was a nullity. In *re Anderson*, 132 N. C. 243, 43 S. E. 649; *Railroad v. Stroud*, 132 N. C. 416, 43 S. E. 913; *Ewbank v. Turner*, 134 N. C. 81, 46 S. E. 508. The same rule and for the same reason should obtain on appeals from a justice of the peace. The case being in the superior court that court should be seized of jurisdiction as fully as if the case had originated there, and the judge should have power to make amendments and to try the case even though the proceeding before the justice was a nullity. The decisions to the contrary can be corrected by overruling the erroneous precedents referred to. In the matter of appeals from the clerk to the judge the correction was made by statute, but it could have been made by the court itself overruling its former decisions. If it had been a matter of jurisdiction under the provisions of the Constitution, it could not have been corrected by statute.

In this connection it may not be amiss to call attention to another inadvertence into which former courts whose judges were still under the influence of the former ideas as to procedure have fallen in holding that a justice of the peace and the clerk have no jurisdiction in equity. The Constitution having abolished the distinction between law and equity, such distinction cannot survive in actions before a justice of the peace or a clerk or any other officer any more than in the superior courts. The abolition is broad and general, and applies to all courts. The ruling to the contrary was nothing more than the survival of preconceived opinions. It is true that neither a justice of the peace nor a clerk can issue an injunction or appoint a receiver. The Legislature has thought fit to restrict such powers to the judges of the superior court. That is a matter of practice resting in the discretion of the lawmaking power. But it is a very different matter to hold by judicial enactment that those officers have no jurisdiction where an equity is to be administered. The Constitution having abolished the distinction between law and equity, there is no reason why equitable rights as well as equitable defenses should not be set up in proceedings before a justice of the peace or before the clerk, though the administration of an equitable remedy by an injunction or the appointment of a receiver is not conferred upon

those officers. It has been held that a justice has jurisdiction of equitable defenses. *Levin v. Gladstein*, 142 N. C. 494, 55 S. E. 371, 115 Am. St. Rep. 747. If so, he must have jurisdiction of equitable causes of action.

When by appeal such cases get into the superior court, the judge can and does issue an injunction and appoint receivers if found an appropriate remedy. The same rule should apply to judgments upon a counterclaim or a cause of action or defense set up by amendment in the superior court.

The case being in the superior court by virtue of the appeal, the parties should not be dismissed thence to re-enter the same court by service of summons in order to litigate identically the same matter.

(155 N. C. 432)

STATE v. HOUSTON et al.

(Supreme Court of North Carolina. May 3, 1911.)

1. CRIMINAL LAW (§ 901*)—TRIAL—SUFFICIENCY OF EVIDENCE—EXCEPTION—WAIVER.

An exception that the evidence is not sufficient to be submitted to the jury is waived if not taken before verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2124; Dec. Dig. § 901.*]

2. CRIMINAL LAW (§ 1048*)—APPEAL—EXCEPTIONS BELOW—NECESSITY.

An exception cannot be taken in the Supreme Court which was not assigned in the lower court, with an opportunity to the judge to rule upon it, except only for want of jurisdiction in the trial court, or that the complaint or indictment does not state a cause of action.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2656; Dec. Dig. § 1048.*]

3. CRIMINAL LAW (§ 1036*)—APPEAL AND ERROR—EXCEPTIONS—WAIVER.

While, if the Attorney General thinks that the interests of justice require that a demurrer to the evidence be entered in a criminal action on appeal, the Supreme Court will permit it, the practice is not to be commended or encouraged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2641; Dec. Dig. § 1036.*]

4. HOMICIDE (§ 268*)—MANSLAUGHTER—EVIDENCE.

In a prosecution for murder, evidence held sufficient to go to the jury.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 268.*]

5. CRIMINAL LAW (§ 1178*)—APPEAL—ERROR WAIVED ON APPEAL.

Exceptions in the record not set out in appellant's brief will be taken as abandoned by him, under Supreme Court Rule 34.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

6. HOMICIDE (§ 840*)—APPEAL—HARMLESS ERROR—INSTRUCTION.

In a prosecution for murder, it was harmless error for the court to charge the jury as to self-defense, although the defendants did not rely upon such defense, but upon the ground that they did not participate in the killing,

as they simply received the benefit of an instruction to which they were not entitled.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

7. CRIMINAL LAW (§ 655*)—CONDUCT OF CASE—EXPRESSIONS OF THE COURT.

In a prosecution for murder, the court stated to the jury that: "It is not at all likely that you can decide the case satisfactorily at this hour of the night. I am weary, and I know you are also. The court therefore recommends that you go to your hotel and rest for the balance of the night. In the morning we can get breakfast at 7. You can, in the morning, when fresh, deliberate on your verdict, before or after breakfast as you choose. Some men can think better on an empty stomach. But you can do as you choose about that, and, if you prefer to deliberate to-night, you can do so. The court will not return to-night. It will adjourn until 9 a. m. to-morrow." Held, that such remarks could not have prejudiced the defendants in any way.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 655.*]

8. HOMICIDE (§ 288*)—INSTRUCTIONS.

The court instructed the jury, in a prosecution for murder, that in passing on the question whether H. slew deceased with a pistol, and whether he did so maliciously, the jury will consider all the evidence relied upon by the state bearing upon the language, acts, and conduct of the deceased and his brother, and the language, acts, and conduct of H. on the night of the homicide leading up to the same, and then instructed the jury to also consider the evidence tending to show the nature of the altercation, and the evidence tending to show the circumstances of the use of the pistol by H., and the evidence relied on by H. and his codefendants, tending to show that he did not engage in the affray and did not shoot the deceased, and did not in any way aid and abet any one else in doing so. Held, that there was no error, as the court was simply telling the jury that they should consider all the evidence in the case, both on the part of the state and on the part of the defendants.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 593; Dec. Dig. § 288.*]

Appeal from Superior Court, Mecklenburg County; Long, Judge.

Charlie Houston and others were convicted of manslaughter, and they appeal. No error.

Stewart & McRae and F. M. Redd, for appellants. T. W. Bickett, Atty. Gen., and Geo. L. Jones, Asst. Atty. Gen., for the State.

CLARK, C. J. [1] The defendants Houston, Byers, and Boyd were convicted of manslaughter. In this court they entered a demurrer to the evidence. It is settled by uniform decisions that an exception that the evidence is not sufficient to be submitted to the jury is waived if not taken before verdict. *State v. Hart*, 116 N. C. 976, 20 S. E. 1014; *State v. Kiger*, 115 N. C. 746, 20 S. E. 456; *State v. Varner*, 115 N. C. 744, 20 S. E. 518; *State v. Braddy*, 104 N. C. 737, 10 S. E. 261; *State v. Harris*, 120 N. C. 577, 26 S. E. 774, and cases there cited; *State v. Wilson*, 121 N. C. 650, 28 S. E. 416; *State v. Huggins*, 126 N. C. 1055, 35 S. E. 606; *State v. Williams*, 129 N. C. 582, 40 S. E. 84, and

numerous cases cited; Clark's Code (3d Ed.) p. 773. The reason is that the object of the law is to try cases on their merits, and, if there is reasonable ground for such motion, it should be made before the case is submitted to the jury in order that the court, if it sees fit, may in its discretion permit the opposite party to introduce further testimony.

[2] Still less can any exception be taken in this court which was not assigned in the lower court with opportunity to the judge to rule upon it, save only: (1) Want of jurisdiction in the court that tried the cause. (2) That the complaint or indictment does not state a cause of action. *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513; *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266; *State v. Craige*, 89 N. C. 475, 45 Am. Rep. 698; *State v. Hardee*, 83 N. C. 619, and numerous other cases cited; Clark's Code (3d Ed.) p. 777.

[3] However, it has been held that, if in this court the Attorney General thinks that the interests of justice require that the demurrer be entered, we will permit it (*State v. Wilcox*, 118 N. C. 1131, 23 S. E. 928), as we would doubtless do in a civil case if the opposite party should waive the objection. But certainly such practice is not to be commended or encouraged. If there is not sufficient evidence to go to the jury, or other ground of exception, the point should be called to the attention of the judge on the trial below and in apt time, that he may have opportunity to correct the error, if any.

[4] Taking the exception as duly entered, it cannot be sustained. There was evidence that the deceased was killed at a fish fry; that there was drinking and gambling going on and a big crowd present; that a fuss arose because the brother of deceased had stepped on the toes of the prisoner Houston. He apologized to Houston, but was told by his brother to apologize again, and, upon approaching Houston apparently for that purpose, the latter suddenly drew his pistol and fired. The witness added that: "In less than two seconds the other prisoners, Boyd and Byers, joined in. There were 12 or 15 shots in less than two seconds. Immediately after firing ceased, the deceased fell. After the firing the prisoners scattered. All the prisoners had pistols." Another witness testified, "The pistols fired like a cane brake set afire." There was a good deal of other evidence, and there was some conflict in the evidence. But the testimony that Houston fired, and that the other two prisoners "joined in," and that "there were 15-20 shots fired," of itself is sufficient to show that there was evidence proper to go to the jury.

[5] There were 17 exceptions taken on the trial and also assigned as errors on appeal; but in the brief of the prisoners there are only four set out, to wit, exceptions 1, 2, 11, and 17. "Exceptions in the record not set out in appellant's brief will be taken as

abandoned by him." Rule 34 of this court (140 N. C. 666, 66 S. E. ix).

[6] The first and second exceptions are that the judge charged the jury as to the principles of law applicable to self-defense. The prisoners contend that this was prejudicial because they did not rely upon self-defense, but upon the ground that they did not participate in the killing. We do not see upon the face of the evidence that any prejudice could have accrued to the prisoners from such charge. If there was no evidence of self-defense, the prisoners simply received the benefit of an instruction to which they were not entitled.

[7] Exception 11 is that the court charged the jury: "It is not at all likely that you can decide the case satisfactorily at this hour of the night. I am weary, and I know you are also. The court therefore recommends that you go to your hotel and rest for the balance of the night. In the morning we can get breakfast at 7. You can, in the morning, when fresh, deliberate on your verdict, before or after breakfast, as you choose. Some men can think better on an empty stomach. But you can do as you choose about that, and, if you prefer to deliberate to-night, you can do so. The court will not return to-night. It will adjourn until 9 a. m. to-morrow." The remarks of the judge are almost identical with those of the judge in *State v. Davis*, 134 N. C. 633, 46 S. E. 722, in which the court said: "The recommendation of the court to the jury, doubtless given at a late hour and after a long fatiguing session, not to consider the case till next morning, is without merit. It is not shown that it prejudiced the prisoner in any way, nor can we see that it was likely to do so."

[8] The seventeenth, and the last, exception in the prisoner's brief, is that the court instructed the jury: "In passing upon the question whether Houston slew deceased with a pistol, and whether he did so maliciously, the jury will consider all the evidence relied upon by the state bearing upon the language, acts, and conduct of the deceased and his brother, and the language, acts and conduct of Houston on the night of the homicide and leading up to the same." But this instruction, if any fault could be found with it taken alone, must be construed together with the following language immediately following it in the same paragraph, which told the jury to also consider "the evidence tending to show the nature of the altercation, if any, in the yard, and the evidence tending to show the circumstances of the use of the pistol by Houston, if he did use it, also all the evidence relied on by Houston and his codefendants, tending to show that he did not engage in the affray, did not shoot the deceased, and did not in any wise aid and abet any one else in doing so." The court was simply telling the jury that they should consider all the evidence in

the case, both that on the part of the state, and that on the part of the defendants, in arriving at their verdict as to whether or not the defendants were guilty.

No error.

(155 N. C. 167)

ROBERTSON & CREED v. MARSHALL.

(Supreme Court of North Carolina. May 3, 1911.)

1. ARBITRATION AND AWARD (§ 57*)—SCOPE OF AWARD—LIMITATION BY SUBMISSION.

An award must not extend beyond the scope of the submission, in the absence of waiver by voluntary introduction of testimony or otherwise.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 280-288; Dec. Dig. § 57.*]

2. ARBITRATION AND AWARD (§ 7*)—AGREEMENTS TO SUBMIT—CONSTRUCTION.

Arbitration being favored, agreements to submit should be given as liberal and comprehensive a construction as the apparent intention of the parties will permit.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 28; Dec. Dig. § 7.*]

3. ARBITRATION AND AWARD (§ 20*)—AGREEMENT TO SUBMIT—SCOPE.

An agreement to submit to arbitration all differences arising from contractual and trade dealings between the parties and all matters incident thereto was sufficient to include an award involved in a trade for a sawmill.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 87-96; Dec. Dig. § 20.*]

4. ARBITRATION AND AWARD (§ 61*)—VALIDITY OF AWARD.

It is essential to a valid award that its performance be possible.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 310; Dec. Dig. § 61.*]

5. ARBITRATION AND AWARD (§ 61*)—VALIDITY OF AWARD.

An award directing a return of notes is not invalid as being impossible of performance because they have been hypothecated, since the pledgor can redeem them.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 310; Dec. Dig. § 61.*]

6. APPEAL AND ERROR (§ 173*)—PRESENTATION OF GROUNDS—PARTIALITY OF ARBITRATOR.

An award under arbitration will not be disturbed on appeal in an action on a bond securing performance on the ground of partiality of one of the arbitrators, where that question was not presented in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.*]

Appeal from Superior Court, Surry County; E. B. Jones, Judge.

Action by Robertson & Creed against S. E. Marshall. Judgment for plaintiff, and defendant appeals. Affirmed.

It appeared: That defendant, S. E. Marshall had sold plaintiff two sawmills, referred to as the big and the little mills, the first at the price of \$2,000, and the latter at \$1,000; the sale being partly on credit, and

the mills, which were then placed on or near the lands of defendant, were to be paid for in lumber sawed by plaintiff at said mills and from certain described lands of defendant. That defendant entered into a contemporaneous agreement to supply the mill with logs up to and including 1907. That, some differences having arisen between the parties, in the effort to adjust the same, defendant agreed to and did take back the little mill, the purchase price being credited, and the parties proceeded in recognition of the contract obligations under conditions produced by the change. Further differences having arisen, among others, the plaintiff complaining that defendant had failed to supply the logs as stipulated, the parties, having entered into a bond of \$2,000 to secure performance, agreed to submit all matters in dispute between them to arbitration, and this was done under the following written agreement: "That, whereas, certain matters of difference or disagreement have arisen between the parties to this agreement on account of their contractual and trade relations and their dealings with each other, entered into and had in Surry county, North Carolina, and Patrick county, Virginia, relating to the lumber business and all else incident thereto, and whereas, the parties hereto have agreed, and by these presents they do contract and agree to submit all such matters of disagreement or difference to arbitrators, and have agreed so to do: Now, therefore, the said J. A. Creed and O. L. Robertson, of the first part, and S. E. Marshall of the other part, in consideration of the premises and the sum of one dollar by each party to the other paid, do agree, the party of the one part to the party of the other part, as follows: That all matters of difference and disagreement, growing out of the aforesaid contractual and trade relations and dealings entered into and had by the parties hereto, and all matters incident thereto, shall be submitted to the settlement of three men, in the persons of F. E. Marshall, O. F. Taylor and W. L. Reece, which three persons shall take such evidence and testimony bearing upon all matters of difference between the parties, as above specified, as they may deem proper; and upon such testimony and evidence they shall make their findings and award, which finding and award, when made, shall be final, and shall conclude all parties to this agreement. It is further agreed that the finding and award of a majority of the three arbitrators shall be the award of the body and shall be final." The arbitrators met, pursuant to notice, heard the evidence, and made a full award, deciding, among other things, that the trade about the big mill be also canceled, and that four of the plaintiff's notes outstanding therefor for \$750 each be surrendered or no longer

considered binding between the parties, stated the account between them on that basis, and awarded plaintiff \$350, balance due as the result of all dealings between them. The defendant answered and admitted the agreement to arbitrate and the award, setting aside the mill trade and the balance found to be due, but denied liability on the ground chiefly that the question of the trade for the big mill and the notes given therefor were not matters in dispute, and therefore not embraced within the terms of the submission. Issues were submitted and responded to by the jury:

"(1) Did the agreement to arbitrate embrace the consideration of the sale of the big mill? Answer: Yes.

"(2) Did the arbitrators, in the absence of S. E. Marshall, admit and consider evidence offered by Robertson & Creed? Answer: No.

"(3) In what amount, if anything, are defendants indebted to plaintiffs? Answer: \$2,000."

Defendant resisted recovery further, on the ground that it appeared in evidence on the hearing: That two of the notes had, with other collateral, been hypothecated with a bank as security for a loan of \$500 and were not then in possession and control of defendant. There was judgment on the verdict for \$2,000 to be discharged on payment of \$350. Second. That the four notes of plaintiff, outstanding for the mill trade, be surrendered, subject to any right the bank of Mt. Airy may have therein. Defendant excepted and appealed.

W. F. Carter, for appellant. Watson, Buxton & Watson and E. L. Haymore, for appellee.

HOKE, J. (after stating the facts as above). [1] As a legal proposition, defendant is correct in contending that an award may not extend beyond the meaning and scope of the submission unless waived by the voluntary introduction of testimony or some other recognized method of enlarging the range of inquiry. Such action on the part of the arbitrators is void, certainly as to the excess, and, if not on matter independent and severable, its effect may be to render the entire award invalid. *Stewart v. Cass*, 16 Vt. 663, 42 Am. Dec. 534; *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; 3 Cyc. p. 537. The facts in evidence, however, do not bring defendant's cause within the principle.

[2] It is said to be the general rule that courts favor arbitrations and will always put as liberal and comprehensive construction upon agreements to submit as the apparent intention of the parties will allow. 2 A. & E. p. 605. And the authorities here and elsewhere are in support of the statement. *Bryan v. Jeffreys*, 104 N. C. 242, 10 S. E. 167; *Bryant v. Fisher*, 85 N. C. 70;

Crawford v. Orr, 84 N. C. 246; *Masters v. Gardner*, 50 N. C. 298; 6 *Lawson's Rights & Remedies*, § 3317.

[3] The terms of this submission: "That whereas certain matters of difference or disagreements have arisen between the parties to this agreement on account of their contractual and trade relations and their dealings with each other, entered into and had in Surry county, N. C., and Patrick county, Va., relating to the lumber business and all else incident thereto: * * * Therefore it is agreed that all matters of difference and disagreements growing out of these contractual and trade relations and dealings entered into and had between the parties and all matters incident thereto," shall be submitted, etc.—are very broad and comprehensive, and, if they do not of themselves include this trade about the big mill, as we are inclined to hold, they are without doubt sufficiently definite and certain to constitute a valid submission and to permit of parol evidence to fit them to the subject-matter. *Osborne v. Calvert*, 88 N. C. 171; *Shackelford v. Purket*, 9 Ky. 435, 12 Am. Dec. 422; *Morse on Arbitration*, p. 61. The verdict on the first issue puts this matter beyond question, and there is ample evidence to support the verdict. While defendant testified that there was no dispute between them about the trade for the big mill, the account filed by him before the arbitrators contained the four notes as items of charge in his favor. C. L. Robertson, speaking to this matter, testified: "Sam Marshall came and asked us if we had agreed to take into consideration the mill notes, and everything else. We told him yes, and he said he would then go into the agreement to arbitrate, and we all signed the paper. I was, at the arbitration, sworn, and so were all the others. I told them the agreement with the big mill and notes were to go into arbitration. Marshall was present. The disagreement grew out of our sawing contract. There was but one contract in writing. He discussed the purchase of the mill, then put it into writing." And J. A. Creed said: "When we agreed to arbitrate, we were to bring in the mill notes, and everything, and he agreed to it, and I took it for granted that it covered the whole thing. We put up evidence that the big mill, lumber and all, was to be considered." On the testimony and findings, therefore, we are of opinion, and so hold, that the award was within the scope of the submission, that it was adequate, sufficiently definite and final, and no reason appears for disturbing the result.

[4] Defendant further insists that no recovery should be had because it appeared upon the hearing that two of the notes, directed to be returned, had, with other collateral, been hypothecated with the bank of Mt. Airy and were not therefore in the ownership, possession, or control of the de-

fendants or either of them. Undoubtedly it is one of the requisites of a valid award that its performance be possible; but, in reference to the question presented, this principle is only held to exclude awards impossible of performance in the nature of things, as "a direction to execute a conveyance on or before a day that had already passed," or to do or obtain something which the party had no legal right to procure or enforce," as to "give some third person as surety" on whom the party had no claim. 8 Waite's Actions & Defenses, pp. 527-540.

[5] But in this case, as shown, the notes, with other collateral, were only hypothecated to the bank to secure an indebtedness of \$500. The defendant, S. E. Marshall, had the legal right to redeem the notes, and the award, in this instance, is no more impossible than an order to pay a sum of money or do any other lawful act within the power of the defendant. The judgment, as a matter of form, protects the rights of the bank in the two notes; but this, while eminently proper, would seem to be unnecessary, as the bank, not being a party, could assert whatever rights it had, notwithstanding the judgment.

[6] The position that the award should be set aside because one of the witnesses testified to facts which tended to show partiality in one of the arbitrators is without merit. There was evidence in full denial of the statement, and, in the absence of any pleading or application of any kind in the court below, assailing the award on that ground, the question may not be considered here. Bryant v. Fisher, supra.

There is no error, and the judgment below is affirmed.

No error.

(155 N. C. 124)

ALEXANDER v. NORTH CAROLINA SAVINGS BANK & TRUST CO.

(Supreme Court of North Carolina. May 3, 1911.)

1. CORPORATIONS (§ 81*)—SUBSCRIPTION TO STOCK—CONDITIONAL SUBSCRIPTION.

A subscription to stock of a corporation may be made on condition that there shall be no liability until the corporation has received actual subscriptions to its capital stock to a specified amount.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266-284; Dec. Dig. § 81.*]

2. WORDS AND PHRASES—"WAIVER."

A "waiver" is an intentional relinquishment of a known right, which may be manifested by word of mouth, or by such acts and conduct as would naturally give rise to an inference that a waiver is intended; and there is no waiver unless the intention to waive is understood by the party to be benefited, or where one party has misled the other, or unless the act relied on ought in equity to estop the party from denying it.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7381, 7382.]

3. APPEAL AND ERROR (§ 1170*)—REVIEW—HARMLESS ERROR.

Where a case is tried in substantial accordance with law, technical errors, not prejudicial, do not entitle the losing party to a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

Appeal from Superior Court, Mecklenburg County; Long, Judge.

Action by S. B. Alexander, Jr., against the North Carolina Savings Bank & Trust Company. Judgment for plaintiff, and defendant appeals. No error.

T. J. Gold and Stewart & MacRae, for appellant. Thos. W. Alexander, for appellee.

PER CURIAM. This action was brought to recover the amount of a promissory note, \$250, which had been given by the plaintiff to the defendant in part payment of the purchase price of stock in the defendant company, and which was afterwards paid to it by the plaintiff, and also to have surrendered for cancellation a note for a like amount given by the plaintiff to the defendant for the balance of the purchase money. Plaintiff had contracted to buy the stock and to pay for it \$500; but, as he alleged, upon the express condition that liability on the notes should not accrue until the defendant had received actual subscriptions to its capital stock in the amount of \$250,000, and that, if that amount was not subscribed, the notes should be void and of no effect. This condition or stipulation plaintiff alleged was contained in a collateral and contemporaneous written instrument which had been lost, and the parties respectively offered proof as to its contents; the plaintiff's evidence tending to show that there was such a stipulation in the writing, and the defendant's the contrary, and that the reference was not to subscribed, but to authorized, capital stock.

The court submitted issues to the jury, which, with the answers thereto, are as follows:

(1) Was the defendant, the North Carolina Bank & Trust Company, chartered by special act of the Legislature, and, if so, when? Answer: Yes, by articles of association filed with the Secretary of State and certified by him June 9, 1906, as per page 1, Book of Company, filed in evidence; and by Act of Assembly ratified 15th of March, 1907 (Priv. Laws 1907, c. 307); also see section 5 as amended and ratified, Special Session, Acts of General Assembly, January 27, 1908 (Priv. Acts 1908, Sp. Sess., c. 3)—all of which is answered as set out in evidence.

(2) Did the plaintiff subscribe for 10 shares of the capital stock of the par value of \$100 each, in the defendant company, and, if so, at what time? Answer: Yes, July, 1906.

(3) Did the plaintiff pay into defendant

company \$250 upon his subscription to the defendant and in response to the first call? Answer: Yes, on the 5th day of August, 1906.

(4) Did the plaintiff execute note for \$250 September 10, 1907, for second installment on subscription? Answer: Yes.

(5) Did the plaintiff subscribe for stock in the defendant company upon the condition and assurance that the subscribed capital stock would be \$250,000 and that his subscription thereto was not to be binding upon him unless and until the \$250,000 was actually subscribed to the stock of the company? Answer: Yes.

(6) If so, did the plaintiff waive the alleged condition that the subscription to the capital stock should amount to at least \$250,000? Answer: No.

(7) Did the defendant company fail to secure the amount of \$250,000 of bona fide subscriptions to the capital stock, and did the defendant reduce its capital stock from \$250,000, as alleged in the complaint? Answer: Yes.

(8) Did the defendant release bona fide, solvent subscribers to its capital stock without the knowledge or consent of the plaintiff, and after the plaintiff had made his subscription to the stock under the conditions set forth in this complaint? Answer: Yes.

(9) Has there been a fundamental change in the charter of incorporation of the defendant company since the date of plaintiff's subscription, without the knowledge or consent of the plaintiff? Answer: Yes.

(10) In what amount, if any, is the defendant indebted to the plaintiff? Answer: \$250, with interest from August 5, 1906.

The defendant contended that, if there was any such condition annexed to the subscription of the plaintiff, it had been waived by him, in that, after he had learned that the defendant had not secured \$250,000 of subscriptions to its stock, he appointed one Williamson, as his proxy, to represent him at a corporate meeting, and that he was so represented. At the meeting the stockholders of the company released certain subscribers, including the plaintiff, so that its stock was greatly reduced. At no time did the subscribed stock equal the stipulated amount, or as much as half of it. The defendant contended that, while he gave the proxy to Williamson, he had been induced, at the time, by correspondence with the defendant, to believe that \$250,000 had been subscribed; that the defendant's letter heads so indicated; and that, relying upon this as the truth, he acted as he did. He also contended that there was no sufficient evidence to show that Williamson ever accepted the proxy and attended the meeting. The proxy was found among the papers of the defendant. His honor, Judge Long, submitted the case to the jury upon the issues and conflicting evidence, under a charge exceptionally full, clear, and just. The material issues involved largely

matters of fact and were peculiarly fit for the consideration and decision of the jury; there being but few, and they simple propositions of law.

[1] The jury found as facts that the plaintiff's subscription to the stock was conditional, and that there had been no waiver. There was nothing unlawful in the condition. The parties had the right so to contract if they so desired. This is frankly conceded in the defendant's brief. *Printing Co. v. McAden*, 131 N. C. 183, 42 S. E. 575; *Penniman v. Alexander*, 111 N. C. 428, 18 S. E. 408; *Kelly v. Oliver*, 113 N. C. 443, 18 S. E. 698.

[2] Upon the subject of waiver, the law seems to be well settled. "A waiver is an intentional relinquishment of a known right. Waiver is voluntary and implies an election to dispense with something of value, or forego some advantage which the party waiving it might, at his option, have demanded or insisted upon. A waiver of an agreement or of a condition may either be by word of mouth, or it may arise out of such acts and conduct of the party as would naturally and properly give rise to an inference that he intends to waive the agreement or condition. A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A man may do that not only by saying that he dispenses with it, that he excuses the performance, or he may do it as effectually by conduct which naturally and justly leads the other party to believe that he dispenses with it. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other." *Herman on Estoppel*, § 825. "There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such rights. No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it. To constitute a waiver on the part of one party to a contract, of the performance of the contract on the part of the other party, it must be shown that the party alleged to have waived his rights had knowledge of what the other party had done contrary to the terms of the contract and what part thereof he had failed to perform; and, if the contract is affirmed in ignorance of facts by which it is invalidated, there is no waiver of the right to rescind. * * * The burden of proving knowledge is on one who relies upon a waiver, and such knowledge must be plainly made to appear. Certainly a presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known. The validity of a waiver requires that it shall have been made intentionally and voluntarily. Indeed, voluntary choice is of the essence of waiver, and the view that waiver is a legal result operating upon a certain state

of facts, independent of intent, has been declared to be without foundation. It has been held that a waiver never occurs unless intended, or where the act relied on ought in equity to estop the party from denying it." 29 Am. & Eng. Enc. of Law (2d Ed.) p. 1093. The conduct of a party may sometimes be such as to require the courts to treat it as a waiver, ratification, or estoppel, without regard to actual knowledge of the facts; but we have no such case here.

[3] We conclude that the case has been tried in, at least, substantial accordance with the law, and, if any technical error there be, it was not prejudicial, and is not, therefore, such as entitles the defendant to a reversal of the judgment which was entered for the plaintiff upon the verdict. *Hulse v. Brantley*, 110 N. C. 134, 14 S. E. 510.

No error.

CLARK, C. J., not sitting.

(155 N. C. 148)

VIRGINIA-CAROLINA PEANUT CO. v. ATLANTIC COAST LINE R. R.

(Supreme Court of North Carolina. May 3, 1911.)

CARRIERS (§ 105*)—PRINCIPAL AND AGENT (§ 143*)—NEGLIGENT DELAY IN TRANSPORTATION OF FREIGHT—SPECIAL DAMAGES—LIABILITY.

Where a carrier contracted with an agent of an undisclosed principal for the transportation of machinery, without being informed of any special circumstance requiring prompt delivery, but was subsequently notified thereof, and negligently delayed the transportation, it was liable for special damages so arising after it had a reasonable opportunity to avoid further delay after such notice, and the undisclosed principal suing for the negligent delay could prove the special circumstances of which the carrier received notice.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 452½; Dec. Dig. § 105;* *Principal and Agent*, Dec. Dig. § 143.*]

Appeal from Superior Court, Martin County; Peebles, Judge.

Action by the Virginia-Carolina Peanut Company against the Atlantic Coast Line Railroad. From a judgment awarding nominal damages, plaintiff appeals. Reversed and remanded.

The action was to recover damages for negligent delay on the part of defendant company in conveying a lot of machinery shipped over defendant's road. On the trial it appeared: That plaintiff was a corporation, doing a general business in manufacturing and cleaning of peanuts, at Williamston, N. C., and that in the latter part of August, 1907, Ell Gurganus, acting for said company, but without having informed the company of this fact, so far as the evidence shows, ordered from the Appomattox Iron Works at Petersburg, Va., a car load of machinery for equipment of plaintiff's mill

at Williamston, N. C., and had same shipped over defendant's road, taking a bill of lading therefor in his own name. That the machinery, consisting of peanut shellers, drums, shakers, and shafting, etc., and described, in detail, in the testimony, was mostly of a heavy order, weighing something like 8,000 pounds, and was shipped in an open car. That the distance between the two points by rail was about 140 miles, the time about two or three days, and there was negligent delay in the carriage, the machinery having been shipped August 29th, and not arriving at Williamston until September 16th. It appeared, further, that the Appomattox Iron Works were manufacturers of machinery for this purpose at Petersburg, Va. That the defendant road extends through eastern North Carolina and Virginia, and large quantities of peanuts are annually shipped from this place, Williamston, over defendant's road; that from the time the machinery should have arrived plaintiff had a house rented in which to place it for the purpose of manufacturing and a lot of hands, two of them experts, awaiting to install and operate the same, and these hands were drawing wages and necessarily kept idle for the time of the delay, and that the capital invested in the machinery was about \$2,000. On the question of notice, plaintiff offered the following evidence by the witness Gurganus: "On the 1st day of September, 1907, I went to the agent of the Coast Line at Williamston, and notified him of the car load of peanut machinery being shipped from Petersburg, Va., and told him that the company had men hired to install this machinery, and told him that the men were on the ground ready for work, and that the peanut company would hold the Coast Line for damage for all delay. I continued to go to the agent each day till the 19th, when machinery came and repeated the same thing." On objection by defendant, this evidence was excluded and plaintiff excepted. Plaintiff then offered the following evidence by J. G. Staton, president of plaintiff company: "On the 1st of September, 1907, I went to the agent of the defendant company at Williamston, N. C., and notified him that this car load of machinery had been shipped, told him that plaintiff company had men hired to install this machinery, and that company would hold defendant liable for any further delay. I told him that the men were on the ground ready for work, and that the plant was idle. I went to see agent every day from the first to the 15th of September about it, and repeated the same thing to him. I helped agent wire for machinery on the 15th of September, and we located it in Wilmington, N. C." This was likewise excluded, and plaintiff excepted. The court charged the jury that "in no event could they, on the evidence, allow any more than nominal dam-

ages." Plaintiff excepted. Verdict awarding nominal damages. Judgment, and plaintiff excepted and appealed.

Martin & Critcher and Winston & Matthews, for appellant. F. S. Spruill and Harry W. Stubbs, for appellee.

HOKE, J. (after stating the facts as above). In *Harper v. Express Co.*, 148 N. C. 87-90, 62 S. E. 145, 146, 128 Am. St. Rep. 588, the court in speaking to the question of damages recoverable by reason of wrongful delay in shipment of goods said: "Where the goods shipped have a market value, and there is nothing to indicate the specific purpose for which they were ordered, these damages are usually the difference in the market value of the goods at the time for delivery and that when they were in fact delivered. We have so held in the case of *Davidson Development Co. v. Railroad*, 147 N. C. 503, 61 S. E. 381; and *Lee v. Railroad*, 136 N. C. 533, 48 S. E. 809, is to the same effect. When, however, the goods are ordered for a special purpose or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated. And it is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the contract, but when they are known to the carrier under such circumstances, or they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages"—citing *Moore on Carriers*, p. 425, and *Hutchinson on Carriers*, § 1367. The modification of the general rule suggested in this excerpt is not infrequently called for in shipments of machinery, and under several decisions of our court on this subject it may be that the facts now in evidence require that the question of substantial compensatory damages arising by reason of notice or knowledge of special circumstances had at the time of shipment should be submitted to the jury. *Lumber Co. v. Railroad*, 151 N. C. 23, 65 S. E. 460; *Sharpe v. Railroad*, 130 N. C. 613, 41 S. E. 799; *Rocky Mount Mills v. Railroad*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682. Without final determination of this matter, however, we are of opinion that there was error in excluding the testimony offered by plaintiff to show definite notice of special circumstances given after shipment made. True, the bill of lading was issued to the witness Gurganus, but it is also true that he had no personal interest in the goods or their shipment, but was acting at the time for the plaintiff company, "which had purchased the machinery, paid for it, received it upon arrival at Williamston, and there paid the freight charges thereon, and in-

stalled same in its plant." From these facts we see no reason why the plaintiff company, as undisclosed principal, did not acquire and hold the general business rights and interests arising from the contract and under the general principles obtaining in case of such a relationship. *Nicholson v. Dover*, 145 N. C. 20, 58 S. E. 444, 13 L. R. A. (N. S.) 167; *Barham & Owens v. Bell*, 112 N. C. 131, 16 S. E. 903; *Clark & Skyles on Agency*, p. 1155; *Tiffany on Agency*, pp. 304, 305. In case of *Barham v. Bell*, supra, it was held: "Where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same position at the time of the disclosure of the real principal as if the agent had been the real contracting party." And in more general terms in *Clark & Skyles*, supra, it is said: "It is held, therefore, that where a person enters into a simple contract other than a negotiable instrument in his own name, but, in fact, as agent for an undisclosed principal, the principal may come in and sue the third party on the contract, and this is true, not only where the agent disclosed the existence, but not the name of the principal, but also where he does not even disclose the existence of the principal." A principle undoubtedly correct, where, as in this case, neither the personality of the agent nor the claims of the third party against him personally require consideration. This then being the position of the parties, if the nominal consignee and the president of the plaintiff company gave the notice embodied in the proposed evidence, and there was negligent delay on the part of the defendant after being afforded full and reasonable opportunity to correct the wrong, such negligence would constitute a tort, giving the plaintiff right to recover damages on facts as they then appeared. This is one principal difference in the elements of damages obtaining in breach of contract and consequential damages arising from a tort. In the one case damages are recovered as a rule on relevant facts in the reasonable contemplation of the parties at the time the contract is made, and in the other, on the facts existent or as they reasonably appeared to the parties at the time of the tort committed. The obligation of diligence imposed by the law on common carriers is continuous during the entire course of the carriage, and a negligent failure to perform such duty, causing special damage to a passenger or shipper of freight, is a tort arising whenever the same occurs. We must not be understood as holding that this consequential damage to arise by reason of special circumstances would commence at the very instant the notice was given to some local agent of the company. The notice, as indicated, must be such as to afford fair and reasonable opportunity to avoid further delay under condi-

tions as they existed when the notice was received, and damages arising thereafter might then be properly estimated under the circumstances which the notice discloses. There is suggestion from authoritative sources that in these continuous contracts of carriage notice of special circumstances given during the course of performance would be relevant as affecting the question of the amount of damages, even when the action could only be considered as one for a breach of contract. This was made by Bramwell Baron in the case of *Gee v. Railway* (Exch.) 6 H. & N. 211, and referred to in *Wood's Mayne on Damages*, p. 35. This suggestion was applied by a Texas court in the case of *Railway v. Gilbert*, and was at first affirmed on appeal, but was afterwards rejected; the Court of Civil Appeals holding on a rehearing that notice given, after contract, of shipment made, should not be allowed to affect the question. *Railway v. Gilbert*, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 820. In a subsequent case, however, and on a different state of facts, the Supreme Court of Texas seems to have modified this ruling. *Bourland v. Railroad*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 647. The digest of this case as it appears in 122 Am. St. Rep. 647, is in part as follows: "The rule that damages of a special or exceptional kind for delay in the shipment of goods cannot be recovered in the absence of notice to the carrier at the time of making the contract of carriage of the particular conditions under which the damages are likely to arise as the result of the delay is not unbending nor applicable to every case." The question is not free from difficulty, nor is it necessary to determine it on the present appeal, for numerous and well-considered decisions in this jurisdiction are to the effect that for breach of duty in reference to a contract of carriage on the part of common carrier doing business under a corporate franchise one having a right by contract to enforce performance may recover damages for a tort, and have the relief administered and his rights determined as in that class of actions. *Williams v. Railroad*, 144 N. C. 498-505, 57 S. E. 216, 12 L. R. A. (N. S.) 191; *Purcell v. Railroad*, 108 N. C. 414, 12 S. E. 954, 956, 12 L. R. A. 113; *Bowers v. Railroad*, 107 N. C. 721, 12 S. E. 452. In *Purcell's Case* and on this question it was held: "(1) It is the duty of a common carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of the obligation if, by the use of reasonable foresight, it could have been provided for. (2) A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains as required by the statute (the Code, § 1963)

may bring an action on contract or in tort, independent of the statute."

And in *Bowers' Case*, supra, the ruling was as follows: "(1) A complaint alleging that the defendant, a common carrier, failed to safely carry certain articles of freight according to contract, and 'so negligently and carelessly conducted in regard to the same that it was greatly damaged,' states facts sufficient to constitute a tort." And in *Williams' Case*, supra, Associate Justice Walker, for the court, said: "It is established, therefore, by the authorities, that when the carrier has wrongfully set the passenger down short of or beyond his destination, or has failed to stop for him, and has thereby imposed upon him the necessity of reaching his destination by other means, the carrier must respond in damages for the wrong, whether the action be brought for the breach of the contract or for the tort, and the rule applies in this case if the plaintiffs presented themselves at the proper place and gave the required signal at such time as enabled the engineer to stop the train for them at the station"—citing 3 *Hutchinson on Carriers* (3d Ed.) § 1429. There is nothing in the record which confines the plaintiff to recovery for a breach of contract. On the contrary, the entire facts are set out by the pleader, including specific statement of the special damages claimed. And in various sections of the complaint the delay is alleged to have been caused by the carelessness and negligence of the defendant company and its agents. In such case the plaintiff, if the facts justify it, may recover on the theory of tort or contract. Speaking to this question, in *Williams' Case*, supra, it is further said: "All forms of action are abolished, and we have now but one form for the enforcement of private rights and the redress of private wrongs which is denominated a civil action, and the court gives relief according to the facts alleged and established." In the case of *Hansley v. Railroad*, 117 N. C. 570, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600, a case much relied upon by the defendant, the court chiefly considered and passed upon the right of a passenger, on a breach of contract of carriage by a common carrier, to punitive or exemplary damages, and the question involved in this appeal was not directly presented. While the reasoning of the principal opinion in *Hansley's Case* is favorable to defendant's position, the decision of the court, reaffirming, as it did, *Purcell's Case*, supra, which was an action in tort for like cause, is in support of our present ruling. The plaintiff then had a right to sue in tort, and, if his cause of action is established, recover damages under circumstances existent at the time the same was committed, and the evidence offered, tending as it did to show conditions affecting the measure of his recovery, should have been received. There is nothing here said which is intended to militate against the ruling of this court in

Helms v. Telegraph Company, 143 N. C. 386, 55 S. E. 831, 8 L. R. A. (N. S.) 249, 118 Am. St. Rep. 811, and other cases to the same effect, "that a party who is not mentioned in a telegraph message or whose interest therein is not communicated to the company cannot recover substantial damages for mental anguish." In *Helms' Case* the contract had been finally broken, and the same was no longer in the course of performance, and, the question at issue being the amount of damages for "mental anguish," the personality of the party and his relationship to the subject of the message was of the substance, and must be made to appear. But the principle does not necessarily obtain when redress is sought for breach of a business contract, in which, as stated, the personality of the nominal parties in no way affects the matter. In such case, as heretofore said, the rights of the parties may be shown and dealt with under the ordinary doctrine that an undisclosed principal may avail himself of rights acquired by the contract of his agent.

For the error in rejecting the evidence offered, the plaintiff is entitled to a new trial, and it is so ordered.

New trial.

BROWN, J. (concurring in result). The damages recoverable in an action for a breach of contract are such as naturally flow from the breach and such special and consequential damages as are reasonably presumed to have been within the contemplation of the parties at the time the contract was entered into. *Williams v. Telegraph Co.*, 136 N. C. 82, 48 S. E. 559; *Johnson v. Railroad*, 140 N. C. 574, 53 S. E. 362. And the same rule is applied in actions for the negligent omission in the performance of a public duty growing out of contract. *Lee v. Railroad*, 136 N. C. 533, 48 S. E. 809, delay in transportation of freight; *Williams v. Telegraph Co.*, 136 N. C. 82, 48 S. E. 559, negligence in transmitting and delivering message; *Hansley v. Railroad*, 115 N. C. 602, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. Rep. 474, delay in carrying passenger. But a different rule is applicable when the cause of action is based upon a pure tort resulting in a wrongful invasion of plaintiff's rights of person or property. Then he may recover all such damages, either direct or consequential, as flow naturally and proximately from the trespass. *Johnson v. Railroad*, supra; *Gwaltney v. Timber Co.*, 115 N. C. 579, 20 S. E. 465; *Hatchell v. Kimbrough*, 49 N. C. 163. In an action based upon such a tort, reasonable foresight is essential to original liability, but it has no place in determining to what consequences the liability shall attach. *Drum v. Miller*, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528. In *Lewark v. Railroad*, 137 N. C. 383, 49 S. E. 882, an action for damages resulting from delay in transportation, this court states the

rule to be: "When one violates his contract, he is liable for such damages as are caused by the breach, or such damages, as being incidental to the breach as the natural consequence thereof, may have been in contemplation of the parties when the contract was made." In *Development Company v. Railroad*, 147 N. C. 508, 61 S. E. 381, Mr. Justice Hoke says: "Consequential damages are only recoverable when they are the natural and probable consequences of the carrier's default. And ordinarily such damages are only considered natural and probable when they may be reasonably supposed to have been in contemplation of the parties at the time the contract was made." This was said in an action for negligent delay in transportation of freight, which was treated by the learned judge as a breach of contract, or tort growing out of contract, as was done in *Lee's Case*, in *Lewark's Case*, and numerous other cases decided by this court.

The error in the opinion of the court in the present case I think is in assuming that notice by the plaintiff of the particular damages and subsequent delay created a liability independent of the contract entered into by Gurganus and the defendant. The plaintiff's right to sue is determined upon principles of the law of agency in the creation of a contract, and yet it is suggested by the court that the damages should be assessed upon the basis of a pure tort resulting from the breach of an independent duty owed plaintiff. Plaintiff's rights having grown out of the contract, the amount of damages recoverable should be determined by the rule laid down by this court in actions based upon tort growing out of contract. Applying that rule, plaintiff could only recover such damages as were in the contemplation of the parties at the time the contract was entered into. All the cases since *Hadley v. Baxendale* fix the time the contract was made as the time when notice of special damages should be given. *Lee v. Railroad*, and cases cited, supra. In *Hansley v. Railroad*, 115 N. C. 602, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. Rep. 474, which by express terms overrules *Purcell v. Railroad*, 108 N. C. 414, 12 S. E. 954, 956, 12 L. R. A. 113, quoted in the court's opinion in this case, it is held that: "The amount recoverable for a breach of contract of carriage is limited to the damage supposed to have been in contemplation of the parties and actually caused by such breach, and the measure of damage is ordinarily not materially different whether the defendant fails to comply with the contract through inability or willfully disregards it." And this is said by the court in that case to be the rule whether the passenger sues for a breach of contract or in tort for the disregard of the duty of the carrier to the public. The result reached in *Purcell v. Railroad* was subsequently approved in *Hansley v. Railroad*, 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600, on peti-

tion to rehear. "But the judgment in that case," says the court, "should be put upon the ground that the defendant treated Purcell with indignity and contempt in rushing by the station at faster speed, when there was room for the passengers, or at least when there was evidence tending to show this." The former decision in the *Hansley* Case that for negligent failure to transport a passenger to his destination the passenger's right of action is *ex contractu*, and not in tort, is affirmed. In *Kennon v. Telegraph Co.*, 126 N. C. 232, 35 S. E. 468, the present Chief Justice says: "It is immaterial under our system of practice whether the action is in tort for the negligence in the discharge of a public duty, or for breach of contract for prompt delivery, for the recovery in either case is compensation for the injury done the plaintiff, and which was reasonably in contemplation of the parties as the natural result of the breach of the contract or default in discharging the duty undertaken."

The plaintiff's action in this case being based upon breach of contract, or tort growing out of contract, and the damages being restricted to such as were in the contemplation of the parties when the contract was made, the evidence of notice of special damages was properly excluded. Such notice cannot affect the liability of the parties after the performance of the contract has been entered upon. But, if such evidence is admitted, the same result must follow, because it would be the duty of the court to instruct the jury that the notice given was insufficient to charge the defendant with liability for special damages. Where the testimony with regard to notice is uncontradicted and is clear and distinct, the question of the sufficiency of the notice is for the court. *Railroad v. Johnson & Fleming*, 116 Tenn. 624, 94 S. W. 600. "It may be stated as the well-settled rule," says *Hutchinson on Carriers*, § 1367, "that special damages can be recovered from the carrier when the transportation has been delayed only where it is shown that the shipper informed the carrier at the time the contract was made of the special circumstances requiring expedition in shipment. And although the carrier may have been notified of such special circumstances in time to have prevented a delay, if such notice was given after the contract of transportation had been entered upon, it would not operate to modify the contract or subject the carrier to liability for special damages arising from a subsequent delay. The fact that the carrier was notified of the special circumstances demanding greater diligence is thus seen to be a crucial one, and that the carrier was so informed must be alleged and proved." "Notice to a carrier after goods have been shipped of circumstances which render special damages a probable result of a delay in their delivery does not operate to modify the original con-

tract so as to render the carrier liable for such damages, even in the event of a subsequent unreasonable delay." *Bradley v. Railroad*, 94 Wis. 44, 68 N. W. 410. In *Illinois Central Railroad v. Johnson & Fleming*, 116 Tenn. 624, 94 S. W. 600, Chief Justice Beard of the Supreme Court of Tennessee says: "Notice to the carrier after goods have been shipped of circumstances which render special damages a probable consequence of delay does not affect the original contract so as to render the carrier liable, although the subsequent delay is unreasonable." Upon facts similar to those presented in our case, the Wisconsin court, in *Bradley v. Railroad*, *supra*, says: "It is only necessary to apply a familiar principle of law in order to answer these questions. No principle of law is more firmly established than that actual damages for a breach of contract are limited to such as may be reasonably considered to have been in contemplation by the parties at the time of such contract as the probable result of a breach of it. Such principle rules this case, unless there is some exception thereto which will fit the special circumstances found by the jury and expressed in the questions submitted. That was obviously the view the learned circuit judge took of the matter. Hence the necessity for the second question—i. e., Did notice to the appellant of the circumstances which rendered the damages found by the jury a probable result of the late delivery operate to modify the original contract between the parties so as to make the appellant liable in damages? Counsel for the respondent failed to bring to our attention any authority to sustain such exception to the general rule, and, indeed, we are satisfied that none can be found, and that the exigency of this particular case is not sufficiently serious and pressing to warrant us in disturbing the settled law regarding the subject, as counsel suggests that we should do." The case of *Bourland v. Railroad*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 647, is not authority for the position suggested in the opinion of the court. It is held in that case that, where notice of such circumstances as will occasion special damages is given the carrier after the contract to carry has been performed, and after the goods have accordingly arrived at their destination and are ready to be delivered, he will be liable for such special damages if he negligently fails to make delivery of the goods. In this case the Supreme Court of Texas accepts the decision in *Railroad v. Belcher*, 89 Tex. 428, 35 S. W. 6, as containing a correct statement of the law upon the question of liability for special damages where notice is given after the contract has been made and transportation commenced, but before the shipment reaches destination. In the *Belcher* Case it is held that such notice is insufficient to charge the

carrier with special damages. Justice Williams, writing the opinion in *Bourland v. Railroad*, adverts to the suggestion made by Baron Bramwell in *Gee v. Railroad*, 6 H. & N. 217, referred to in the opinion of the court, and says: "The decisions have been to the contrary in cases of this character which have come to our attention, where it became necessary to pass upon the point." This dictum in the *Gee Case* is referred to in section 158 of Sedgwick's work on Damages, and, after quoting the language of Baron Bramwell, the author says: "The majority of the court, however, took a different view. And, however reasonable the view may be in itself, another rule is firmly established. *Hadley v. Baxendale*, as we have seen, held that damages for breach of contract were limited to such as were either normal or communicated at the time of the contract." Sedgwick further says (section 159): "Notice must form the basis of a contract. It appears that the notice must be more than knowledge on the defendant's part of the special circumstances. It must be of such a nature that the contract was to some extent based upon the special circumstances. This appears from the language of the courts in many cases where the subject is discussed." In *Smeed v. Poord*, Campbell, C. J., doubted whether notice could have any effect in changing the rule of damages, unless it formed part of the contract. In *British Columbia S. M. Co. v. Nettleship*, Willes, J., said: "The mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." In *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487, Church, C. J., stated, as his opinion, that notice of the object of the contract would not of itself change the measure of damages, "unless it formed the basis of an agreement." Proof of notice, of course, cannot be received to vary the contract, which always speaks for itself. It is merely an attendant circumstance, which, like any other matter in evidence, affects the consequences of the breach and the measure of recovery. *Hadley v. Baxendale* lays no stress on the question whether the contract was founded upon or influenced by the notice; but the weight of recent authority seems to be in accordance with these opinions, to the effect that the notice must be such as that the contract was in some degree founded on it. The defendant sold goods to rig a vessel, and damages were claimed for loss of use of the vessel. The Supreme Court of Michigan said: "To create such extraordinary liability, there must in every case be something in the terms of the contract, read in the light of the surrounding circumstances, which show an in-

tention on the part of the vendor to assume an enlarged engagement, a wider responsibility than is assumed by the vendor in ordinary contracts for the sale and delivery of merchandise."

In this case the defendant is notified, after entering upon the performance of the contract, that the special damages would result, and was for the first time notified that such damages would result to a company whose name nowhere appears in the contract of shipment, and whose existence was probably unknown to the defendant. If such notice is sufficient to charge the defendant with liability for special damages, then the great case of *Hadley v. Baxendale* has power only to vex unsuspecting parties who regard its principles as established and enforceable in our courts. The facts are not sufficient to bring this case within the decision of *Lumber Company v. Railroad*, 151 N. C. 23, 65 S. E. 460, and other cases in this court charging the carrier with special damages for delay upon the ground that the character and circumstances of shipment were sufficient to give notice of such damages. There was nothing about this shipment to give the defendant the slightest intimation that the plaintiff company intended to conduct a peanut-cleaning business, and had employed hands to install and operate the machinery, and had rented a house for that purpose. It was reasonable for the defendant to suppose that Gurganus was receiving the machinery for sale to another party, or that he was receiving it as agent for the shippers. In fact, the purpose for which the shipment was intended was a pure matter of conjecture to the defendant. The *Lumber Company Case* presented the following combination of facts which this court said was sufficient to go to the jury upon the question of notice of special damages: (1) Plaintiff's name, indicating the character of business engaged in by it; (2) the nature of the article shipped, to wit, an edger, a machine used by sawmills, weighing about 1,000 pounds, indicating an article not of general use, but for particular purpose; (3) that the machine was shipped unboxed, uncovered, and open, and thus observable by the defendant; (4) being a single machine, indicating that it was intended to be used in conjunction with other machinery; (5) the destination being a section in which lumber was manufactured. A mere enumeration of these conditions destroys that case as an authority upon which to submit to the jury the question of special damages in this case.

For wrongful delay in the transportation of goods having a market value the damages usually supposed to be in contemplation of the parties is the difference in value of the goods at the time when they should have been delivered and when they were delivered. In the absence of appreciable loss, the interest on the money invested in the

goods themselves for the time of the delay would be the correct measure. *Lee v. Railroad*, 136 N. C. 533, 48 S. E. 809; *Development Company v. Railroad*, 147 N. C. 508, 61 S. E. 381. If the jury should find in this case that the plaintiff has been injured by the negligence of the defendant, the measure of damages should be fixed by the principle of these cases. Upon the evidence as now presented, the plaintiff is not entitled to special damages. However, his honor was in error in instructing the jury that the plaintiff could recover only nominal damages, for which there should be a new trial.

WALKER, J., concurs in this opinion.

ALLEN, J. (concurring). A bill of lading is "a written acknowledgment by the common carrier of the receipt of certain goods and an agreement, for a consideration, to transport and to deliver the same at a specified place to a person named or to his order." 4 Elliott on Railroads, § 1415. It is then both a receipt and a contract, and there are but two stipulations in the contract: (1) To transport. (2) To deliver. If therefore the shipper must rely upon the written contract and can only sue for breach of its obligations, he is without remedy if his goods are injured, or, if he suffers loss by delay, if they are finally transported and delivered. The law, however, recognizes that railroad property is in some measure devoted to a public use, and is therefore subject to public regulation. As was said by Rodman, J., in *Branch v. Railroad*, 77 N. C. 349: "They are granted great privileges in consideration of the performance of certain duties to the public. They enjoy a virtual monopoly of the carriage of freights within a certain distance. There could not be a clearer case of private property devoted for a valuable consideration to a public use, and consequently subject to public regulation." "He (the common carrier) exercises a public employment, and has duties to the public to perform." *York Mfg. Co. v. Central R. R.*, 70 U. S. 112, 18 L. Ed. 170. "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the public at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. "Railroads are common carriers, and owe duties to the public." *Joy v. St. Louis R. R.*, 138 U. S. 51, 11 Sup. Ct. 243, 34 L. Ed. 843. These duties to the public are sometimes enforced by statute, and sometimes by the principles of the common law, and they are independent of contract. "The duties of the common carrier as such do, not rest upon contract,

but are imposed by law." 4 Elliott on Railroads, § 1454. "The liability of a common carrier does not rest in his contract, but is a liability imposed by law. It exists independently of contract, having its foundation in the policy of the law, and it is upon this legal obligation that he is charged as carrier for the loss of property intrusted to him." *Merritt v. Earle*, 29 N. Y. 122, 86 Am. Dec. 292.

What, then, are the duties imposed by law on a common carrier, who has received freight for transportation? There are two: (1) To carry safely. (2) To deliver within a reasonable time. The extent of the liability as to the first duty is clearly stated by Justice Brown in *Hollingsworth v. Skelding, Receiver*, 142 N. C. 247, 55 S. E. 212. He quotes the following extract from the opinion of Chief Justice Faircloth in *Daniel v. Railroad*, 117 N. C. 602, 23 S. E. 327, 4 L. R. A. (N. S.) 485: "Carriers of passengers are insurers as to their passengers, subject to a few reasonable exceptions. They are held to exercise the greatest practicable care, the highest degree of prudence, and the utmost human skill and foresight which has been demonstrated by experience to be practicable. They are so held upon the ground of public policy, reason, and safety to their patrons. The exceptions are the act of God and the public enemy. If these—that is, the act of God or of the public enemy—be the proximate cause of the injury and without any neglect on the part of the carrier, the carrier is not liable. He is against all perils bound to do his utmost to protect and prevent injury to his passengers." And, after holding that this is erroneous as applied to passengers, he says: "The rule laid down by the late Chief Justice applies to the transportation of freight and all classes of inanimate objects only." It should be added that there is no liability on the carrier if the injury is caused by the negligence of the shipper, or is due to the inherent qualities of the articles transported. The second duty imposed by law is to deliver within a reasonable time, and a failure to do so is negligence. *Boner v. Steamboat*, 46 N. C. 216. The distinction as to the degree of liability in the performance of these duties is clearly stated by Pearson, Chief Justice, in *Boner v. Steamboat Co.*, supra. He says: "It is said that the defendants are common carriers, and in regard to them the law makes an exception, and holds them liable as insurers, except against the act of God and the king's enemies. This is so; and the question is, does their liability as insurers extend to the time of delivery, or is it confined to the safe delivery of the goods? The case before the court when Lord Holt delivered his famous opinion concerned the safe delivery of goods, and nothing was said in regard to the time of delivery; so that our question was left open. The reason for making an exception in regard to the safe delivery of goods in the case

of a common carrier is that it was a matter of public policy in order to guard against fraud and conspiracy, by which, through 'con-
vin and collusion,' the carrier might 'contrive to be robbed and divide the spoils.' It is evident that the reason for holding the common carrier liable for the safe delivery of goods has no relevancy or bearing upon the question of his liability as to the time of delivery; so there is no rule of policy making an exception in regard to the time of delivery. That falls under the general rule by which, when both parties are benefited, the bailee is liable for ordinary neglect."

On account of the fact that the goods are in possession of the carrier, and the shipper cannot go with them, and cannot know what the conduct of the carrier is, proof of delay makes out a prima facie case of negligence, and it is incumbent on the carrier to excuse the delay. *Parker v. Railroad*, 133 N. C. 340, 45 S. E. 658, 63 L. R. A. 827. We have, then, in the case of a shipment of freight, a contract between the shipper and the carrier, by which the carrier has agreed to transport and to deliver, and the law has imposed on the carrier the duty to carry safely, and to deliver within a reasonable time; and our next inquiry is, What is the remedy for a breach of the duty imposed by the law? I think the shipper may at his election sue in contract or in tort. He may treat the obligations imposed by law as entering into and becoming a part of the contract of carriage, in which event his action would be for breach of contract, or he may sue for a breach of the public duty, which has caused him special damage, and his action would be in tort. 4 *Elliott on Railroad*, § 1693, says: "Where there is a breach both of contract and of duty imposed by law, as in case of loss or injury by a common carrier, the plaintiff may elect to sue either in contract or in tort." We are not without authority in our state that an action for a breach of duty imposed by law is in tort, and that in many cases on the same facts a party may sue in tort or contract. In *Robinson v. Threadgill*, 35 N. C. 41, and in *Bond v. Hilton*, 44 N. C. 308, 59 Am. Dec. 552, Nash, Chief Justice, says: "Where the law from a given statement of facts raises an obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, an action on the case founded on the tort is proper." And in *Williamson v. Dickens*, 27 N. C. 265, although the plaintiff could have sued in contract, he was allowed to sue in tort, and thereby avoid the defense of a discharge in bankruptcy. These cases are approved in *Solomon v. Bates*, 118 N. C. 315, 24 S. E. 478, 54 Am. St. Rep. 725.

It appears, therefore, that the property of the common carrier is affected with a public use; that out of this grows the power to regulate the performance of its obligations; that in the exercise of this power the law has imposed the duty when it undertakes to

transport freight, to carry safely and to deliver within a reasonable time; and that an action to recover damages for a breach of duty imposed by law is in tort. This duty, as it seems to me, does not arise out of contract, but is imposed because the carrier has devoted its property in part to a public use. If so, I think the rule laid down in the opinion of the court is just, and with the limitations imposed no hardship can arise from its application. It requires notice to be given to the carrier, while the goods are in its possession, of the facts out of which the special damages will arise, and gives it a reasonable time, after notice, within which to deliver, and the carrier is not liable for the special damages unless, after notice, and under the conditions then existing, it negligently fails to deliver. The expressions in different opinions opposed to this view are based upon the case of *Hadley v. Baxendale*, which has been quoted with approval so often that it approaches rashness to question it.

I may suggest, however, that it is stated in the opinion that "the only circumstances here communicated by the plaintiff at the time the contract was made were that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill," while the report of the case, as contained in 5 Eng. Rul. Cases, p. 503, shows that "the plaintiffs' servant told the clerk that the mill was stopped and that the shaft must be sent immediately, and, in answer to the inquiry when the shaft would be taken, the answer was that, if it was sent up by 12 o'clock any day, it would be delivered at Greenwich the following day. On the following day the shaft was taken to the defendant's before noon and at the same time the defendant's clerk was told that a special entry, if required, should be made to hasten delivery." It was held that the notice was not sufficient to charge the defendant with special damage. I doubt if this ruling would be sustained to-day, and think the evidence indicated that there was a contract to deliver within a particular time. The decision was rendered in 1854, within 30 years after the first steam railway began to operate in England, when railroading was in its infancy, and the facilities for transportation were limited, and while the rule, adopted as to damages for breach of contract generally, ought to be adhered to, it is doubtful if it was intended to apply to the contracts of common carriers under the conditions existing to-day. It was then important for the carrier to know, at the time the goods were received, the circumstances requiring diligence, that it might prepare to meet them, while to-day the carrier is required to receive goods tendered for shipment and to be prepared to transport.

The carrier has the goods in its possession, is in the performance of a duty that is continuous until delivery, and has or ought to have the facilities for transporting, and it

has the opportunity of avoiding loss by exercising reasonable diligence. It would seem that it ought to be held to this degree of responsibility.

(155 N. C. 173)

WILSON v. LIFE INS. CO. OF VIRGINIA.
(Supreme Court of North Carolina. May 3, 1911.)

1. EVIDENCE (§ 405*)—INSURANCE (§ 143*)—CANCELLATION OF INSTRUMENTS (§ 4*)—TESTIMONY AFFECTING POLICIES—ADMISSIBILITY.

Prior parol agreements being merged in a written policy, it cannot be varied or contradicted by testimony of parol inducements and assurances, but the policy may be set aside or corrected for fraud or mutual mistake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1818-1824; Dec. Dig. § 405; Insurance, Dec. Dig. § 143; Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. § 4*]

2. JUSTICES OF THE PEACE (§ 141*)—JURISDICTION—REFORMATION OF INSTRUMENTS.

There can be no reformation of an instrument in an action originating before a justice of the peace.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 660-664; Dec. Dig. § 141.*]

3. JUSTICES OF THE PEACE (§ 43*)—JURISDICTION—AMOUNT INVOLVED.

A justice of the peace has jurisdiction of a suit under a policy involving less than \$50, whether the suit be in tort or contract.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 43.*]

4. INSURANCE (§ 138*)—LIFE POLICIES—FRAUD—EVIDENCE.

Evidence held insufficient to show fraud or deceit, inducing plaintiff to accept life insurance.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 138.*]

Clark, C. J., dissenting in part.

Appeal from Superior Court, Durham County; Daniels, Judge.

Action by J. T. Wilson against Life Insurance Company of Virginia. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Civil action heard on appeal from justice of the peace, before his honor, F. A. Daniels, judge, and a jury, at January term, 1911, of the superior court of Durham county. Evidence was offered, and on the argument before the court and jury, the court having intimated an opinion that on the evidence, if believed, plaintiff was not entitled to recover. In deference to such intimation, plaintiff, duly excepting, submitted to a nonsuit and appealed.

Manning & Everett and Bramham & Brawley, for appellant. Bryant & Brogden, for appellee.

HOKK, J. There was no error in the ruling of the court below. It appeared that on the 21st of March, 1898, plaintiff took out a life insurance policy in defendant company, insuring his life for a period of 10 years

on payment of weekly premiums, and at the end of the specified time the policy contained several options looking to a continuance of the same on certain terms, and also one numbered 4 in words as follows: "4. Surrender this policy and draw the entire cash value, that is the legal reserve computed according to the Actuaries' Table of Mortality and four per cent. interest together with the dividend." The premiums having been paid for 10 years, and plaintiff having elected to terminate the contract relation under the fourth option set out above, the claim was calculated, and the amount due under the provisions of said option, \$3.62, was duly tendered plaintiff and refused. Plaintiff made the refusal on the ground that the agent of the company, during the bargain about the policy, assured plaintiff that at the end of 10 years he would get back the premium and interest thereon at 4 per cent. and on the trial testified to that effect.

[1] We have said, in *Floors v. Insurance Co.*, 144 N. C. 232-235, 56 S. E. 915, 916: "It is also accepted doctrine that when the parties have bargained together touching a contract of insurance, and reached an agreement, and in carrying out, or in the effort to carry out, the agreement a formal written policy is delivered and accepted, the written policy, while it remains unaltered, will constitute the contract between the parties, and all prior parol agreements will be merged in the written instrument; nor will evidence be received of prior parol inducements and assurances to contradict or vary the written policy while it so stands, as embodying the contract between the parties. Like other written contracts, it may be set aside or corrected for fraud or for mutual mistake; but, until this is done, the written policy is conclusively presumed to express the contract it purports to contain," citing *Beach's Laws of Insurance*, §§ 495, 496; *Vance on Insurance*, pp. 163, 348; *Insurance Company v. Mowry*, 96 U. S. 547, 24 L. Ed. 674. This position being well recognized and the policy not providing for any such settlement or adjustment of plaintiff's claim as he now demands, a recovery could only be had by reformation of the policy, or on the ground of fraud or deceit.

[2] The action having originated in the courts of a justice of the peace, and that court having no equitable jurisdiction in actions for reformation of written instruments, the first ground of relief is not open to plaintiff. *Berry v. Henderson*, 102 N. C. 525, 9 S. E. 455; *Dougherty v. Sprinkle*, 88 N. C. 391; *Fisher v. Webb*, 84 N. C. 44. And the demand can only be maintained, if at all, on the second ground stated, for fraud or deceit.

[3] The suit being for no more than \$50, there is no defect of jurisdiction in this aspect of the case, whether the action be con-

sidered as one in tort or in contract. *Stroud v. Insurance Co.*, 148 N. C. 54, 61 S. E. 626; *Duckworth v. Mull*, 143 N. C. 461, 55 S. E. 850.

[4] We concur in the opinion, however, that the evidence is not sufficient to sustain an action for fraud or deceit. Nor would it justify a reformation of the policy on that ground. True, plaintiff testified that defendant's agent assured him in general terms that the investment was as good as a savings bank, and told him that under this clause 4 he would get his premiums back, with interest at 4 per cent., but these representations were not of a kind nor under circumstances that justified plaintiff in relying upon them, nor would they uphold the view that an actionable fraud had been perpetrated. The testimony showed that plaintiff was a man of fair intelligence and some business experience. He could read and write, had worked for about 12 months in a furniture store, taking written leases from purchasers. That he also worked in a grocery store five or six years, selling goods on time and entering up the items of charge in the credit department of the business, and in a hardware store for some months, where he had done the same thing. That plaintiff and defendant's agent, who solicited the insurance, had worked in a mill together, and there was nothing to show any disparity between them, either in intellect or information, and the case, we think, comes clearly under the class considered and passed upon in *Cathcart v. Insurance Co.*, 144 N. C. 623, 57 S. E. 890, and *Clements v. Insurance Co.*, 70 S. E. 1076, at present term.

There is no error, and the judgment of nonsuit is affirmed.

Affirmed.

CLARK, O. J., concurs in the conclusion and in the opinion, but dissents from the following dictum: "The action having originated in the court of a justice of the peace, and that court having no equitable jurisdiction in actions for reformation of written instruments, the first ground of relief is not open to plaintiff."

1. The Constitution, art. 4, § 1, provides: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished; and there shall be in this state but one form of action, for the enforcement or protection of private rights or the redress of private wrongs which shall be denominated a civil action." This provision is not restricted to the superior court, but applies to all courts. Section 27 of the same article confers upon justices of the peace jurisdiction "of civil actions founded on contract, wherein the sum demanded does not exceed \$200; and wherein the title to real estate shall not be in controversy," and authorizes the General Assembly to confer upon justices of the peace "jurisdiction of other civil actions, wherein

the value of the property in controversy does not exceed \$50." Accordingly the Legislature has conferred such additional jurisdiction in Revisal 1905, § 1420. The phrase "property in controversy" has been held to mean the value of the injury complained of, or the amount in controversy. *Malloy v. Fayetteville*, 122 N. C. 480, 29 S. E. 880; *Watson v. Farmer*, 141 N. C. 453, 54 S. E. 419; *Duckworth v. Mull*, 143 N. C. 464, 55 S. E. 850. There is nothing, therefore, in either the Constitution or the statute which denies a justice of the peace jurisdiction of a controversy within the amounts above specified, on the ground that an action is equitable in its nature; the only exception is "when title to real estate is in controversy." It has been held that the justice has jurisdiction of an equitable defense within the prescribed amount. *Levin v. Gladstein*, 142 N. C. 494, 55 S. E. 871, 115 Am. St. Rep. 747. If so, he necessarily has jurisdiction of an equitable cause of action within that limit.

2. Even if the justice of the peace did not have jurisdiction, the case having gone by appeal to the superior court, that court has full jurisdiction. This has been held in *McMillan v. Reeves*, 102 N. C. 559, 9 S. E. 452, wherein Smith, C. J., says: "It is not material to inquire into the question of the jurisdiction invoked in initiating the suit, since any objection on this account is obviated by the removal of the cause into the superior court, presided over by the judge, and the submission of all the parties thereto to his exercise of jurisdiction in the premises, as fully as if the action had there originated. As, then, the court, assuming to exercise jurisdiction, did possess it fully over the subject-matter of the action and the parties to it, in which all the heirs were represented by counsel, the cause was, in a strict sense, coram iudice, on the rulings in *West v. Kittrell*, 8 N. C. 493, and *Boing v. Railroad*, 87 N. C. 360, even without the aid of Laws 1887, c. 276, which sustains the jurisdiction thus acquired and authorized the court 'to proceed and hear and determine all matters in controversy in such action,' etc.

In *Boing v. Railroad*, 87 N. C. 363, it was held that, where the subject-matter of the action is one of which the court of the justice of the peace and the superior court have concurrent jurisdiction, and the case is carried by appeal to the superior court, the latter will retain jurisdiction though the proceedings in the court of the justice of the peace are void for irregularity. This can only be sustained upon the ground that the case, having gotten into the superior court, which has jurisdiction, the notice of appeal has the same efficacy as the service of a summons in bringing the defendant into court. In *West v. Kittrell*, 8 N. C. 493, it was held that where a case was irregularly carried to the superior court from the county court the former will retain jurisdiction, if it was a subject-matter of which the su-

perior court would have had jurisdiction, if the action had originally been instituted in that court.

The jurisdiction of the superior court is fixed by the Constitution, and, when it has jurisdiction of the controversy, upon the above authorities it has it fully, regardless whether the cause originated in a lower court or in the superior court. The doctrine of derivative jurisdiction (though sustained by some cases), whereby a case brought by appeal to that court is dismissed, in order that it may straightway be brought back by a summons, has no foundation in the Constitution or in reason.

No plaintiff will subject himself to the delay and expense of bringing an action before a justice of the peace when the jurisdiction is clearly in the superior court. A judgment by a justice of the peace, when he has no jurisdiction, would be a nullity. But when, by appeal, the cause gets into the superior court, nothing is to be gained by dismissing the action. The trial should proceed. If amendments, or the defense set up, bring in matters of which the justice would not have had jurisdiction, that is no reason why the superior court, having obtained jurisdiction by the notice of appeal, should not proceed with the trial.

(155 N. C. 136)

FANN v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. May 8, 1911.)

1. JUDGMENT (§ 475*)—PROBATE DECREES—CONCLUSIVENESS.

Decrees of probate courts within their power and under jurisdiction of the subject-matter properly acquired are generally immune from collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 910; Dec. Dig. § 475.*]

2. EXECUTORS AND ADMINISTRATORS (§ 29*)—APPOINTMENT—COLLATERAL ATTACK.

Under Revisal 1905, § 16, providing for appointment of an administrator in the county where decedent died domiciled, or in the county where, being a nonresident, he left assets, etc., where such facts appear an appointment is immune from collateral attack.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 178-182; Dec. Dig. § 29.*]

3. EXECUTORS AND ADMINISTRATORS (§ 12*)—JURISDICTION—"ASSETS."

A cause of action for decedent's negligent death constitutes "assets," within Revisal 1905, § 16, providing for administration in the county where decedent left assets.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 24; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 1, pp. 556-559.]

4. EXECUTORS AND ADMINISTRATORS (§ 28*)—APPOINTMENT—VALIDITY—EVIDENCE.

The legality of plaintiff administrator's appointment being questioned on the ground of his nonresidence, it was proper to admit evidence that he went to another state merely to work,

intending to return and retain his residence within the state.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 28.*]

5. RAILROADS (§ 350*)—DEATH OF PEDESTRIAN AT CROSSING—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Whether a pedestrian killed at a street crossing was guilty of contributory negligence held, under the evidence, a jury question.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1172-1192; Dec. Dig. § 350.*]

Appeal from Superior Court, Guilford County; Daniels, Judge.

Action by R. W. Fann, administrator, against the North Carolina Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

It appeared in evidence: That on or about June 5, 1909, in the city of Greensboro, the intestate was endeavoring to cross the tracks of defendant company on Jackson street, a public crossing, and was run down and killed by a train going north at the time, being the third or fourth section of No. 36, a train hauling fruit to northern markets. There were four tracks at the crossing. The first two, in the direction from which intestate was approaching, being side tracks parallel to the main tracks, the third was the main track for trains going north, and the fourth was the main track for trains going south over defendant's road. That when intestate entered on crossing there was a long freight train of 30 or 40 cars going south which was passing over the crossing at the time, and intestate, having passed over the second side track, was standing on the main track leading north waiting for the freight going south to pass. When in that position, the third or fourth section of a fruit train going north ran over and killed intestate. There was evidence tending to show: That the freight train going south was making quite a noise at the time. That the tracks curved just below the crossing, and the approach from the south was to some extent obscured by the freight train, and that no signal was given by the fruit train which killed intestate except several signal whistles when in 25 steps of deceased and the train was running between 20 or 30 miles an hour, faster than ordinary freight trains. Plaintiff introduced two ordinances of the city of Greensboro in force at the time, as follows:

"Sec. 282. That it shall be unlawful for any railroad company to allow two engines or trains to cross any street in the city at the same time from opposite directions."

"Sec. 284. That no railroad engine or train shall run or be propelled at a greater speed than twenty miles an hour within the city."

An issue having been raised as to the legality of plaintiff's appointment on the ground that he was a nonresident, there was testimony offered on part of plaintiff to the effect: That he had gone to Durham in the panic

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of 1898 to get work temporarily and continued in his employment there as cotton mill hand until November, 1910. That he could not at the time obtain employment in Greensboro, and his purpose in going to Danville was to stay there temporarily and try and save some money to return to the bakery business in Greensboro. That he left his property in Greensboro with a sister who lived there, a bureau, trunk, chairs, and some clothing, and a horse and wagon he had used in the bakery business and was keeping for like work, when he was able to resume that business, and that during his stay in Danville he returned to Greensboro every month or so, remaining at one time as much as six weeks. On this point plaintiff testified: "Q. Did you go to Virginia with intent to leave North Carolina, or did you consider that your home? A. This was my home. I just went there to work. My intention was to come back. My home was here. Q. Did you go once with the intention of permanently remaining there? A. Just temporarily remaining there. Q. For what purpose? A. To save up money to start a bakery." This evidence as to the intent of plaintiff in leaving North Carolina and of his purpose to return was admitted over defendant's objection, and exception was duly noted. There was evidence on part of defendant company that the train was only going 10 or 12 miles an hour at the time, and all the usual signals were given; that the vision of engineer was obscured by reason of a curve below the crossing, and as soon as intestate was discovered on the track, additional signals were given, emergency brakes applied, and everything possible done to avoid the result. The court under a full, clear, and comprehensive charge submitted the questions raised to the jury under the following issues: "(1) Is the plaintiff the legally appointed and duly qualified administrator of M. E. Fann? A. Yes. (2) Was the intestate of the plaintiff killed by the negligence of the lessee of the defendant as alleged in the complaint? A. Yes. (3) Did the intestate of the plaintiff contribute to his death by his own negligence? A. Yes. (4) What damage is the plaintiff entitled to recover? A. \$1,000." Judgment on the verdict for plaintiff. Defendant excepted and appealed, assigning for error: (1) The ruling of the court on the question of evidence. (2) That the plaintiff should have been nonsuited for the reason chiefly that on the evidence intestate was guilty of contributory negligence.

Wilson & Ferguson, for appellant. John A. Barringer and T. H. Calvert, for appellee.

HOKE, J. (after stating the facts as above). (1) In this day and time, and under our present system, it seems to be generally conceded that the decrees of probate courts, when acting within the scope of their power, should

be considered and dealt with as orders and decrees of courts of general jurisdiction, and, where jurisdiction over the subject-matter of inquiry has been properly acquired, that these orders and decrees are not as a rule subject to collateral attack.

[2] The facts very generally recognized as jurisdictional are stated, in section 16 of our Revisal of 1905, to be that there must be a decedent; that he died domiciled in the county of the clerk where the application is made; or that, having his domicile out of this state, he died out of the state, leaving assets in such county, or assets have thereafter come into such county. Having his domicile out of the state, he died in the county of such clerk, leaving assets anywhere in the state, or assets have thereafter come into the state, and where, on application for letters of administration, these facts appear of record, the question of the qualifications of the court's appointee cannot be collaterally assailed. That is one of the very questions referred to him for decision. But, if a person has been selected contrary to the prevailing rules of law, the error must be corrected by proceedings instituted directly for the purpose. Hall v. Railroad, 146 N. C. 345, 59 S. E. 879; Springer v. Shavender, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708; Lyle v. Siler, 103 N. C. 261, 9 S. E. 491; Moore & Wife v. Eure, 101 N. C. 11, 7 S. E. 471, 9 Am. St. Rep. 17; London v. Railroad, 88 N. C. 535. And, generally on the subject, see Dobler v. Strober, 9 N. D. 104, 81 N. W. 37, with notes by the editor in 81 Am. St. Rep. 530-535; Croswell on Exrs. & Adms. p. 19 et seq.

[3] In the present case the deceased was killed in Greensboro, N. C., where he resided at the time and had his domicile. The cause of action is of itself assets. Vance v. Railroad, 138 N. C. 460, 50 S. E. 860. The clerk, therefore, had full jurisdiction, and the letters of administration are not open to collateral attack in the present suit.

[4] The question, however, can hardly be said to arise in this case, for, under a correct charge, the jury have determined that the plaintiff was a resident of the state at the time of the appointment, and the evidence offered by plaintiff, and objected to by defendant, was clearly competent and directly relevant to the issue. Watson v. Railroad, 152 N. C. 215, 67 S. E. 502. Approaching then the principal question presented, this court, in Cooper's Case, 140 N. C. 209-221, 52 S. E. 932, 3 L. R. A. (N. S.) 391, endeavored to lay down certain general rules, applicable to injuries at railroad crossings as fair deductions from the cases considered, as follows: "(1) That a traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this

duty. (2) That, where the view is unobstructed, a traveler, who attempts to cross a railroad track under ordinary and usual conditions without first looking, when, by doing so, he could note the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence. (3) That, where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen, and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence. (4) There may be certain qualifying facts and conditions which so complicate the question of contributory negligence that it becomes one for the jury, even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether, as when gates are open or signals given by watchmen, and the traveler enters on the crossing reasonably relying upon the assurance of safety."

And in another case at same term (*Sherill v. Railroad*, 140 N. C. 252, 52 S. E. 940), applying the general rule contained in the fourth clause, it was held, among other things: "Negligence having first been established, facts and attendant circumstances may so qualify the obligation to look and listen, as to require the question of contributory negligence to be submitted to the jury, and in some instances the obligation to look and listen may be altogether removed." And the facts relevant are very correctly embodied in the fourth headnote of the case as follows: "Where the testimony of the plaintiff tended to show that his duties by contract with the defendant railroad caused him to work almost on the track and frequently required him to be upon and across it, and that while so engaged he was run over by an engine of the defendant which had come upon him without any warning, and which warning was required both by the custom and rules of the railroad, and that he had just looked and listened both ways, and the way then appeared clear, held, that a nonsuit was erroneous, as the question of contributory negligence must be left to the jury to determine under proper instructions." And the court, in its opinion, said, quoting with approval from *Rodrian's Case*, 125 N. Y. 526, 26 N. E. 741: "But, where one has looked for an approaching train, it would not necessarily follow as a rule of law that he was remediless because he did not look at the precise place and time, when and where looking would have been of the most advantage."

Again, in *Morrow's Case*, 146 N. C. 14, 59 S. E. 158, the same principle was illustrated and applied; the court holding that: "It was not error in the court below, upon the

question of contributory negligence, to refuse a motion as of nonsuit at the close of the evidence which tended to show that, after waiting at the railroad crossing on a public highway for about five minutes for defendant's freight train to pass, the plaintiff immediately proceeded to cross and was struck by a passenger train of defendant going in an opposite direction to the freight; that he did not know of the approach of the passenger train, though he had looked and listened; that the noise and smoke of the freight train, and it being a dark and cloudy evening, about 5 o'clock, with fog arising from the ground, covered with sleet, and there being no lights, prevented him from so doing."

And like ruling was made in *Inman Case*, 149 N. C. 123, 62 S. E. 878; the relevant facts and decision in the case being stated as follows: "(1) While a person who had voluntarily gone on a railroad track, where the view was unobstructed, and failed to look and listen, cannot recover damages for an injury which would have been avoided by his having done so, when the view is obstructed or other existing facts tend to complicate the matter, the question of contributory negligence may become one for the jury. (2) Where there is evidence tending to show that a railroad company has several tracks in a city over which the plaintiff usually went in going to and from his work, and that the view of the track was obstructed, and plaintiff, having listened for warnings he had a right to expect, but which were not given, stepped upon the track and was injured by defendant's train running at a much greater speed than allowed by the town ordinance, and which was unsafe at the place indicated, the question of contributory negligence is properly submitted to the jury. (3) When there is a town ordinance preventing the blowing of locomotive whistles within its limits, the bell should be rung continuously where there are numerous tracks and the conditions and surroundings render the running of trains continuously dangerous to pedestrians."

The same position has been reaffirmed and applied in a case at the present term (*Wolfe v. Railroad*, 70 S. E. 993) where a watchman at a crossing was run on and injured by an engine which gave no signal of its approach, and when the watchman crossing the track in the discharge of his duty was engaged at the time in the effort to prevent a traveler from entering on the crossing under circumstances threatening danger.

[6] An application of these authorities, and the principle upon which they rest, to the facts presented, fully support the ruling of his honor below, in submitting the question of contributory negligence to the jury. There was evidence on the part of plaintiff tending to show that at the precise time of the injury the plaintiff was standing on the main track for trains going north, while a

'ong freight train of defendant company was on the crossing moving south on the main track just ahead. A curve in the track, just below, shut off the view to some extent. The noise of the passing train naturally interfered with his hearing when he was run over and killed by the third or fourth section of a fast freight train carrying fruit to the northern markets. There was evidence, also, on part of plaintiff, to the effect that this train was running at a greater rate of speed than allowed by the city ordinance, and that no signals of its approach were given except the warning emergency blow when in 25 steps of intestate, and an ordinance of the city was also in evidence which prohibited this train from entering on the crossing at all till the freight train on the other track had crossed. In *Inman's Case*, supra, and in *Norton's Case*, 122 N. C. 910, 29 S. E. 886, the existence of a city ordinance, directly bearing on the occurrence, was allowed much weight; the principle being stated in *Norton's Case* as follows: "A city ordinance regulating the rate of speed of a railway train is presumably passed for the protection of the people, and, when within the scope of the city charter, has the force and effect of law, and a citizen has the right to expect that it will be respected and obeyed by the railroad corporation." Under the circumstances, as stated, or evidence tending to establish them, the court, imposing on the intestate the duty of looking and listening for the approach of trains, and being careful for his own safety, properly submitted the question of contributory negligence to the jury, and there is no error in the charge giving the defendant any just ground of complaint. We have quoted from our decisions bearing on the question more at length by reason of a suggestion in argument, at the present term, that they had been modified to some extent by later decisions of the court, notably in *Mitchell's Case*, 153 N. C. 116, 68 S. E. 1059, and *Coleman's Case*, 153 N. C. 322, 69 S. E. 251; but there is no conflict in the cases when properly understood and as applied to the facts existent in each, nor any change in the controlling principle.

Adverting again to the third rule deduced from the authorities in *Cooper's Case*: "That, where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen, and is induced to enter upon a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence"—the same was applied in *Inman's Case*, where a pedestrian, endeavoring to pass over a public crossing, and having his view obstructed, stopped and listened for

the accustomed signals, and, hearing none, he stepped from behind the car onto the track and was run on and struck by an engine which approached without any warning and at a greater rate of speed than allowed by the ordinance. There were "two steps" for him to walk after he came into view of the track, but the case was submitted to the jury, and in *Norton's Case*, supra, the fact appeared that the claimant had his view obstructed, had listened for signals, and was mislead to his injury, by the failure of defendant to give same. It may be well to note that these claimants were not relieved of the duty of properly caring for their own safety as a matter of law; but it was held only that the facts and circumstances attendant on the occurrence so qualified the obligation that the question of their conduct and its effect should be submitted to the jury. In *Coleman's Case* the plaintiff testified, it is true, that he had both looked and listened; but he also stated that he had done this some distance back from the crossing when his view was obstructed by houses, and that he afterwards, in daylight, drove in a buggy, "with curtains buttoned down both sides and back," across an open space of 65 feet, affording full opportunity to see down the track the way the train came for three-fourths of a mile and without any effort to further look or listen. There was nothing here to qualify his obligation to care for his own safety, and recovery was denied. In *Mitchell's Case* a deaf and dumb negro, familiar with the schedule of the trains and a frequenter of the train yards, walking towards the crossing just at the time when a train was scheduled to arrive, stopped where a box car obstructed his view, and then, with 11 feet of clear space, walked across the track, without looking, just as a fast train approached, and was struck and permanently injured. There was no evidence that plaintiff had listened for signals, and, hearing none, was induced to venture on the track for that reason, as in *Inman's Case* and in *Norton's Case*. There was nothing shown to distract his attention. The fact that he was deaf should have quickened his obligation to look more carefully, as held in *Foy v. Winston*, 126 N. C. 381, 35 S. E. 609. Nothing appeared therefore to qualify the duty upon him to care for his own safety, and recovery in that case was also denied.

As heretofore stated, on the precise facts existent in each case, our decisions are in accord on the question presented, and, when properly applied, sustain the trial judge in submitting the question of contributory negligence to the jury.

There is no error, and the judgment is therefore affirmed.

No error.

(155 N. C. 123)

COSTNER et al. v. PIEDMONT COTTON MILLS CO.

Appeal of RUDISILL et al.

(Supreme Court of North Carolina. May 3, 1911.)

1. CORPORATIONS (§ 565*)—INSOLVENCY—CLAIMS—ESTATE—RECOVERY BY TRUSTEE.

A trustee who wrongfully loaned trust funds to a corporation of which he was secretary, treasurer, and director may, on the insolvency of the corporation, recover his pro rata part in the distribution of the corporate assets as against the objection that he and the corporation were in pari delicto.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 565.*]

2. CORPORATIONS (§ 566*)—INSOLVENCY—PRIORITY OF CLAIMS—TRUST ESTATE—RECOVERY BY TRUSTEE.

A trustee who wrongfully loaned trust funds to a borrower who became insolvent was not entitled to any priority in payment over other creditors, though a part of the money was used by the insolvent in the payment of employes, but more than 60 days before the receivership, and in the purchase of coal sold by the receiver, and in the purchase of cotton spun into yarn.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 566.*]

3. SUBROGATION (§ 36*)—RIGHT TO SUBROGATION.

The right of subrogation does not exist in favor of a trust fund which has been wrongfully loaned by a trustee, and the loan is a simple debt, the right of subrogation being merely to subject the indebtedness due the trustee by reason of such loan in priority to other creditors of the trustee, and not to other creditors of the borrower.

[Ed. Note.—For other cases, see Subrogation, Dec. Dig. § 36.*]

4. TRUSTS (§ 356*)—MANAGEMENT OF TRUST ESTATE—RIGHT TO FOLLOW TRUST FUNDS.

The right of a cestui que trust to follow a trust fund exists only against the trustee or a third person who has the fund, or against property bought therewith, and not as against other creditors of one who has borrowed the trust fund and spent it.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 356.*]

5. SUBROGATION (§ 23*)—RIGHT TO SUBROGATION.

Where a trustee who wrongfully loaned trust funds to a borrower who became insolvent paid his cestui que trust, he had no right of subrogation because of any application made by the borrower of the funds borrowed.

[Ed. Note.—For other cases, see Subrogation, Dec. Dig. § 23.*]

Appeal from Superior Court, Lincoln County; Long, Judge.

Proceedings by A. Costner for the allowance of a claim against the Piedmont Cotton Mills Company, an insolvent corporation. From an order allowing the claim, declared a first lien, L. N. Rudisill and another appeal. Reversed and remanded.

A. L. Quickel, for appellants. W. C. Feinster, for appellee.

CLARK, C. J. The plaintiff Costner loaned a trust fund of \$1,400, which he held as

trustee in bankruptcy, to the defendant Cotton Mills Company, of which he was secretary and treasurer and one of the directors. The defendant company, becoming insolvent, was placed in the hands of a receiver, and this is an appeal from the order of the judge allowing the motion made by Costner to have the aforesaid sum of \$1,400 declared a first lien to be paid out of the first proceeds in the hands of a receiver.

[1] The investment of the trust fund by Costner was without the order of any court, and was wrongful. We cannot, however, assent to the proposition of the appellants that the plaintiff is entitled to recover nothing on account of said debt on the ground that the parties are in pari delicto. The defendant company received and used the money, and it would be against good conscience to hold that it is not liable for the debt. It borrowed the money, and used it. It does not lie in its mouth to say now that the plaintiff had no right to lend it. *Wetmore v. Porter*, 92 N. Y. 76; *Zimmerman v. Kinkle*, 108 N. Y. 287, 15 N. E. 407.

[2] On the other hand, we know of no principle upon which the plaintiff who has made a wrongful conversion of trust funds is entitled to any priority in payment over other creditors of an insolvent debtor. This would be to reward him, and save him harmless on account of his own wrongdoing. It is true that part of the money was used by the defendant company in the payment of employes, and a part in the purchase of coal which was sold by the receiver and part in the purchase of cotton, which has been spun up into yarn. The payment of the employes was made more than 60 days prior to the receivership, and, even if there was a right to subrogation, there would be no priority as to that.

[3] But, independent of that, the right of subrogation does not exist in behalf of a trust fund which has been wrongfully loaned by a trustee. It is simply a debt, which, like any other debt, must share in the distribution in its class, and the cestuis que trustent must look to the trustee to recover any shortage in the fund, resulting from his wrongful act. Neither they nor the trustee can recoup themselves for any loss at the expense of the other creditors of the debtor.

[4] The right of a cestui que trust to follow the fund exists only against the trustee himself or a third party who has the fund in hand or against the property bought therewith. This right does not exist as against the other creditors of one who has borrowed the money and spent it. The right of subrogation is to subject the indebtedness due the trustee by reason of such loan in priority to other creditors of the trustee, but not in priority to other creditors of the debtor to the trustee.

[5] Here there can be no subrogation for

the further reason that Costner has paid his cestui que trust, and he has no right of subrogation because of any application made by the borrower of the money borrowed. His rights certainly are no greater nor less than if he had loaned his own money.

The judgment must be set aside and the cause remanded, to the end that the debt may receive its pro rata part in the distribution of the assets of the insolvent corporation in the debts of its class.

Reversed.

(155 N. C. 90)

SHELL v. ROSEMAN.

(Supreme Court of North Carolina. May 3, 1911.)

1. FRAUD (§ 20*)—MISREPRESENTATIONS CONCERNING QUANTITY OF LAND—RIGHT TO RELY.

A purchaser's right to recover damages for misrepresentation that land contained 108 or 113 acres, whereas it actually contained 88 acres only, is not defeated because the corners afterwards embraced in his deed were shown to him.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

2. FRAUD (§ 20*)—RELIANCE ON MISREPRESENTATIONS.

A purchaser of land must guard himself against defects in title, quantity, and incumbrances, and has no legal remedy for damages where he is guilty of negligent failure to use proper diligence; but he can recover for misrepresentations by the vendor, reasonably relied upon and constituting a material inducement to the contract, if they were false to the vendor's knowledge, and caused damage to the purchaser, and if the latter has acted with ordinary prudence.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

3. FRAUD (§ 58*)—MISREPRESENTATIONS—EVIDENCE—SUFFICIENCY.

Evidence held to show fraudulent misrepresentations by a vendor concerning quantity of land sold, affording an action for deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

4. EVIDENCE (§ 588*)—INCONSISTENT STATEMENTS OF WITNESS—EFFECT.

A witness' statement on cross-examination as to a material matter, conflicting with his testimony in chief, affects his credibility only, and does not warrant withdrawing his evidence from the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.*]

Appeal from Superior Court, Iredell County; J. S. Adams, Judge.

Action by John W. Shell against M. I. Roseman. Judgment for plaintiff, and defendant appeals. Affirmed.

This action is to recover damages for a false and fraudulent representation in the sale of land. The plaintiff offered evidence tending to prove that the defendant agreed to sell him a tract of land, known as the Christopher place, for \$1,600; that the plaintiff did not know the boundaries of this place; that the defendant agreed to have

the land surveyed before the deed was made, and to notify the plaintiff, so that he might be present at the survey; that the defendant had the survey made, but gave no notice to the plaintiff, and by the survey there were found to be 108 acres in the Christopher place, and 88 acres in the deed afterwards made to the plaintiff; that after the survey the defendant showed the plaintiff certain corners and made the deed according to those corners, but did not show him the corners of the Christopher place, and did not tell him the corners shown to him did not embrace all of the place; that the defendant made the deed to the plaintiff, conveying 88 acres, a part of the Christopher place, and in the deed it is stated that it contains 113 acres, more or less, and the plaintiff swears: "I relied on his (defendant's) statement that Exhibit B (the deed made by defendant to the plaintiff) covered all of the Christopher place, and that there were 113 acres." There was evidence to the contrary, and on cross-examination the plaintiff said: "I don't remember his telling me how many acres there were in the tract. It was always spoken of as 113 acres." There was a verdict for the plaintiff, and the defendant appealed.

W. D. Turner and J. B. Armfield, for appellant.

ALLEN, J. The defendant relies on two exceptions in his brief, and all others are waived. The first is to the refusal to charge that there was no evidence of fraud, and the second to failure to give the following instruction: "If the jury shall find from the greater weight of the evidence that, before the delivery and acceptance of the deed from the defendant to plaintiff, the plaintiff and the defendant went upon and looked over the land, and that the defendant, Roseman, showed to the plaintiff, Shell, the lines and corners of the land defendant was selling to plaintiff, and if the jury shall further find from the greater weight of evidence that the deed delivered by Roseman and accepted by Shell covered the identical lands so pointed out, and the identical lines and boundaries, and that the plaintiff, at the time of the acceptance of the deed, knew what land he was getting and the lines and boundaries thereof, then you will answer the second issue, 'No.'"

The two exceptions present only one question for determination, and that is, was there evidence of fraud, fit to be submitted to the jury, because the facts embodied in the prayer, the basis of the second exception, were admitted by the plaintiff; and if, upon these facts, in connection with the other evidence, the jury must answer the second issue, "No," there was no evidence of fraud.

[1] We do not think it was necessarily fatal to the action of the plaintiff that the corners, afterwards embraced in his deed, were shown to him. If he had known the

corners of the Christopher place, or had known there were only 88 acres within the lines shown him, he could not recover, because under these circumstances he would not have been misled, but there is no evidence that he knew either of these facts, and it is requiring too much to say he must have known the acreage, because he saw the land and knew the corners. Men of intelligence and experience will frequently differ widely as to the acreage of a tract of land of 70 or 100 acres, and the fact that one has relied on a statement that there are 108 or 113 acres in a tract of land containing 88 acres, which he has seen, would not be such negligence as would defeat a recovery, particularly when it is known that the party making the statement has recently surveyed the land.

[2] The rule applicable to cases like this is clearly and accurately stated in *Etheridge v. Vernoy*, 70 N. C. 724: "In all contracts for the sale of land, it is the duty of the purchaser to guard himself against defects of title, quantity, incumbrances, and the like; and if he fails to do so it is his own folly, for the law will not afford him a remedy for the consequences of his own negligence. 'If, however, representations are made by the bargainor, which may reasonably be relied upon by the purchaser, and they constitute a material inducement to the contract, and are false within the knowledge of the party making them, and cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief.' And this is approved in *Woodbury v. Evans*, 122 N. C. 781, 30 S. E. 2. The same principle is stated in reference to a contract for the sale of land in *Foy v. Houghton*, 85 N. C. 173: "If there is, on the part of the vendor, any act of actual misrepresentation, or other positive fraud, in regard to a material matter reasonably relied on, then the purchaser will be afforded relief; otherwise the maxim, *caveat emptor*, applies in all courts, whether of law or equity."

[3] Guided by these authorities—and many others could be cited to the same effect—we think there was evidence of fraud, and it was for the jury to determine its reliability. There was evidence that the defendant agreed to sell the plaintiff the Christopher place for \$1,600, and represented that there was an acreage of 113 acres; that he agreed to have the land surveyed and to notify the plaintiff of the time of the survey that he might be present; that he had the land surveyed, but did not notify the plaintiff, who was not present at the survey; that by the survey he found that the Christopher place contained 108 acres, and that he ran a line cutting off about 20 acres of the place; that he took the plaintiff to the land and showed him the corners of the land which he embraced in his

deed, containing 88 acres; that he represented these corners to be the corners of the Christopher place, and did not tell the plaintiff he had cut off the 20 acres; that after the survey he represented that there were 113 acres in the deed he made to the plaintiff, and that he so stated in the deed; that the plaintiff did not know the boundaries of the Christopher place, nor the acreage of the place conveyed to him, and relied on the representations of the defendant.

If so, there was evidence that the defendant made a representation which was material to the contract, false within his knowledge, and relied on by the plaintiff, and, we think, not unreasonably relied on, in view of the fact that the plaintiff knew that the land had been surveyed for the defendant a few days before. We attach much importance to this circumstance, as it distinguishes this case from those where there is an expression of opinion or a statement as to the supposed acreage of a tract of land, which could not be made the basis of a cause of action.

[4] We are not inadvertent to the fact that the plaintiff made a statement on cross-examination, as to a material matter, apparently in conflict with his evidence when examined in chief, but this affected his credibility only, and did not justify withdrawing his evidence from the jury. *Ward v. Manf. Co.*, 123 N. C. 252, 31 S. E. 495. The meaning of the statement itself, as presented in the record, is not very clear, when considered in connection with the sentence which follows. If the plaintiff had stated on cross-examination that he was mistaken as to some statement made on his first examination and wished to correct it, the rule would be different.

We find no error.

No error.

(155 N. C. 96)

BONEY v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. May 8, 1911.)

1. EVIDENCE (§ 535*)—OPINION EVIDENCE—ADMISSIBILITY.

In the absence of a finding or admission that a witness is an expert, the exclusion of a question calling for expert testimony is not erroneous.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 535.*]

2. EVIDENCE (§ 493*)—OPINION EVIDENCE—SUBJECT-MATTER.

The opinion of a witness, not present at the accident, is not admissible as to what would have been the effect on a train and its engineer, if the latter had only been running six miles an hour, as the rules required, when he ran into a train slowly moving in the same direction, trying to get out of the way; the jury being equally competent to form an opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2275-2282; Dec. Dig. § 493.*]

3. APPEAL AND ERROR (§ 1032*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR—BURDEN OF SHOWING PREJUDICE.

A party complaining of the exclusion of a question asked a witness, who does not show what the answer would have been, does not show that he was prejudiced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

4. MASTER AND SERVANT (§ 296*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In an action for the death of a servant, requested instructions submitting the issue of decedent's contributory negligence are properly modified by adding the element that the acts relied on to show contributory negligence must have been the proximate cause of his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1193; Dec. Dig. § 296.*]

5. MASTER AND SERVANT (§§ 265, 291*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—ISSUES.

A defendant, in an action for the negligent death of a servant, must allege and prove contributory negligence, and instructions on contributory negligence must be limited to the facts alleged and proved.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 908; Dec. Dig. §§ 265, 291.*]

6. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—QUESTION FOR JURY.

Where, in an action for the death of an engineer running into an open switch and colliding with a train, the evidence showed that the injury occurred in the nighttime in a railroad yard where there were numerous tracks and switches, the question whether by ordinary care decedent could have discovered the absence of any light at the switch in time to have stopped the train was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

7. MASTER AND SERVANT (§§ 235, 289*)—INJURY TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

An engineer running a first-class train on the main line may assume that the company has performed its duty to have the track through its yard clear five minutes before his train reaches a switch, and that if there is danger that it will turn the danger signal to the main line, and whether such an engineer, who knew that there was no light at a switch and who did not stop his train, failed to exercise ordinary care was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. §§ 235, 289.*]

8. MASTER AND SERVANT (§§ 247, 248*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The negligence of a servant is not contributory negligence defeating an action for his death, unless it is the cause of the accident, or unless the master, by the exercise of ordinary care, could not have averted the injury, notwithstanding the servant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795-804; Dec. Dig. §§ 247, 248.*]

9. MASTER AND SERVANT (§ 296*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

Where, in an action for the death of an engineer running into an open switch and colliding with another train, the evidence showed that an employé was at the switch and knew it was broken when decedent's train was 1¼

miles distant, that the employé could have turned the red light to the main line, but failed to do so, and that if he had done so the engineer could have seen it in time to have stopped the train, that the rules of the company provided that the absence of any light at a switch was notice of danger, and that the engineer did not regard the rule, there was evidence from which it might be found that the negligent failure to display the red light at the switch was the proximate cause of the accident, notwithstanding the absence of any light at the switch, and the engineer's failure to consider that fact as notice of danger, warranting the refusal of an instruction that disobedience of the rules would be contributory negligence barring recovery for the engineer's death.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.*]

10. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

One relying on contributory negligence must prove facts from which the inference of contributory negligence must be drawn by men of ordinary reason.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.*]

11. MASTER AND SERVANT (§ 285*)—INJURY TO SERVANT—NEGLIGENCE—RES IPSA LOQUITUR.

That an engineer ran his train into an open switch and collided with another train raised a presumption of actionable negligence of the railway company, justifying the jury in finding negligence, unless satisfied on all the evidence that there was none.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 881; Dec. Dig. § 265.*]

12. MASTER AND SERVANT (§ 296*)—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

Where there is evidence that, though a servant was negligent, the master had the last clear chance to avoid injuring him, the court must submit the issue of liability of the master on the theory of last clear chance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1194; Dec. Dig. § 296.*]

13. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE.

In an action for the death of an engineer running his train into an open switch and colliding with another train, evidence held to justify a finding of actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

14. MASTER AND SERVANT (§ 281*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action for the death of an engineer running his train into an open switch and colliding with another train, evidence held to justify a finding that the light giving notice of safety was turned on the main line, so that the rule of the company that the absence of a light must be regarded as a stop signal did not affect the right of recovery.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 281.*]

Walker and Brown, JJ., dissenting.

Appeal from Superior Court, Duplin County; Whedbee, Judge.

Action by E. Boney, administrator of G. W. Boney, deceased, against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for the killing of the plaintiff's intestate by the defendant.

The plaintiff alleges that his intestate, G. W. Boney, was in the employment of the defendant as engineer, and that he was killed on the main line of the defendant near South Rocky Mount, while on duty, at 2:30 o'clock, a. m. of November 6, 1907, by running into an open switch and coming in collision with another train. The plaintiff alleges various acts of negligence on the part of the defendant. The defendant denies that it was negligent, but admits that the intestate was killed while on duty in the manner alleged.

The defendant also pleads contributory negligence as follows: For a further defense:

First. That the plaintiff's intestate was a locomotive engineer, and at the time of his death was engineer on a passenger train running from Florence, S. C., to Rocky Mount and beyond; that the printed schedule containing the time-table of the defendant's different trains, and also the rules and regulations to be observed by conductors and engineers running their several trains, are furnished when issued to all of its conductors and engineers; that the time-table and schedule which was in force and effect at the time mentioned in the complaint was numbered 10 and went into effect September 15, 1907, at one minute past 12 a. m.; that this schedule or time-table contained the following rules and regulations: "*All trains passing through Rocky Mount and South Rocky Mount will approach passenger station at Rocky Mount, N. & C. main line crossover, crossover at Bassett street telegraph office, South Rocky Mount and middle yard crossover, under full control, expecting to find tracks occupied. Trains will not exceed six miles per hour passing these points.*" That the collision mentioned in the complaint happened at one of the points mentioned in the said rules above quoted. A copy of this schedule containing the said rules and regulations was duly given and furnished to the plaintiff's intestate at the time or before the said schedule and regulations and rules went into effect, and it was his supreme duty to inform himself of all rules and regulations and the time-table applying to his district, and in particular to carefully obey and comply with the rules and regulations above quoted. That in addition to this the following rule was issued from the transportation department: "*Rocky Mount, N. C., Sept. 9, 1907. Bulletin No. 18. C. & E. and All Concerned: All trains passing Rocky Mount and South Rocky Mount will approach passenger station at Rocky Mount, N. & C. main line crossover, crossing at Bassett street telegraph office, South Rocky Mount and middle yard crossover, under full control, expecting to find track occupied. Trains will not exceed six miles per hour passing these points.*" W. B. Darrow, Superintendent Transporta-

tion. Richmond, Manchester, Weldon, Rocky Mount, South Rocky Mount, Pinners Point, Tarboro, Contentnea, Wilmington, Florence, Selma."

Second. Defendant further alleges that the plaintiff's intestate was guilty of negligence which directly contributed to bring about the injury complained of in the complaint, in that the plaintiff's intestate, while approaching the point where the accident occurred, was given the danger or stop signal by waving a lantern in the usual manner and acknowledged the same with his whistle, but failed to stop his train in time to avoid the accident; that if plaintiff's intestate had obeyed the instructions given in the schedule or time-table and bulletin herein above mentioned he could have stopped his train in time to have avoided the accident, but that at the time he was disobeying and violating the said rules and regulations and instructions aforesaid, and running at a very high rate of speed between 40 and 50 miles per hour.

The following facts seem to be undisputed: (1) That the intestate was running a first-class passenger train, as engineer, at the time he was killed, on the main line of defendant; that the train was going north and the track was straight for more than two miles. (2) That he was killed by running into an open switch, and colliding with another train. (3) That as he approached the switch his train was running at the rate of 30, 35, or 40 miles an hour. (4) That the rules of the defendant required him to approach this switch at six miles an hour. (5) That a switch lamp was maintained at this switch, with a white and red light, and when the white light was turned to the track it indicated safety, and that the switch was all right for the main line, and the red light indicated danger. (6) That the following rules were in force:

"Rule 13, page 15. Any object waved violently by any one on or near the track is a signal to stop." "Rule No. 934. They (engineers) must have a copy of the current time-table, to which they must conform in running their trains, and a full set of signals which they must keep in good order and ready for immediate use." "Rule 27. A signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a stop signal, and the fact reported to the superintendent." "Rule 7, page 14. Employees whose duty may require them to give signals must provide themselves with proper appliances, keep them in good order and ready for immediate use." "Rule 91a, page 31. The speed of a train would ordinarily be that of its schedule, but in cases of delay, may be so moderately increased as in the judgment of the engineer and conductor will be safe and prudent, due consideration always being given to condition of track, weather and all circumstances." "Rule 93, page 32. Within yard limits the

main track may be used, protecting against third and fourth class trains. Third and fourth class and extra trains must move within yard limits prepared to stop, unless the main track is seen or known to be clear. Rule 93a, page 32. Engines working within yard limits must clear the time of first-class trains five minutes. Enginemen must know that switches are properly set before they attempt to pull in or out of siding." "B-72. Trains of the first class are superior to those of the second; trains of the second class are superior to those of the third, and so on."

(7) That the switch track led from the switch at which the intestate was killed on the main line, to what is called the "lead track," which ran about parallel with the main line. (8) That as the train on which the intestate was approached the switch (the distance from it being in dispute) another train of the defendant was on the lead track. (9) That this last train consisted of an engine and 15 cars of coal; that the cars were in front of the engine, and the engine was running backwards. (10) That it was the intention of the defendant for this train to remain on the lead track, but when it reached the switch going from the lead track to the main line, this switch was open or out of fix, and the train passed through the switch, across the switch track, through the switch to the main line and on the main line, and as the intestate was approaching it ran back on the switch track, where the collision occurred. (11) That the switch at which the intestate was killed was in the yards of the defendant at South Rocky Mount, and that there were numerous tracks and switches in said yards.

The facts in dispute relate to the condition of the switch at the main line; the condition of the lights at this switch; the conduct of the conductor, named Cole, in charge of the train that came from the lead track, after he discovered the switch at the main line was open; the distance from the switch, at that time, of the train on which the plaintiff's intestate was running, and the conduct of the plaintiff's intestate.

The plaintiff contends: (1) That the switch at the main line was broken, and that the defendant has given no satisfactory explanation why it was so. (2) That if the explanation of the defendant is accepted, that it was caused by the engine and cars running from the lead track, that this would not excuse the defendant, because the engine and cars could not have reached the switch at the main line but for the negligent act of the defendant in permitting the switch at the lead track to be open, or out of fix. (3) That a white light was turned to the main line, indicating safety, or there was no light at the switch, and the purpose of lights at the switch is not only to show its condition, but also its location. (4) That at the time the conductor, Cole, discovered the switch was broken he was at the switch,

and the plaintiff's intestate was distant $1\frac{1}{4}$ miles; that he (Cole) could then have turned the red light to the main line, and if he had done so it would have been seen, and the train on which the intestate was could have been stopped. (5) That, instead of doing so, he waited until the intestate was in 25 yards of the switch before he gave any signal, and when he did so it was by waving a lantern some distance from the track, and not across it.

The defendant contends: (1) That it explained the breaking of the switch; that it was broken a few minutes before the plaintiff's intestate was killed by the train coming from the lead track, and was the result of an accident. (2) That there is no evidence that it was negligent in leaving the switch at the lead track open, but if this was a negligent act, it was remote, and not the cause of the death of the plaintiff's intestate. (3) That there is no evidence that the white light was turned to the main line, and if there was no light at the switch this was notice to the plaintiff's intestate to stop, under the rules of the defendant. (4) That at the time the defendant's conductor, Cole, discovered the switch was broken the plaintiff's intestate was one-fourth mile from the switch, and if he (Cole) had then turned the red light on the main line, it would have been too late to stop the train. (5) That the conductor, Cole, did all that a prudent man could do to avert any injury; that he waved his lantern across the track; that this was a danger signal, and if it did not cause the train to stop a red light would not have done so. (6) That the plaintiff's intestate was running in violation of the rules of the defendant, and this was the cause of his death.

The material parts of the evidence are stated, but not all of it. J. C. Mercer testified that he was police for defendant on its yards; that he went to the switch at 8 o'clock a. m. of November 6, 1907; that he examined the switch; nothing was broken, except the rod which throws the switch; that he tried to operate it, and it would not throw the switch, *but would turn the lamp; that the white glass was turned to the main line.*

H. T. Cole, the conductor, testified: "As soon as I discovered that switch was broken, I ran down the track of the main line to flag No. 82 (Mr. Boney's train), and he was blowing the station blow when I signaled him down by stop signal, and he answered my signal by two short blasts, which was an answer to my signal, and understood that he knew what I meant, and then I stepped aside, and he ran into the yard. Our train was then moving ahead, trying to get out of the way. Mr. Boney was a good quarter of a mile when he answered my signal. I was 25 yards from the switch down the track towards Mr. Boney's train. He could have seen me for two miles signaling him down.

It was 75 yards from where switch left main line to where train collided with our train. *The wheels of my engine broke the rod which controlled the switch.* * * * Boney blew the station blow and then immediately blew the two short blasts, answering my signal. I got away far enough to keep myself from harm. I did not have time to get a red light and signal with, after I saw Boney's train was coming. I did not display any red light. I knew train was coming when I told engineer. It was an accident that we were out on the main line. We were trying to go on the lead, but got out on the main line. The switch which let us on the crossover from the lead to the main line had been left open or was out of fix, so that instead of going on the lead we went on the switch which goes into the main line, then went on the main line. That is, the engine went on the main line, and the switch at this point had the rod broken (that is, the switch at the main line). The only thing I know was when I got there the rod was broken, and I know of no other way it could have been broken, except by my engine. I mean by that the engine I was using. I did not see the engine break it; but the engine had just got on the switch point at the main line just far enough to break the rod."

William Andrews testified: "I am fireman for defendant and have been for six years. Was on engine at the time of the accident. I was coming back deadhead to Rocky Mount from Fayetteville, to which point I had fired another train. I had run extra on this run for two years. Just as we got 1¼ miles of South Rocky Mount Station, Mr. Boney blew one long blast. That was station blow, and when he got within one mile of station, some one waved a white lantern, but not across the main line. He waved it across his body. I knew what that meant. The signal was to stop. Mr. Boney shut off the steam. The man who gave the signal was 25 yards from the main line to one side. I do not know who he was signaling to. The yard engine blew Mr. Boney, and he then blew two short blasts, and then he applied emergency brakes and stood up and reversed the engine. The switch is at the middle crossover. *Mr. Boney was 25 yards from the switch when he answered the signal by two blasts, and was in the switch or entering the switch when he put on emergency brakes.* Mr. Boney was running 35 to 40 miles an hour when he turned off steam. * * * *Mr. Boney was 1¼ miles from switch when he blew the signal station blow, and then he shut off the steam.* I was looking over Mr. Boney's shoulder. It was usual for them to have lights at switch, but I did not see any. *If there had been a red light at the switch, Mr. Boney could have seen it in time to stop at the rate his engine was going.* I do not know whether the man was signaling with a lantern, was signaling a train on the switch in the yard to stop, or

signaling the train we were on." Two or more witnesses testified that they saw no light at the switch.

The issues and the responses thereto are as follows: "First. Was the plaintiff's intestate killed by the negligence of the defendant as alleged in the complaint? Answer: Yes. Second. Did plaintiff's intestate by his own negligence contribute to his own death? Answer: No. Third. What damage is plaintiff entitled to recover of the defendant? Answer: \$10,000." The defendant appealed.

Davis & Davis and Stevens, Beasley & Weeks, for appellant. Herbert McClammy, J. O. Carr, and George Rountree, for appellee.

ALLEN, J. (after stating the facts as above). The first and second exceptions are to the refusal to allow a witness for the defendant, J. M. Donlan, an engineer, to answer the following questions: First. If the jury shall find from the evidence that Mr. Boney's train had been running at six miles per hour at the time it collided with the train, and the other train with which it collided was running slowly in the same direction, what would have been the effect on the train and engine on which Mr. Boney was riding? Second. If the jury shall find from the evidence that the engine and train which were being driven by Mr. Boney had been running at the speed of six miles per hour, or less, at the time it struck the train of Conductor Cole, what would have been the effect of such collision, and how greatly would it have damaged the train and imperiled the lives of those on board?

[1] We do not think the ruling was erroneous. If the questions were asked of the witness as an expert, there is no finding or admission that the witness was an expert. As was said by Justice Manning, in *Lumber Co. v. Railroad*, 151 N. C. 220, 65 S. E. 920, 922: "We cannot assume that his honor, in this view, found the witness to be an expert, and then excluded the question and answer. In order that the witness might testify when objection is made, there must be either a finding by the court, or an admission or waiver by the adverse party that the witness was so qualified."

[2] The questions were also not permissible to elicit the opinion of the witness, as he was not present at the time of the occurrence, and the jurors were as competent to form an opinion upon the facts as he. *Taylor v. Security Co.*, 145 N. C. 385, 59 S. E. 139, 15 L. R. A. (N. S.) 583; *Wilkinson v. Dunbar*, 149 N. C. 20, 62 S. E. 748.

[3] Again it does not appear that the defendant has been prejudiced by the refusal to permit the questions to be answered, as it is not shown in the record what would have been the answer of the witness, or what the defendant expected to prove by him.

[4] The fourth, fifth, and sixth prayers for instruction, requested by the defendant, were as follows:

"Fourth. If the jury shall find that Boney was running his train at a greater rate of speed than six miles per hour at the time he passed the switch, then he was guilty of contributory negligence, and the jury will answer the second issue, 'Yes.'"

"Fifth. If the jury shall find that Boney did not obey the rule set forth in the timetable that he must approach the middle yard crossover and the switch where the accident occurred with his train under full control and expecting to find the track occupied, but in disregard of this rule approached the said switch and crossover without having his train under full control, then he was guilty of contributory negligence, and the jury must answer the second issue, 'Yes.'"

"Sixth. Even though the jury shall find that the defendant was guilty of negligence, yet if they shall also find that Boney did not obey the rule set forth in the timetable as to the rate of speed and manner in which he should approach the middle yard crossing and switch where the accident occurred, then he was guilty of contributory negligence, and the jury must answer the second issue, 'Yes.'"

His honor gave these instructions, except he added to each the element of proximate cause, which we think he ought to have done. The question of proximate cause will be considered in discussing other exceptions appearing in the record. The defendant relied principally on its motion to nonsuit, and the exceptions to the refusal to give the following instructions:

"Seventh. That if the jury shall find from the evidence that at the time No. 82, the train being run by Boney, deceased, was approaching the switch into which he ran and the switch had no lights, either red or white, and Mr. Boney knew there were no lights, either red or white, as a signal at the switch at the time, and he failed to slacken his speed and stop his engine, then he was guilty of contributory negligence, and the jury will answer the second issue, 'Yes.'"

"Ninth. That it was the duty of Mr. Boney, engineer, to know the situation and location of the switches leading into the main line of the South Rocky Mount yards, and to observe whether the said switches were lighted and the signals indicated by it, and if the jury shall find from the evidence that the switch lamp at the place of accident was not lighted, either with red or white lights, then it became the duty of Mr. Boney, deceased, to stop his engine and ascertain the cause, and to ascertain if it was safe to pass over the track at that point, and if he failed to do so he was guilty of contributory negligence, and the jury will answer the second issue, 'Yes.'"

There are several reasons for refusing to give these instructions.

[5] 1. The answer does not allege that the plaintiff's intestate was guilty of contributory negligence, in that he failed to perform the duties imposed upon him in the instructions, and a defendant must allege and prove contributory negligence. *Stewart v. Railroad*, 137 N. C. 690, 50 S. E. 312. A liberal construction of the answer discloses that it alleges two acts of contributory negligence, and no other: (1) That the intestate was disobeying a rule by running in excess of six miles an hour. (2) That he failed to stop when the lantern was waved.

[6] 2. The instructions imposed the duty, without qualification, to know the exact location of the switch, in the absence of a light, and to note that the light was not there. The injury occurred in the night on a yard of the defendant where there were numerous tracks and switches, and it was for the jury to say, under these circumstances, whether he could, by the exercise of ordinary care, have discovered the absence of a light in time to stop the train.

[7] 3. They omit the rule of the prudent man. If the intestate knew there was no light at the switch, he also knew that he was running a first-class train on the main line, and that it was the duty of the defendant to have the track clear five minutes before his train reached the switch, and if there was danger to turn the red light to the main line. He had the right to assume that these duties would be performed, and under the circumstances the question was raised as to whether he acted as a man of ordinary prudence, which it was for the jury to decide. The instructions require the court to decide, as matter of law, that the facts embodied in them constitute contributory negligence.

[8] 4. They omit the element of proximate cause. If the intestate knew there was no light at the switch and was running in excess of six miles an hour, he was negligent, but it is not every act of negligence, on the part of a plaintiff, that is contributory negligence in its legal sense. It is not contributory, unless it is the real cause of the injury; nor is it so if the defendant, by the exercise of ordinary care, can avert the injury, notwithstanding the negligence of the plaintiff.

[9] There was evidence that an employé of the defendant was at the switch and knew it was broken when the plaintiff's intestate was distant $1\frac{1}{4}$ miles; that this employé could have turned the red light to the main line, and failed to do so; that if he had done so it could have been seen in time for the intestate to stop his train at the rate he was going. If so, there was evidence that the failure to turn the red light to the main line was the proximate cause of the death of the intestate, and that, notwithstanding the negligence of the plaintiff in

falling to stop, if he knew there was no light at the switch, that the defendant, by the exercise of ordinary care, could have averted the injury. It may be said that under the rules of the defendant the absence of a light at the switch is notice of danger, and that if the intestate did not regard this the display of a red light would not have caused him to stop. There is force in this view, but there may be a difference of opinion as to the conclusion. We think it would not be unreasonable to accept the other view, and conclude that if the intestate knew there was no light at the switch he also knew it was the duty of the defendant to keep the track clear five minutes before his train reached the switch, and to display the red light, if there was danger; and knowing these facts he might proceed, in the absence of a light, when he would not do so in the face of a red light, giving positive notice of danger. The absence of a light would ordinarily indicate nothing except a failure to light the lamp; while a red light is a signal of danger.

[10] "The law does not presume contributory negligence. It must be alleged and proven, and the defendant must show such facts, either omissions of such cautions or the doing of such acts, from which only one inference, to wit, the plaintiff's negligence, can be drawn by men of ordinary reason and intelligence." *Farris v. Railroad*, 161 N. C. 489, 66 S. E. 457, 459.

[11] We also conclude that the motion to nonsuit ought to have been denied. The open switch and the collision raise a presumption of negligence (*Stewart v. Railroad*, 137 N. C. 689, 50 S. E. 312, and cases there cited), and where such a presumption is raised, or a prima facie case is established, the jury is justified in finding negligence, unless "satisfied upon all the evidence in the case that in fact there is no negligence," as was said by Justice Walker, at this term, in *Kornegay v. Railroad*, 70 S. E. 731. There is also other evidence of negligence on the part of the defendant; two switches open or broken; the failure to maintain lights at the switch; the failure to keep the track clear; and the failure to notify the plaintiff's intestate of danger, as he approached the switch. There is also evidence of negligence on the part of the intestate.

[12] Under these circumstances, the fact upon which the decision of the case turned was proximate cause, and if there was a phase of the evidence that would justify the jury in finding that, although the plaintiff was negligent, the defendant had the last opportunity, the last clear chance to avoid the injury, it was the duty of the judge to submit the question to them. *Edge v. Railroad*, 153 N. C. 215, 69 S. E. 74, and cases there cited. We have seen that the evidence presented this question.

[13] The jury could find from the evidence that an employé of the defendant was at the

switch, and knew it was broken, and appreciated the danger to the approaching train when it was distant $1\frac{1}{4}$ miles; that he could have turned the red light to the main line in an instant, and that this would have been a warning of danger; that he failed to do so; that if he had done so the plaintiff's intestate could have seen the red light in time to stop the train before it reached the switch; that, instead of doing so, he gave no signal until the train was in 25 yards of the switch, and then, by waving a lantern some distance from the track, and not across it; and, if so, the jury could find that the negligence of the defendant was the proximate cause of the death of the intestate.

[14] The jury could also reasonably find from the evidence that rule 27, saying that "the absence of a signal at a place where a signal is usually displayed must be regarded as a stop signal," did not affect the right to recover, because there was evidence that there was a light at the switch, and that the white light, a notice of safety, was turned to the main line. The plaintiff's intestate was killed about 2 o'clock a. m. J. C. Mercer, a witness for the defendant, testified that he went to the switch at 8 o'clock a. m., and that the white glass was turned to the main line. Between 2 o'clock and 6 o'clock the switch, lamps, and yards were in the possession and under the control of the agents of the defendant, and no witness was produced to show any change in conditions, or that the lamp was touched after 2 o'clock, after the time Mercer saw the white glass turned to the main line.

The case was submitted to the jury with great care and the contentions of the defendant were fairly presented. The presiding judge, among other things, charged the jury:

"If the jury shall find that witness Cole waved his lantern across the track of the approaching train of which Boney was engineer, and Boney saw the signal, or with the exercise of ordinary care could have seen it, it was his duty to have stopped the engine, and, if he could have done so in time to avoid his injury, then he was guilty of contributory negligence, and the jury will answer the second issue, 'Yes.'"

"If the jury shall find that Boney was running his train at a greater rate of speed than six miles per hour at the time he passed the switch, and shall further find that this was the proximate cause of the injury, then he was guilty of contributory negligence, and the jury will answer the second issue, 'Yes.'"

"If the jury shall find that Boney did not obey the rules set forth in the time-table, that he must approach the middle yard cross-over and the switch where the accident occurred with his train under full control and expecting to find the track occupied, but in disregard of this rule approached the said

switch and crossover without having his train under full control (and this was the proximate cause of the injury), then he was guilty of contributory negligence, and the jury must answer the second issue, 'Yes.'

"Even though the jury shall find that the defendant was guilty of negligence, yet if they shall find that Boney did not obey the rules set forth in the time-table as to the rate of speed and manner in which he should approach the middle yard crossing and switch where the accident occurred (and this was the proximate cause of the injury), then he was guilty of contributory negligence, and the jury must answer the second issue, 'Yes.'"

We have examined each exception and find no error.

No error.

WALKER, J. (dissenting). Without discussing other rulings of the court which I think were erroneous and entitle the defendant, at least, to a new trial, I will notice a few which go to the very root of the case, and, in my opinion, are palpably wrong and work great injustice to the defendant.

A railroad company would be grossly derelict in its duty, both to the public and its employees, if it failed to adopt such rules and regulations for the running and operation of its trains as make for safety, and it follows that the servant, for whose guidance in the discharge of his important and hazardous duties these rules are made, must obey them, and if he fails to do so, and is himself injured by reason of his disobedience, he is to be regarded in law as the author of his own injury, and if thereby he injures others the railroad company is liable to them, under the rule respondent superior, and he is liable to the company for all damages caused by his negligence. *Holland v. Railroad*, 143 N. C. 435, 55 S. E. 835; *Haynes v. Railroad*, 143 N. C. 154, 55 S. E. 516, 9 L. R. A. (N. S.) 972. The intestate's death was caused, not by the negligence of the defendant, but by his own glaring disobedience of express orders and regulations, which, if observed, would have carried him on his train safely to his destination. He was not only disobedient, but his conduct was reckless, and, in consequence of it, he rode to his death. I think this appears from the plaintiff's evidence and the undisputed facts. The tragedy is regrettable, but the law must be administered with cold neutrality. With slight change, we may well repeat what we said in *Holland v. Railroad*, supra: "The intestate was the one to whose keeping had been committed the safety of his comrades in the company's service (of the passengers on the train) and of his employer's property, and he was more responsible for it than any one else. He failed in the performance of his duty at the very moment when his obedience to orders and his vigilance were most required to prevent the resulting catastrophe. His negligence was ever

present and the efficient and, indeed, the dominant cause of his injury and death, reaching to the effect, and therefore proximate to it. To subject the defendant to a recovery in such a case does not seem to be equitable, and would certainly contravene established principles of law. Plaintiff's death was caused, not by the defendant's negligence, but by his own disobedience of instructions." If a servant disregards the express directions of his master, and pursues his own way in performing his duties, the resultant injury to himself, if any, the law imputes to his own willful or negligent act, as the proximate cause, if not the only cause thereof. *Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17; *Hicks v. Manufacturing Co.*, 138 N. C. 319, 50 S. E. 708; *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562; *Biles v. Railroad*, 139 N. C. 532, 52 S. E. 129. The intestate simply did something which he was told not to do. He substituted his own will for that of his employer, and his case falls within the maxim, "volenti non fit injuria." *Patterson v. Lumber Co.*, 145 N. C. 42, 58 S. E. 437. These principles are directly applicable to this case.

1. I think the motion to nonsuit should have been granted, and for the following reasons: I will assume in the beginning that the red light was not displayed at the switch, and there is no evidence that the white or safety light was, so that the case must be considered as if there was no light. But that of itself is made a signal of danger, as much so as if the red light had been shown, and the duty of the intestate, by the very terms of the rule, was to stop his train. This was the mandate of the rule, as much so as if there had been a red light there to warn him of danger. The order was not even to slow down or bring his train under control, but to stop at once, and herein is to be found the error in the opinion of the court as to proximate cause. If he had obeyed the rule and stopped, seeing that there was no light at the switch, the accident would have been a physical impossibility, for two trains, one at rest and the other moving away from it, could never collide. This is so very evident that I presume the court should take judicial notice of it. It is as much an axiom in physics, as that a man cannot be in two widely separated places at one and the same time, and as judges we have no right to close our eyes to the existence of such a fact and refuse to take notice of it, without proof and a finding of the jury. We have the right to use our common sense, experience, and observation as to certain matters, and this is one of them. It is said that there is no evidence that Boney did see that there was no light at the switch. That is not the question. It was his duty to see—to keep a constant lookout—especially at this place, and if he failed to do so it is the same in law as if he had looked and seen. *Arrowood v. Railroad*, 126 N. C.

629, 36 S. E. 151; Whitesides v. Railroad, 128 N. C. 229, 38 S. E. 878. We have so held in cases without number, when charging a railroad company with responsibility for the negligence of its engineer, and the decision must apply here, unless we recede from the position taken in those cases. In Pickett v. Railroad, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611, it is said: "If (the engineer) had looked and stopped the train, the collision would have been prevented, notwithstanding the previous want of care (or negligence) on the part of the boy who was killed." And again, after citing and referring to numerous cases of this court, theretofore decided, on the same point, the court says: "It was repeatedly declared in those cases that it was negligence on the part of the engineer of a railway company to fail to exercise reasonable care in keeping a lookout, not only for stock and obstructions, but for apparently helpless or infirm human beings on the track, and that the failure to do so, supervening *after the negligence of another* (the alleged negligence of Cole), where persons or animals were exposed to danger, would be deemed the proximate cause of any resulting injury." If he did not actually see, he would, in law, be taken to have seen, when he can see by looking, for he is not permitted to say, under such circumstances, that he did not look, and therefore did not see. By the rules of the company and of the law, it was made his duty to keep a watchful lookout, and if he had looked he would have discovered, long before he reached the switch, that there were no lights burning there. If there was one, he would, by all the testimony, have seen it, and not seeing it he was under a peremptory order to stop. He had no discretion in the matter. His duty was simply and solely one of obedience, and had he obeyed the accident would not have occurred.

What becomes of the doctrine of proximate cause? He knew where the switch was, for he gave the station blow two miles away, as he approached it, and the switch was between his train and the station. We have seen that he was negligent, if he could have known there was no light at the switch, and did not know. But General Burnett, witness for the plaintiff, who was in the cab with him, testified that the track was straight for at least two miles, and that he looked long before they reached the switch and saw no light there. Lights, red or white, were displayed at the switch before that time, and in all this he agrees with the other witnesses. He looked when Boney blew for the station, being then a half a mile from the switch, and saw no lights. There is no evidence to the contrary of this. No witness testified that he saw a white light, and the absence of such a light was a signal of danger and required Boney to stop his train. Speaking of a situation similar to this, the court (Connor, J.), in Haynes v. Railroad, 143 N. C. at

page 164, 55 S. E. at page 519 (9 L. R. A. [N. S.] 972), said: "Assuming that the light was out, or as expressed by some of the witnesses, that the switch showed 'a dead light,' the rule imposed upon the plaintiff's testator the duty of treating it as a danger signal, and directed him how to act. The evidence was plenary that he knew of the rule, and, if in force, *was under obligation to obey it.*" But he was forbidden to run his train there at a greater speed than six miles an hour, and if he had been running at that rate of speed he could surely have discovered, as he approached the switch, that there was no light there and have easily stopped his train before entering the switch at the crossover, but at that very time his speed, according to all the proof, was at least 35 miles an hour. His death, in any view of the evidence, as there is really no disputed fact upon this branch of the case, was due to his own negligence in these respects: (1) He did not heed the danger signal at the switch, if he saw it. (2) If he did not see it, he was negligent in not looking for it, and in law the same result follows. (3) He was running his train at a reckless rate of speed, in open violation of the rule fixing the rate at six miles an hour, and a further rule requiring "trains to approach junctions prepared to stop," and "all trains passing Rocky Mount to approach the passenger station, main yard crossover and middle yard crossover under full control, expecting to find the track occupied"; that is, impassable. If he had obeyed any one of these rules, the accident would not have occurred, but instead of doing so, he ran his train almost to its speed limit and nearly seven times as fast as he was authorized to do.

Is proximate cause, in a case like this, a question of fact or of law? One of these rules required that he should approach the switch with his engine under full control, as if expecting to encounter danger ahead, and another that he should be prepared to stop, unless both switches and signals are right and the track is clear. These rules were adopted to prevent just such a catastrophe as this one, and, too, for the engineer's safety, and yet this company is held liable to him for his own willful and daring violation of them. He took his life in his own hands, but the road must pay for it. It is impossible to consider the evidence, as the law regards it, without seeing at once that the intestate brought disaster upon himself. Suppose a man had been lying drunk and helpless on the track at the switch and was run over and killed, would we hesitate to say, under our decisions and the *admitted* facts of this case, that the negligence of the engineer was, in law, the proximate cause of his death? How can one rule be applied to the engineer, when representing the railroad, and another man is killed, and a different one when, under identically the same circumstances, he is killed; his negligence being the

same in both cases? There is but one answer to this question. The same rule applies alike to the two cases, unless our former decisions are founded upon the wrong principle and should be overruled. We must exonerate the defendant in this case or reverse a long line of decisions by this court.

I have so far discussed the case upon the motion for nonsuit and the admitted facts, or upon the plaintiff's own evidence, favorably construed for her, and when thus considered there is still another view of the case which conclusively makes against the plaintiff and defeats her right to recover. H. T. Cole, the engineer of the other train, ran down the track about 25 yards and with his lantern signaled Boney to stop. Boney knew it was a stop signal, because plaintiff's witness, Gen. Burnett, testified that when 200 or 300 yards from the switch he answered it with two short blasts of the whistle, shut off steam, and applied the emergency brakes. Do we need a jury to tell us that, if he had been running at the proper speed—six miles an hour—he could have stopped his train within 150 yards, yes, within 50 yards? We know it. The evidence is that he could have stopped it, with the appliances at hand, within 50 feet, and this was not denied on the argument. But the speed of the train was so excessive that he was unable to stop, and that was the only cause of the intestate's death. By the rule he was ordered to have his train well in hand, so that he could stop in any emergency, if switches or lights were wrong or the track was blocked. We *know* that he could have done so, had he been so minded; but Burnett, plaintiff's witness, testified that Boney told him several weeks before the accident occurred that he had orders to run slow at that place, but that he increased the speed of his train from time to time until it reached the speed of 35 or 40 miles an hour, at which it was running on the fateful night, and, too, by the switch with a danger signal displayed. After he had received and acknowledged the lamp signal, he had, by Burnett's testimony, 200 yards within which to stop his train before reaching the switch, and 75 yards beyond the switch where the collision occurred. In all the cases heard by this court since I have sat in it—and there are many of them—there has never been presented such an example of reckless indifference on the part of an engineer to his own safety and that of his passengers and fellow servants. He deliberately violated the rule of the company, after telling Burnett that it had been issued to him, and persistently continued to do so, and did it, too, almost with the very words of the rule on his lips when talking to Burnett and while passing that very place, and yet this defendant must pay a heavy penalty for his flagrant disobedience, and, too, pay it to him or his representatives. This cannot be law *because it is not just*, and such a ruling is utterly at variance with well-considered de-

cisions of this court, holding railroad companies liable to third persons for similar acts of negligence by engineers, but of not so grave, serious, and pronounced a character. We have heretofore charged the company, because such negligence we then considered to be the proximate cause of the injury, as in Arrowood's Case and Pickett's Case, and the long train of cases following them; and by this decision we discharge the engineer and, in effect, pay him for his own wrong. If in any one of the cases just mentioned the road had sued the engineer, after being held responsible for his negligence and mulcted in damages, could it have been entitled to recover? I think so. We have so intimidated, and even held, in several of the cases. If so, how can the engineer in this case recover?

2. But if the nonsuit should not have been granted, the court erred in refusing to give the instructions requested. I will lay special stress and emphasis on one only—the seventh: "If the jury shall find from the evidence that at the time No. 82, the train being run by Boney, deceased, was approaching the switch into which he ran and the switch had no lights, either red or white, and Mr. Boney knew there were no lights, either red or white, as a signal at the switch at the time, and he failed to slacken his speed and stop his engine, then he was guilty of contributory negligence, and the jury will answer the second issue, 'Yes.'" It is said in the opinion of the court that this instruction should not have been given, first, because there is no averment in the answer upon which it can be based, and, second, because it is predicated on the fact that the intestate *knew* there was no light, of which there was no evidence. We will consider these reasons in inverse order.

As to the intestate's knowledge that there was no light at the switch, it must be remembered that the instruction asks the jury to find the fact of knowledge, and does not assume that Boney had such knowledge. The only question, therefore, is, Was there any evidence of knowledge? We have shown, I think, that it makes no difference, *in law*, whether he had actual knowledge or not, if, by the exercise of the care exacted of him, he could have had it. But Burnett, plaintiff's own witness, testified that he looked and did not see any light. Could the jury infer from this fact, and the further fact that it was Boney's duty to keep a lookout, that he did so, and if Burnett saw no light that he saw none? But there is other evidence, far more than a scintilla, that Boney was looking, and what is it? He saw the signal lantern of Cole swaying to and fro, and he would not have seen it if he had not been looking. Another fact, he blew for the station as he saw its lights, and was therefore looking ahead. Boney was familiar with the line; he knew he was within the yard limits, because there were several tracks and in-

dications all around him showing that fact, and those on the engine showed by their testimony that they knew where the switch was with reference to the position of the approaching train. There are other facts and circumstances which tend to prove knowledge by Boney in regard to the light at the switch. A man knows as well when he does not see a thing, as when he does see it. Am I wrong in making this common-sense statement? If the light was not in sight, it was his duty to stop, and his failure to do so was not only gross negligence, but the decisive and proximate cause of his death, for if he had obeyed the rule and stopped there would have been no collision. He had the last clear chance. No light being as much of a danger signal as a red light, it was his plain duty to so regard it. It was for his employer to make this rule and for him to obey it. It turns out that it was a wise rule, and an observance of it would have saved Boney's life. We have held that, under such circumstances, the employer is not liable to the servant because the latter has seen fit to disregard orders and act upon his own judgment, and it would not be right to hold the master responsible for the consequences. *Patterson v. Lumber Co.*, 145 N. C. 42, 58 S. E. 437; *Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17.

It will not do to say that his failure to stop the train was not the proximate cause; in the first place, because it was as a matter of law, and, in the second, because if there was any duty resting upon Cole to turn the red light, when no light was itself a danger signal—and I think there clearly was not—Cole did give him a signal equally as good, and which he received in full time to stop his train, if he had been running at a proper speed. He answered this signal, and could easily have brought his train to a full stop after doing so but for his willful disregard of orders as to speed. The company, by its rules, had prescribed a safe course for Boney to pursue, and it would have proved to be a most effective one. It was not required to provide more than one. If Boney had kept his engine under control, as if expecting to find the road blocked and the junction and switches in a dangerous condition—and this was what he had been ordered, in plain language, to do—he did not require any signal from Cole, as this duty was enjoined upon him without regard to the signal lights at the switch. Not only did he have this peremptory order, but Burnett testified that a light at the switch could have been seen two miles away on this straight track, and not seeing a light, as there was none there, his duty was to stop and ascertain the cause of this unusual situation. The opinion of the court is based upon the erroneous hypothesis that Boney was entitled to have two signals of danger. *Edwards v. Railroad*, 132 N. C. 99, 43 S. E. 585. The company had the right to make the absence of a light a danger sig-

nal, and yet it is argued that, even if Boney saw there was no light at the switch, he was entitled to have the red light turned to the track by Cole. The force of this reasoning is conceded in the opinion, and the answer to it is that Boney knew that, by the rules, the track must be kept clear five minutes before his train reached the switch. But that order was made in the interest of greater safety and was to be executed by other employes, and Boney had no right to rely on its observance, for he was commanded to proceed with his train under control, as if it had been violated and proper precautions had not been taken at the switch, and the track ahead was blocked, so that he could not proceed on his way. By all the evidence, he ran in flagrant disobedience of orders, and at the rate of 35 miles an hour, into the switch and crossover, and right by a danger signal. This is his case in a nutshell. The fallacy of the entire argument of the court is that the premises are not justified by the admitted facts, and the reasoning practically ignores the legal effect of the provisions of the rule that the speed must not be in excess of six miles an hour, that no light shall be as much a danger signal as a red light, and that the engine must be kept under control, so that the engineer can guard against danger in any possible emergency.

The instructions given by the court and copied in the opinion were erroneous, because the first one required the jury to find that Boney could have stopped his train, then running at a high rate of speed after seeing the signal of Cole, whereas they should have been told that if he was unable to stop it by reason of the excessive speed, and could have stopped it if he had been running at the prescribed rate, his own act in disobeying the rule as to speed was the proximate cause of the injury, for the court has so held in *Norton v. Railroad*, 122 N. C. 911, 29 S. E. 886, and numerous other cases. The other instructions were faulty, in that they required the jury to find whether Boney's disregard of the rules was the proximate cause of his death, whereas the court should have told the jury that, as he was warned of the danger by the absence of a light, his failure to stop was the proximate cause of his death, as much so as if a red light had been displayed, and besides, that, his failure to observe the rule requiring him to have his engine under control, as if the track were blocked, and so that he could stop it if the track was not clear, was itself the direct cause of his death, for we have held in *Norton's Case*, and in many others, that if the engineer deprives himself of the ability to stop his train by the disobedience of rules, or because the train is being run at an excessive speed, it makes the company liable for any resulting injury to others, as the engineer's negligent act is "continuing" in its nature up to the very moment of the injury,

and is therefore its proximate cause. If he had not been negligent in this way, he would have had the last clear chance to avoid the injury, and for this reason the company, his employer, when defendant, has been charged with liability. *Edwards v. Railroad*, 129 N. C. 78, 39 S. E. 730. With greater reason does the law deny to him or his representatives the right of recovery, when his own negligent act caused the injury.

My conclusion is that the plaintiff should, for the reasons stated, have been nonsuited, or that, at least, there should be a new trial, so that the case may again be tried according to correct principles; otherwise the defendant will be made to suffer vicariously for the fault of its engineer by compensating his representatives, contrary to the maxim of our law, "*Nemo puniatur pro alieno delicto.*" *Wingate's Maxims*, 336.

But a difference is supposed to exist between a positive and a negative signal of danger. I think this is based upon a misapprehension of the rule, and that there can be no such distinction. The question is not, what Boney thought the signal should be, but what it is. The "red light" and "no light" are made by the rule positive notice of danger. The mere fact that "no light" involves the negation of a fact does not change the character of the signal from a positive to a negative one, for the rule is plain, *positive*, and peremptory in its mandate that, whether there is a red light or no light, or even "a light imperfectly displayed," the engineer must stop, and in case there is no light ascertain the cause and report to the superintendent. So that a red light, no light, or an imperfect light are all equally "positive" stop signals, and so declared to be in express and unmistakable terms. But if, under such a rule, an engineer could have any margin of discretion in the matter, that avenue to success is closed to the plaintiff by another mandatory order contained in rule 106: "In all cases of doubt or uncertainty, the safe course must be taken and no risks run." So that if Boney had any room for doubt or uncertainty, he should have stopped his train. There are two other similar rules: No. 105: "Both conductors and enginemen are responsible for the safety of their trains and, under conditions not provided for by the rules, must take every precaution for their protection." No. 707: "The company does not wish, nor expect, its employees to incur any risks whatever from which, by exercise of their own judgment and by personal care, they can protect themselves, but enjoins them to take time in all cases to do their duty in safety, whether they may, at the time, be acting under orders of their superiors or otherwise."

It is suggested that the defendant has not sufficiently pleaded the negligence of Boney in order to rely on it. This seems to me a very strained construction of the answer; one that is contrary to the express direction

of the statute: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties." *Pell's Revisal*, § 495, and notes. The common-law rule is modified, and every reasonable intendment is now made in favor of the pleader. *Wright v. Insurance Co.*, 138 N. C. 488, 51 S. E. 55. We strictly enforced this provision in favor of the plaintiff, when charging negligence, against the objection of the defendant, in *Knott v. Railroad*, 142 N. C. 238, 55 S. E. 150, and the case is an authority here. The answer, perhaps, should have been more full and explicit, but I think it quite sufficient, under the statute, to present the defense. It distinctly avers that Boney had a copy of the rules, regulations, and schedule, knew, or should have known, their contents, and that it was his duty to observe and obey them; while he failed to do so and was violating the rule when he was killed. It is true defendant pleads specially the failure to heed Cole's signal with the lamp, but the answer embraces within its general scope an averment of negligence in disobeying the rules, and this is all set up as a separate defense; the purpose of the defendant to plead such contributory negligence, if necessary to do so in this case, being apparent. This answer is certainly as comprehensive in its allegations as was the complaint in the *Knott Case*. No such point is hinted at in the plaintiff's brief, nor was it mentioned in the oral argument. Why? Because plaintiff's counsel were well apprised by the answer of the true defense. Their brief shows it, for it deals with all the questions now raised by the defendant, and as if properly pleaded. There was no objection to any of the evidence as being irrelevant, because addressed to the defenses that there was a stop signal at the switch and that Boney did not, under the admitted circumstances, handle his train as required by the rules.

But whether his negligence in this respect is pleaded or not, all the questions are presented by the denial of the answer. If the breaking of the switch was not an unavoidable accident, Boney, under a known rule, was warned of the situation by a danger signal which he was as much bound to obey, as we have seen, as if the red light had been in plain view. The defendant had safeguarded the place and neutralized its negligence, if any, by displaying a danger signal, which Boney was required to obey by stopping his train. If there had been a red light there, and Boney had disregarded it and been killed, would not his death be imputed to his own wrongful act as the proximate and sole cause thereof? I have shown that "no light" or an "imperfect light" was, by the very terms of the rule, as much a danger signal as a red light, and the same result must flow from his failure to so regard it. If the fireman had been

killed at the same place, instead of Boney, would this court listen to a plea, in an action against the defendant for causing his death, that Boney had failed to obey its rules, or that he was not sufficiently acquainted with the road and surroundings to know that he was approaching the switch and middle yard crossover, where he was killed? I think not, for the reason that Boney's negligence, in such a case, would be held, in law, as the *decisive* and proximate cause of the fireman's death, and the sole cause, however well the defendant had safeguarded the switch. There is no difference, in law, between the two cases.

It is further suggested that the witness J. C. Mercer testified that when he was there the white glass was turned to the track. This was not evidence that there was a white light burning at night. It tended to prove the contrary, and, at most, was merely conjectural. *Byrd v. Express Co.*, 139 N. C. 273 (Anno. Ed.), 51 S. E. 851. It was no more evidence of a white light than the fact that the red glass was turned to the track would be of a red light. It is not the glass that gives the signal, but the light that is in it. Mercer did not say that there was a light in the glass, and if he had so stated, the plaintiff's own witness, Gen. Burnett, testified that he saw no light there, and that a light could have been seen, if one had been at the switch. *Edwards v. Railroad*, 29 N. C. 78, 39 S. E. 730. So in this conflict of testimony, if there is any as between Burnett and Mercer, the defendant was entitled to the finding of the jury as to whether there was a light or not, and if there was none, then to the other finding whether Boney knew it (or could have known it if he had looked, which is the same thing), for this was the form of the prayer. The defendant did not assume, in the requested instruction, that there was no light at the switch, nor that Boney knew there was none, or could have known it, but asked that both inquiries be submitted to the jury for their finding of the truth in regard to it. Was it not plainly entitled to the instruction, even if the "white glass was turned to the track," and this is evidence that there was a light? It was not by any means conclusive, and is not so treated in the court's opinion.

My conclusion is that the plaintiff's intestate caused his own death by reckless conduct on his part. He did what his employer told him not to do, and however unfortunate the result the defendant is not responsible for it, if we follow our former unanimous rulings. *Whitson v. Wrenn*, and other cases, *supra*. They are all supported by many cases in this court and by numerous decisions in other jurisdictions.

BROWN, J., concurs in this dissenting opinion.

(89 W. Va. 133)

FIELDER & TURLEY v. ADAMS EXP. CO.
(Supreme Court of Appeals of West Virginia.
April 11, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 361*)—CERTIFICATE OF ERROR—DISMISSAL.

That a certificate of error appended to a petition for a writ of error antedates the allowance of a bill of exception in the transcript is immaterial, and constitutes no ground for dismissal of the writ.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 361.*]

2. EXCEPTIONS, BILL OF (§ 38*)—POWERS OF INTERMEDIATE COURT.

The judge of the intermediate court of Kanawha county has authority to settle and sign a bill of exception and make it a part of the record within 30 days after the adjournment of the term at which the judgment was rendered.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 48; Dec. Dig. § 38.*]

3. APPEAL AND ERROR (§ 1175*)—ERROR TO INTERMEDIATE COURT—REVIEW—ENTRY OF FINAL JUDGMENT.

On a writ of error from the circuit court of Kanawha county to a judgment of the intermediate court of that county, the former court, on reversing the judgment of the latter, should render final judgment in the case, if it is fully made up and susceptible of such disposition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

4. STATUTES (§ 196*)—CONSTRUCTION.

In seeking the legislative intent, words in a statute may be referred to their proper connections, and each given proper force in its place.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 274; Dec. Dig. § 196.*]

5. CARRIERS (§ 158*)—INJURY TO FREIGHT—LIMITING LIABILITY.

The interstate commerce act, passed by Congress and approved June 29, 1906 (Acts June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), does not inhibit an interstate carrier from limiting the amount of its liability for loss, damage, or injury to property entrusted to it for shipment by an agreement with the shipper as to the value thereof, entered into in good faith, or procured by misrepresentation on the part of the shipper as to the value thereof.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 158.*]

6. CARRIERS (§ 124*)—LOSS OF FREIGHT—AMOUNT OF RECOVERY.

If in such case two or more articles be shipped under an aggregate valuation thereof agreed upon or procured as aforesaid, and part of them be delivered and the balance lost, the shipper can recover only a portion of the agreed value, determinable by the ratio of the aggregate value of the property to the amount stipulated in the agreement as such value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 599-607; Dec. Dig. § 124.*]

Error from Circuit Court, Kanawha County.

Action by Fielder & Turley against the Adams Express, Company. Judgment for plaintiff before a justice was affirmed by the intermediate court, but reversed on error by the circuit court, and plaintiffs bring error. Reversed, and judgment entered.

Payne & Payne and J. F. Bouchelle, for plaintiff in error. Simms, Enslow, Fitzpatrick & Baker, for defendant in error.

POFFENBARGER, J. Fielder & Turley brought this action against the Adams Express Company, in a justice's court, to recover the value of certain goods shipped to them over said company's line from New York and lost. In that court they recovered a judgment for \$111.30. The defendant took an appeal to the intermediate court of Kanawha county. There a jury was dispensed with, and the case submitted to the court on a statement of facts agreed to, and a judgment was rendered for \$114.55, with damages according to law. To this judgment the circuit court of Kanawha county awarded a writ of error, on which it was reversed and the case remanded to the intermediate court for further proceedings and final determination. Complaining of this, Fielder & Turley procured a writ of error from this court to the judgment of the circuit court, on which lack of a sufficient bill of exceptions, want of a certificate of error as required by section 8 of chapter 135 of the Code of 1906, failure to apply for the writ in proper time or manner, lack of a writ of error from the circuit court or order therefor, the remand of the case to the intermediate court, and reversal by that court are assigned as grounds of error. These assignments were made on an incomplete transcript. A supplemental record shows the issuance of a writ of error and supersedeas by the circuit court and acceptance of service thereof, as well as an order awarding the same. This sufficiently disposes of some of the arguments found in the brief.

[2] The bill of exceptions, embodying the agreement as to the facts, was signed and certified in the vacation of the intermediate court, and an order entered in vacation purporting to make the same a part of the record. Alleged want of authority in the judge of the intermediate court to allow the bill of exception after the adjournment of the term, under the provisions contained in section 9 of chapter 131 of the Code, is one argument against the validity of the bill of exception. This contention is answered in the negative by express terms of section 4 of chapter 25 of the Acts of 1907, which created said court and defined its powers. It gives the judge of that court the same powers in vacation as are now or may hereafter be conferred upon the judge of the circuit court of Kanawha county in respect to all cases, matters, and proceedings within the jurisdiction of said intermediate court.

[1] On the petition for a writ of error presented to the circuit court, there is a certificate of an attorney stating that in his opinion there was error in the judgment of the intermediate court. This certificate was dated May 21, 1909. The bill of exception was signed by the judge on May 29, 1909. As

the petition was certified before the bill of exception was signed or made a part of the record, it is contended that the certificate is void, and the petition therefore insufficient. We see no force in this contention. The date is wholly immaterial. The petition could be prepared and dated in anticipation of what it was known the record would be, when made up.

[3] The circuit court erred in refusing to retain and finally decide the case, and in remanding it to the intermediate court. As it was fully made up and could not be in any respect changed, since the facts had been agreed, there was no reason for remanding it, and we think final judgment should have been rendered. Though section 21 of chapter 25 of the Acts of 1907 says "the circuit court may retain the case for trial or remand the same back to the said intermediate court to be further proceeded in and finally determined," these general terms must be so construed as to make them operate reasonably and justly. It must be assumed the Legislature did not intend a useless and detrimental proceeding. After an appellate court has ascertained what judgment should have been rendered in a case fully made up, a remand for judgment involves both delay and risk of additional error as well as double work. Hence it is an idle, useless, and injurious proceeding, which the Legislature cannot be deemed to have intended, if the clause quoted can perform some other substantial purpose or function. While some effect must be allowed to all words in a statute, or other writing, if possible (*State v. Harden*, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394), it is not always necessary nor proper to allow them effect to the full extent of the letter thereof (*Coal & Coke Ry. Co. v. Conley*, 67 S. E. 634). It is improper to do so, if such construction leads to an absurd or unjust result. *Hasson v. Chester*, 67 S. E. 731; *B. & L. Ass'n v. Sohn*, 54 W. Va. 101, 46 S. E. 222. Words may be referred to their proper connections, giving each in its place its proper force, in seeking the legislative intent. *B. & L. Ass'n v. Sohn*, cited. Reversals take place in two well-known general classes of cases, one in which new jury trials must take place, or additional evidence be heard, or further orders made to carry the judgment or decree into effect, and one in which none of these things are necessary. In the former class the cases are remanded, under general appellate law, and, in the latter, finally disposed of in the appellate court. The classification and usual mode of disposition were, we must assume, known to the Legislature, and it has dealt with both in very general terms. Power to remand in both involves idle, useless, and practically absurd action or procedure. Hence we may well say, "reddendo singula singulis," under the rule declared in *B. & L. Ass'n v. Sohn*, the power to remand is applicable to the former class and the power of

retention to the latter. Whether the act confers power to retain all cases we do not say, that question not being involved, but we are clearly of the opinion that the circuit court must act finally in complete cases, requiring nothing other than the rendition and entry of judgment.

[5] We come now to the vital questions in the case, the validity and application of a clause in the bill of lading, purporting to limit the liability of the express company to \$50. This clause says the company shall not be liable in any event for more than \$50, the amount stated therein as the value of the property shipped. It is one of the regular forms furnished by the company to its patrons in which such valuation is printed, together with the notice that there shall be no greater liability unless a greater value is stated in the bill. It bears a stamp saying, "Value asked and not given." It was the practice of the company to leave a book of these bills with the shippers, and send its agent to receive the packages and put this stamp upon the bills, unless a greater value was declared. At least such was the fact in this case. Under the general law, unless changed by the interstate commerce act, a limitation of liability to the extent of the value declared and agreed upon is valid. *Zouch v. Railway Co.*, 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116; *Hart v. Railway Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717. Upon this question, there is some conflict of authority in the various jurisdictions of this country, but we see no occasion to depart from the rule heretofore declared in this state and sustained by the Supreme Court of the United States, nor any necessity for discussion of the decisions enunciating or purporting to declare a different doctrine.

Sections 2 and 20 of the railroad rate act were passed by Congress and approved June 29, 1906. The first of these sections inhibits the receipt by an interstate carrier, directly or indirectly, from any person or persons of a greater or less compensation for any service rendered than is charged or received from any other person or persons for doing the same or a like kind of traffic under substantially similar circumstances and conditions. The other makes such carrier liable for any loss, damage, or injury to property received by it for transportation from a point in one state to a point in another, caused by it or any common carrier to which such property may be delivered or over whose line or lines it may pass, and provides that no contract, receipt, rule, or regulation shall exempt such common carrier from the liability thereby imposed. They have been construed and enforced as prohibiting such limitation of liability. *Ward v. Railway Co.*, 158 Mo. 228, 58 S. W. 28. See, also, *Hutchinson's Com. Car.* (3d Ed.) § 548. In reaching this conclusion the Missouri court merely gave its own interpretation of the

statute. In our opinion this construction goes beyond the necessary import of the terms used. They do not deal with the extent of liability or limitation thereof. Section 2 forbids discrimination. It does not prescribe a rule, requiring a rate based upon any particular standard, such as weight, volume, or value, and inhibit departure therefrom. All other things being equal, it inhibits discrimination as between persons. We do not see how it can be said to inhibit a variation in rate or liability on account of difference in value. That portion of section 20 to which we have referred deals with the question of liability, not the measure or extent thereof. At least that is its primary or main purpose. It does not deal expressly with the limitation of liability. It says the common carrier shall be liable for the loss, damage, or injury to the property, but does not fix any measure or standard of compensation. Of course, it destroys the effect of all receipts, contracts, rules, and regulations purporting to wholly exempt interstate common carriers. Its exact terms are that the carrier shall be liable for loss, damage, or injury, and no contract, receipt, rule, or regulation shall exempt it. When this act was passed, the right of common carriers to limit their liability in the manner in which this one has done so had been declared by the federal Supreme Court and many others. Congress is deemed to have had knowledge of this, and, having such knowledge, it placed no express provision in the act abolishing the right or inhibiting the practice. The purpose of this clause of the statute was to make the initial carrier liable for loss, damage, or injury to goods entrusted to it for interstate transportation, whether occasioned by negligence or not, on its own line or elsewhere, notwithstanding any contract, receipt, rule, or regulation purporting or attempting to relieve from liability therefor. It does not deal with the extent of liability.

The limitation clause in one of its aspects is necessary to the protection of common carriers. In an action for loss, damage, or injury, when no agreement has been made respecting the value of property, the carrier is at a great disadvantage in respect to the evidence of value. The shipper occupies a superior ground. Carriers have just and reasonable ground for requiring a specification of value, setting a limit beyond which no damages can be claimed, as a measure of protection against exorbitant and unjust demands. On the other hand, a shipper seeking or obtaining a valuation below the actual value of the property for the purpose of obtaining a low rate is guilty of an act of misrepresentation. Hence there is no hardship nor injustice in holding him bound by his representation or agreement as to the value. This contract of limitation therefore rests upon good solid reason and just con-

siderations. The abolition thereof would have introduced a very great change in the methods of transportation for purposes extending far beyond any indicated by the express terms of the act. It does not fall clearly within the inhibition of discrimination. At any rate, the express prohibition thereof is not adopted as a means of preventing discrimination, nor does it fall clearly within the purpose, respecting exemption from liability. Therefore we think the act does not abrogate the rule permitting limitation of liability. While the Interstate Commerce Commission disclaims power to determine this question, it being a judicial one, it expresses the opinion that the act has not altered the rule. In *re Released Rates*, 13 *Interst. Com. Com'n R.* 550.

This right to limit liability by agreement as to value is subject, however, in the opinion of many courts, to a very important qualification. The shipper is bound by his agreement on the principle of estoppel. One who avails himself of an estoppel must have been misled by the opposite party. Hence, if the carrier agreed upon a valuation, known to be merely arbitrary and far below the actual value of the property, it cannot claim the status of a person misled to his injury. Accordingly it has been held in many cases that a collusive or corrupt contract between the shipper and carrier fixing the amount below the actual value of the property is void, and does not limit the liability of the latter. On the other hand, if the agreement has been made in good faith in accordance with what the parties deemed to be the actual value of the property, it is binding, or, if the shipper, without the knowledge of the carrier, has declared a false low valuation, he is bound by it on the principle of estoppel. See the opinion of Commissioner Lane, 13 *Interst. Com. Com'n R.* 550, attempting to reconcile the apparently conflicting decisions, upon these principles.

The record in this case presents no evidence of a false value collusively agreed upon. The body of the express receipt was filled out by an employé of the shipper, and the two packages placed where the carrier's agent was expected to find them. He did find them there, together with the receipt book in which the receipt therefor had been filled out and the value specified therein left unaltered. He placed his stamp upon the receipt, showing the date, the number of packages, and that the value had been asked and not given. Having done this, he took the packages, and in a few minutes afterwards the manager of the stock and shipping de-

partments found the receipt there, saw that the goods had gone, and filed the receipt away. This amounted to a representation on the part of the shipper that the property was not of greater value than \$50, and precludes the idea of collusion or a corrupt agreement as to the value of the property. We think, therefore, the contract was valid and binding.

[6] One of the packages, having an actual value of \$120, was delivered to the consignee, while the other, having an actual value of \$105.50, was lost. Under these circumstances, it remains to say whether the consignee may recover the entire \$50 or only a portion thereof, determinable by the ratio of the entire value of the goods to the whole amount of indemnity. By the great weight of authority the indemnity is to be apportioned. *U. S. Express Co. v. Joyce (Ind.)* 72 *N. E.* 885; *Railway Co. v. Lesser*, 46 *Ark.* 236; *Goodman v. Railway Co.*, 71 *Mo. App.* 460; *London Assurance Co. v. Companhia De Moagens Do Barreiro*, 167 *U. S.* 149, 17 *Sup. Ct.* 785, 42 *L. Ed.* 113. Hastily examined, the following decisions might be considered as inconsistent with this conclusion: *Brown v. Steamship Co.*, 147 *Mass.* 58, 16 *N. E.* 717; *Starnes v. Louisville Co.*, 91 *Tenn.* 516, 19 *S. W.* 675; *Nelson v. Railway Co.*, 28 *Mont.* 297, 72 *Pac.* 642; but they are not. In all these cases the valuations stipulated were by the package for merchandise, or head for live stock, which makes a very material difference, the agreement being separable and each piece of property or head of stock protected by a legally separate contract. Under this principle, the plaintiffs were entitled to recover at the date of the judgment of the intermediate court \$23.44 and \$1.40 interest, making a total of \$24.84, for which amount judgment will be rendered as of the date of the judgment rendered by the intermediate court and with interest from that date.

It remains only to dispose of the question of costs. As the appellant in the intermediate court had not tendered the amount due, it was not entitled to costs in that court. *Gas Co. v. Holt*, 66 *W. Va.* 516, 66 *S. E.* 717. Having successfully resisted the efforts of the plaintiff in error in this court to reinstate the judgment reversed by the circuit court, the defendant in error substantially prevails here, and is entitled to costs in this court, if the amount in controversy brought the case within its jurisdiction. This amount was the judgment of the intermediate court, \$114.55.

Therefore costs in this court will be adjudged to the defendant in error here.

(69 W. Va. 176)

HALL v. HALL.(Supreme Court of Appeals of West Virginia.
April 18, 1911.)*(Syllabus by the Court.)***1. DIVORCE (§ 53*)—RIGHT TO RELIEF—INEQUITABLE CONDUCT OF PLAINTIFF.**

The rule of courts of equity, denying relief to a party because of his own inequitable conduct in and about the subject-matter of his cause of action, applies in suits for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 188, 189; Dec. Dig. § 53.*]

2. DIVORCE (§ 55*)—LIMITED DIVORCE—DESERTION—CONDUCT PRECLUDING RELIEF.

Under this rule, conduct of a plaintiff, in a suit for a limited divorce on the ground of desertion, not sufficient to justify the desertion, may nevertheless be sufficient to preclude relief.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 197; Dec. Dig. § 55.*]

3. DIVORCE (§ 37*)—DESERTION—RIGHT OF HUSBAND TO DETERMINE DOMICILE.

Though a husband has the legal right to determine the place of abode of the family, and the wife must submit to his decision, this power must be exercised in a reasonable and just manner. It cannot be exercised arbitrarily, nor used as a means of procuring dissolution of the marital relation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 129; Dec. Dig. § 37.*]

*(Additional Syllabus by Editorial Staff.)***4. DIVORCE (§ 37*)—"DESERTION."**

Mere absence of one spouse from the other, though voluntary, does not constitute "desertion"; but cohabitation must cease, and there must be intent in the mind of the offending party to desert or abandon the other.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 107-132; Dec. Dig. § 37.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2020-2024; vol. 8, p. 7635.]

Appeal from Circuit Court, Monongalia County.

Bill by William H. Hall against Millie Hall. Decree of dismissal, and plaintiff appeals. Affirmed.

L. V. Keck and Cox & Baker, for appellant. Lazzelle & Stewart, for appellee.

POFFENBARGER, J. His bill for a divorce from bed and board having been dismissed and relief denied him, the plaintiff obtained this appeal.

On its face, the bill is sufficient as one for a limited divorce on the ground of abandonment and desertion. It charges that on the 9th day of September, 1908, the defendant, without any just cause and in the absence of the plaintiff, deserted and abandoned him, without his knowledge or consent, and took up her residence with her father, where she has since remained. It sets up all jurisdictional facts. These are admitted by the answer; but the charge of desertion is emphatically denied and resisted. Admitting her absence from the plaintiff's place of abode and the date of her leaving, the defendant charges misconduct on the part of

the plaintiff as reason or excuse for her absence, and relies upon these facts as a bar to the relief asked.

Married on the 18th day of March, 1908, a female child was born to the parties, July 18, 1908. On their marriage, they took up their residence in a small house owned by the plaintiff's father and in which his widowed aunt had resided for some years. There seems to have been no serious trouble between the plaintiff and defendant; but the latter complains of the conduct of the aunt, with whom she had a quarrel on the day on which she left. She charges other previous difficulties with her and neglect and unkindness on the part of the husband. On or about the day of her leaving, she told her husband she could not get along with the aunt and requested him to obtain another place of residence. To this he replied that he could not rent two or three houses. Then a conversation occurred between him and the mother-in-law on the same subject. The latter charged him with having mistreated her daughter, in that he had failed to go out with her or give her money and told him the wife intended to leave and take the child. To this he replied that, if the mother-in-law intended to run the business, she might do so, but he proposed to run his own business. He says that, before leaving the house, he declared his willingness to take care of the wife as long as she should stay with him. In her testimony, the wife says she was unable to live with her aunt, and that when the latter ordered her out she does not see why she had not the right to go. The husband has never asked her to return, nor made any effort to induce her to do so. Nor has he visited her or communicated with her, except as he casually met her on one or two occasions. After she left, he seems not to have made any inquiry about her or to have cared whether she returned or not.

[4] Mere absence of one spouse from the other, though voluntary, does not constitute desertion. Not only must cohabitation cease, but there must be intent in the mind of the offending party to desert or abandon the other, and these two ingredients must combine and coexist. *Alkire v. Alkire*, 33 W. Va. 517, 11 S. E. 11; *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12. Though the statute allows a divorce a mensa et thoro for abandonment or desertion, in general terms, and does not in express words require willfulness, it must be assumed that the legislators, in drafting and enacting it, intended such abandonment and desertion as is generally recognized and treated as sufficient ground for a limited divorce. So this court has construed the statute.

Nothing else considered, we might say the declared intention of the defendant to leave, her actual departure and failure to return, make a case for divorce under this view of

the statute. Both her declarations and acts are indicative of intent. There was a cessation of cohabitation, coupled with declarations of intent. The inference or conclusion to which these facts tend is opposed, however, by her willingness, avowed in her answer and protested in her testimony, to renew cohabitation, provided the plaintiff will separate himself from the company of his aunt. At the time, she requested him to obtain another house, and still says she is willing to cohabit with him, if he will do so. Insufficiency of these protestations is charged on the ground that they are conditional. Though conditional, they, taken in connection with other facts and circumstances, may be sufficient to preclude the relief asked for by the plaintiff and sustain the decree appealed from. Whether they are or not depends upon the consideration and application of principles now to be stated.

[3] Alleged fatality of this condition is founded upon the supposed absolute right of the husband to determine the place of domicile. This right is stated by Schouler, in his work on Husband and Wife, at section 59, as follows: "And the husband, as dignior persona, has the right to fix it (the domicile) where he pleases. The wife's domicile merges in that of her husband." But, in the same section, he qualifies the proposition as follows: "In the genuine sense the domicile of the husband becomes that of the wife, and wherever he goes she is bound to go likewise; not, however, unless his intent be bona fide and without fraud upon her person or property rights." At section 61 he says: "A husband would not be permitted to remove his wife to some remote and undesirable place for the sake of punishing or tormenting her, or so as to compel her to stay alone where he did not mean to reside himself; for this would not fix the matrimonial domicile with honest intent." This principle was applied in *Powell v. Powell*, 29 Vt. 148, in a case very similar in one respect to this. The wife had refused to live with her husband in a particular locality in close proximity to his relatives. He applied for a divorce on the ground of desertion which the trial court refused. In affirming this decree, the Supreme Court, through Redfield, C. J., said: "Now, while we recognize fully the right of the husband to direct the affairs of his own house, and to determine the place of the abode of the family, and that it is in general the duty of the wife to submit to such determinations, it is still not an entirely arbitrary power which the husband exercises in these matters. He must exercise reason and discretion in regard to them. * * * Any man who has proper tenderness and affection for his wife would certainly not require her to reside near his relatives, if her peace of mind were thereby seriously disturbed." Other cases declaring and applying the same doctrine are *Gleason v. Gleason*, 4 Wis. 64;

Bishop v. Bishop, 30 Pa. 412; and *Boyce v. Boyce*, 23 N. J. Eq. 337.

[1] The conduct of the husband in fixing the place and conditions of the matrimonial residence may subject him to the application of another principle of almost universal observance. In seeking a divorce, he cannot obtain the benefit of his own wrong. Courts are ordained for the enforcement and vindication of the law and legal rights. They never aid anybody in efforts to violate law nor give him the benefit or fruit of his own violation thereof. No court of law or equity will enforce or give any right upon an illegal contract. Following the same principle, a court will not allow the use of its powers and process to obtain a benefit founded directly upon a breach of law by the applicant therefor. Courts of equity go still further and refuse relief, even in cases of equitable right, if the applicant has been guilty of fraud or misconduct in or about the matter in respect to which he seeks relief. *Peters v. Case*, 62 W. Va. 33, 57 S. E. 733, 13 L. R. A. (N. S.) 408; *Hogg's Eq. Prin.* § 324, p. 450. To obtain relief in a court of equity, the plaintiff must come with clean hands, and this maxim applies in divorce cases as well as in others of equitable cognizance. This is the principle underlying the defenses of connivance, collusion, and recrimination, everywhere recognized and permitted. *Bishop, Mar., Div. & Sep.* §§ 201-409, inclusive; *Wass v. Wass*, 41 W. Va. 126, 23 S. E. 537; *Pierce v. Pierce*, 3 Pick. (Mass.) 299, 15 Am. Dec. 210; *Myers v. Myers*, 41 Barb. (N. Y.) 114; *Danforth v. Danforth*, 105 Ill. 603. [2] Conduct sufficient to bar relief need not be such as would give the defendant cause for a divorce. Remedy and divorce are different things. Conduct sometimes denies remedy for apparent rights. Inequitable conduct on the part of the plaintiff, though it does not amount to cause for a divorce, suffices to defeat his application for relief. A different conclusion would be violative of the fundamental principle just stated. Adherence to that principle is necessary to the protection of the interest the state has in every suit for divorce. Marriage was instituted for the good of society. Once incurred, the marital relation must be continued, if continuance thereof is reasonably practicable, for the same reason: Its solemnity and importance as a factor in civilization forbid severance of the relation for slight cause. To allow both parties to dissolve the relation at will, or one of them to effect dissolution by trickery or fraud, would tend directly to defeat all the high and necessary purposes for which marriage was ordained. These are some of the obvious reasons for the application of the equitable maxim and legal principle in numerous cases of denial of relief. *Bacon v. Bacon* (decided at this term) 70 S. E. 762; *Wass v. Wass*, cited; *Cooper v. Cooper*, 17 Mich. 205, 97 Am. Dec. 182; *Mc-*

Gowen v. McGowen, 52 Tex. 357; Simpson v. Simpson, 31 Mo. 24; Ingersoll v. Ingersoll, 49 Pa. 249, 88 Am. Dec. 500; Goldbeck v. Goldbeck, 18 N. J. Eq. 42; Lynch v. Lynch, 33 Md. 328; Gray v. Gray, 15 Ala. 779; Crow v. Crow, 23 Ala. 533.

Viewing the facts disclosed by the record in the light of these principles, we are unable to say the trial court erred in refusing a decree of divorce. The plaintiff married a woman with whom he had previously had illicit intercourse. He knew her character and history when he married her. His entire conduct indicates a desire for separation and relief from the marriage relation, and likely because of her character. As to this, he made his election when he made her his life companion. He took her to a house occupied by an aged relative, where she says her relations were unpleasant. He gave her no public recognition as his wife otherwise than by living and cohabiting with her at that place. He refused to go out with her in public or to accompany her even upon visits to her own parents. When she expressed her dissatisfaction with her surroundings and treatment, he made not the slightest effort to comply with her wishes. His ultimatum was that he would support and keep her, if she would accede to his arbitrary will and determination as to the place in which, and the conditions under which, they should live together. Knowing her dissatisfaction with this and her intention, not to desert him absolutely, but to withdraw from that place, and her willingness to live with him under other conditions, he did not even request her to stay, nor ask her to return, nor in any way indicate a desire to renew cohabitation. There was no serious obstacle to his complying with the wish and desire she expressed. The house did not belong to him, and he had nothing invested in it. According to his own contention and claim, he had simply taken the place of his aunt as tenant of the house and paid rent for it. How much rent or for what period of time, he does not disclose. This conduct is not consistent with good faith and an honest effort to maintain the solemn relation he had assumed. In *Martin v. Martin*, Judge English well expressed a proposition, in full and complete harmony with the principles we are applying, in the following terms: "In assuming the marriage relation, it is understood that the contracting parties do so fully aware of the frailties and imperfections of human nature, and conscious of the fact that mutual forbearance must be practiced to enable them to pursue pleasantly the journey of life as companions; each party undertaking to overlook the moral wrongs and infirmities of the other. The best interests of society, decency, and morality combine in demanding that the obligations taken upon themselves, by the parties who enter into the marriage

contract, should not be abandoned and disregarded upon the mere whim or caprice of either party, or upon slight cause, real or imaginary."

Seeing no error in the decree, we affirm it.

(69 W. Va. 197)

WARD v. HOTEL RANDOLPH CO. et al.
(Supreme Court of Appeals of West Virginia.
April 18, 1911.)

(Syllabus by the Court.)

1. RECEIVERS. (§ 35*)—APPLICATION FOR APPOINTMENT—NECESSITY FOR NOTICE.

Notice must be given to parties interested of an application for appointment of a receiver, except in case of emergency, or when the application is made after process served and in term and the bill asks the appointment.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 54-60; Dec. Dig. § 35.*]

2. RECEIVERS (§ 5*)—APPOINTMENT—VALIDITY.

An appointment of a receiver, though the bill ask it, made without process served, and before decree on the merits, without affidavit to support the application, is erroneous.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 5.*]

(Additional Syllabus by Editorial Staff.)

3. EQUITY (§ 273*)—PLEADING—AMENDMENT TO BILL—DEPARTURE.

Where the original bill praying appointment of a receiver called only for a receiver, an amended bill, doing the same, and stating matters supposed to sustain the application, and further asking a dissolution and winding up of the company, is neither inconsistent with the original bill, nor foreign nor ungernant to it.

[Ed. Note.—For other cases, see *Equity*, Dec. Dig. § 273.*]

Appeal from Circuit Court, Randolph County.

Bill by Wirt C. Ward against the Hotel Randolph Company, John Wilson, and others. From an order appointing a receiver, defendant Wilson appeals. Reversed and remanded.

D. H. Hill Arnold, for appellant. Jared L. Wamsley, for appellee.

BRANNON, J. In this case this court rendered a decree reversing the action of the circuit court in appointing a receiver. *Ward v. Hotel Randolph Company*, 65 W. Va. 721, 68 S. E. 613. We held that the original bill was only a bill to get a receiver, and that such a bill, for that purpose only, could not be sustained. When the case went back to the circuit court, Ward presented an amended bill asking for a receiver and a dissolution of the corporation and a winding up of its affairs. The court made an order appointing a receiver to take charge of the hotel and carry on its business. The decree went no further, decreed no relief. No process to answer the amended bill was

issued before said decree was made. No notice was given to Wilson of the application for the appointment of the receiver. The amended bill was not sworn to; no affidavit to support the appointment was filed.

[1] We think it was error to appoint this receiver without notice to Wilson, a large stockholder. In *Bargain House v. St. Clair*, 58 W. Va. 585, 52 S. E. 660, we held: "There is no principle of the law of receivership of greater wisdom, and more firmly established, than that requiring notice of the application." Likewise in *Batson v. Findley*, 52 W. Va. 343, 43 S. E. 142. Such is the law everywhere, as shown in 34 Cyc. 117. An emergency case is excepted. Now, Wilson was a defendant to this cause, deeply interested in such appointment as a stockholder. The plaintiff deemed it necessary to give him notice, and did give him notice before the first appointment of a receiver. If the plaintiff regarded it necessary to give him notice then, why not necessary on the second application? If process to answer the amended bill had been served, it would be different, as the bill asks the appointment of a receiver; but there was no process or notice. The appointment was made simply on the showing of the unsustained bill.

[2] It does not meet this objection to suggest that the order was made in a pending suit, and therefore no notice was required. A receiver may, after process served, be appointed in term in a pending suit, if the bill asks it; but there was no process on the amended bill, the only pleading justifying the appointment, as we held the original bill did not in our former decision.

The former decree in this case distinctly held that good cause must be shown for the appointment. But in this case no cause was shown except the mere statement of the unverified bill. It will not do to say that the affidavit to the original bill would dispense with a verification of the amended bill, because the amended bill made statements not stated in the original bill, charged insolvency, and contained other matter in addition to that. That the corporation consented does not matter, as it could not represent Wilson's interest, and as it appears to the court that Wilson had adverse interest, and appealed from the former appointment, and thus opposed the appointment. Conflict of interest thus existed. 34 Cyc. 114, contains this text: "Regularly a motion for a receiver should be founded upon affidavits, or, as in the practice of some states, on a bill sworn to by the complainant or by some one cognizant of the facts stated." It is stated in 17 Ency. Pl. & Prac. 736, that: "A petition for a receiver should be verified by affidavit, and both the petition and the verifying affidavit must be positives, as must also other affidavits filed in support of or in opposition to the application." Alderson

on Receivers, § 132, tells us that there must be such affidavit.

[3] The point is made against the amended bill that it is a departure from the original bill and cannot be entertained. We do not sustain this position. We held that the original bill called only for a receiver. The amended bill does the same, stating matters supposed to sustain the application, and it further asks a dissolution and winding up of the hotel company. We do not think that the amended bill is either inconsistent with the original bill or foreign or ungermane to it. This appeal is only from the order appointing the receiver. Answers were filed in the case, but that was after the appointment, and they have not been passed upon by the court. The order was made simply on the amended bill and the prior record.

We will reverse the order appointing a receiver and remand the case for further proceedings.

(68 W. Va. 194)

HUDKINS et al. v. BUSH.

(Supreme Court of Appeals of West Virginia.
April 18, 1911.)

(Syllabus by the Court.)

1. EVIDENCE (§ 334*)—APPOINTMENT—PROOF.

A mere certificate by a clerk that by an order of his court a certain person had been appointed a receiver is not admissible to prove, and does not prove, such appointment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1266-1272; Dec. Dig. § 334.*]

2. RAILROADS (§ 270*)—ACTIONS AGAINST—PROOF OF OPERATION OF RAILROAD BY RECEIVER.

In an action against a receiver of a railroad company to recover damages for killing cattle by a train, it must be proven that the railroad was being operated by a receiver.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 865; Dec. Dig. § 270.*]

Error to Circuit Court, Randolph County.

Action by B. Hudkins and others against B. F. Bush, receiver of the Western Maryland Railroad Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Talbott & Hoover and W. B. Maxwell, for plaintiffs in error. Benjamin A. Richmond and E. A. Bowers, for defendant in error.

BRANNON, J. B. Hudkins and W. G. Hudkins brought an action of trespass on the case against B. F. Bush, receiver of the Western Maryland Railroad Company, to recover damages for killing some cattle on the railroad track, and the court, on motion of the defendant, excluded the plaintiffs' evidence and directed a verdict for the defendant, and on such verdict gave judgment for the defendant, and the plaintiffs sued out a writ of error.

[1] At the start we come across the question of the appointment of the receiver. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

only evidence thereof is a paper called a certificate of facts, if we can say that even that is a part of the record. It is a paper by which S. B. Harrison, clerk of the Circuit Court of the United States, certifies that by an order entered of record Bush was appointed receiver of "all the lands, properties, railroads, franchises and premises embraced in and covered by a certain mortgage given by the Western Maryland Railroad Company to secure bonds." There is no copy of the order of appointment of a receiver. All the books seem to say that this is necessary. Before the statute dispensing with proof of incorporation, where a corporation was sued or suing, its existence must have been proven. Such was the common-law rule. *Central Land Co. v. Calhoun*, 16 W. Va. 362, pt. 7; *Grays v. Turnpike Co.*, 4 Rand. (Va.) 578. Why should not a receiver prove his appointment? The paper we have is only the *opinion* of Harrison as to the effect of the order, *his construction* of it. The best evidence of a document is the document itself speaking for itself to the court. This paper is not even secondary evidence, and is wholly abortive to prove the appointment. *Dickinson v. Railroad Co.*, 7 W. Va. 390; *Anderson v. Nagle*, 12 W. Va. 98, 112; *Roe v. Town*, 45 W. Va. 785, 32 S. E. 224. The general issue put in contest each and every material allegation of the declaration. If Bush was not receiver, there was no liability on him as such. His liability as such was one of the elements of the case. It is hardly worth while to advert to the old rule that, where a record attests a fact, that record must be produced. It or a copy, not of the whole record, but of the order of appointment, is the best evidence and must be produced. *Beach on Receivers*, § 703; 10 *Encyclopedia of Evidence*, 659.

[2] Then another question occurs. Some receivers have power of operation, some have not, dependent on the terms and powers given by the order of appointment. Even that certificate of facts does not answer this question. Was this receiver in the actual operation of this railroad and liable as such? It does not appear that such were his powers or liabilities.

And then again, was not the burden on the plaintiffs to show that the train which did the injury was a train in the hands of the receiver and operated by his servants? All the declarations against railroads for injuries of this kind charge that the railroad on which the misfortune occurs is the property of a given company, and that the train doing the injury is a train of that company. True, where a company is in charge of a railroad, it is presumed that trains on it belong to it; but in this case it must be shown whose train this was. If it was not a train of this receiver, he would not be liable.

If your charge that an injury was received from a horse of a certain person, you must prove that it was his horse. If you charge that a defendant committed assault and battery, you must prove that he did the act. We suppose this is fundamental and plain. "The plaintiff has the burden of proof that the defendant railroad company owned and operated the railroad from which his injuries were received, where that is made an issue by the pleading." 4 *Elliott on Railroads*, § 1777. The plea of not guilty put this in issue in this case. In *Citizens' St. R. Co. v. Stockdell*, 159 Ind. 28, 62 N. E. 22, we find this: "The averments in the complaint that the appellant, the Citizens' Street Railway Company, owned and operated the railroad, and that the appellee was received by it as a passenger, were of the most material character, and the facts so alleged constituted the very foundation of the appellee's claim for damages. Each of these allegations was expressly denied and was put in issue by the answer." It was held there could be no recovery for want of this evidence. So, in this case it must be proven that this train belonged to the receiver. "A failure to prove that the defendant corporation owned or operated the road or car in question must be fatal to appellee's cause. The general denial filed by the appellant puts every material fact in issue." *Indianapolis St. R. Co. v. Lawn*, 30 Ind. App. 515, 66 N. E. 508. Since writing to this point I happen to meet with the following text in *Alderson on Receivers*, § 569, p. 776: "There is no presumption that persons were appointed receivers because they have acted as such. The appointment must be alleged and proved. It has been declared that the only proof that should be made of the appointment of a receiver is a certified copy of the appointing order."

So, we think that the case fails for want of evidence above stated, and that the court did not err in its action. Essential facts were not proven to sustain the action.

This renders it unnecessary for us to pass on other features of the case, and we affirm the judgment.

(66 W. Va. 160)

FEDER v. HAGER et al.

(Supreme Court of Appeals of West Virginia.
April 18, 1911.)

(Syllabus by the Court.)

1. PUBLIC LANDS (§ 186*)—SALE—DECREE.

A decree of sale, reciting that the land proceeded against and directed to be sold is "school land" or "waste and unappropriated land," is sufficient prima facie evidence of the state's title to meet the requirements of points 3 and 4 of the syllabus in this case on former writ of error. 64 W. Va. 452, 63 S. E. 285.

[Ed. Note.—For other cases, see *Public Lands*, Dec. Dig. § 186.*]

2. PUBLIC LANDS (§ 186*)—SCHOOL LANDS—IDENTITY OF LAND SOLD.

The whole of the record of proceedings for the sale of school lands, together with the deed made in pursuance thereof, should be looked to for the purpose of identifying land thereby sold as land now in controversy.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. § 186.*]

Error to Circuit Court, Boone County.

Action by Julius C. Feder, as administrator, against John W. Hager and others. Judgment for defendants, and plaintiff brings error. Reversed, and judgment rendered.

Payne & Payne and Brown, Jackson & Knight, for plaintiff in error. F. C. Leftwich and W. R. Thompson, for defendants in error.

ROBINSON, J. An understanding of this unlawful entry and detainer case may be had by reference to the opinion on a former writ of error. 64 W. Va. 452, 63 S. E. 685. It will there be observed that the judgment was reversed and the case remanded for a new trial. Plaintiff had not fully traced his title to the state. He relied upon a deed from a commissioner of school lands, but did not sufficiently support that deed by the record of the proceedings in which it was authorized to be made. We held that "such parts of the record of the court proceedings upon which the deed is based as show forfeiture of the land or title thereto in the state are necessary as *prima facie* evidence that the deed carried the state's title," and that "the court proceedings introduced to support the deed are not evidence that the state had title which was thereby conveyed, if they contain no reference to such facts of title."

There has been another trial of the case—one by the court in lieu of a jury. All the evidence on the former trial was again considered, by agreement of the parties. In addition, plaintiff introduced a decree for the sale of school lands, entered in the proceedings which were the basis of the deed through which he claims. This decree directs the sale of the land as school land—waste and unappropriated land. Plaintiff also proved that the title under which defendants claim to hold was forfeited at the time of the sale pursuant to this decree. Besides, plaintiff proved that he and those under whom he holds have regularly been charged with the taxes on the land and have paid the same. On defendants' part, the evidence on the new trial was practically the same as that on the former one. The court found for defendants and entered judgment in their favor. The right to possession which plaintiff claimed by the action was thereby denied him, and he has prosecuted the writ of error now under consideration.

We are well satisfied that the judgment is erroneous. Plaintiff proved good title to the

land and upon it was entitled to possession as against defendants who claim possession under an inferior title. Plaintiff traced his title to the state. He showed a complete and superior title to the land. Being the real owner he is entitled to possession as against those claiming under an inferior title. "Entry upon land by any person other than the legal owner is unlawful, if it be without the owner's consent." Defendants were not in possession by consent of plaintiff, who shows himself the legal owner, and they should have been ousted.

In this new trial, plaintiff supplied everything that we held to be wanting on the former trial. He made the *prima facie* case which we there prescribed. Defendants did not meet the case so made. Plaintiff introduced court proceedings to support the deed of the commissioner of school lands, which proceedings contained references to the fact that the land belonged to the state and was liable to be sold for the benefit of the school fund. The decree of sale certainly meets every requirement in this particular. It recites that the land was "school land" and that it was "waste and unappropriated."

[1] These recitals take the title to the state. In our former opinion herein we said: "If there was a single declaration in such record that the land proceeded against was forfeited, treated as forfeited or belonging to the state, it would be *prima facie* evidence of such fact. If a report of state lands liable to sale, by the proper officer, or decree of sale reciting such report, treated the land as belonging to the state, it would be sufficient until rebutted. *Strader v. Goff*, 6 W. Va. 268." The decree of sale, now introduced, recites a report of state lands liable to sale, made by the proper officer, and that decree in terms treats the land so reported and now involved in this suit as then belonging to the state. So the requirements of our former holding have been met.

[2] Defendants contend, however, that the particular tract of land now in controversy is not identified as the land mentioned in that decree. They say that plaintiff failed in proof because the decree, reciting the report of state lands liable to sale and directing sale thereof, does not name a tract that fits the land plaintiff claims. If we look only to the decree of sale, that may be true. But the report of survey, the decree confirming sale, and the deed made in pursuance of the last named decree, sufficiently identify the land now claimed by plaintiff as the Tract No. 8 named in the decree of sale which recites that it was state land when proceeded against for the benefit of the school fund.

The judgment will be reversed, and judgment that plaintiff have possession of the land as against defendants will now be entered here.

(69 W. Va. 171)

FIRST NAT. BANK OF PHILIPPI v. KITTLE et al.(Supreme Court of Appeals of West Virginia.
April 18, 1911.)*(Syllabus by the Court.)***PRINCIPAL AND SURETY (§ 115*)—DISCHARGE OF SURETIES—NEGLIGENCE OF CREDITOR.**

A creditor is bound to use proper care and diligence in the management and collection of collateral securities; and a surety will be released, to the extent of the loss actually sustained by the negligence of the creditor, to the same extent, as if such loss was due to some positive act of the creditor.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 244-268; Dec. Dig. § 115.*]

Error to Circuit Court, Barbour County.

Action by the First National Bank of Philippi against Mary D. Kittle and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Fred O. Blue and Arthur D. Dayton, for plaintiff in error. William T. George and John B. Dilworth, for defendants in error.

MILLER, J. In an action by plaintiff, before a justice, against V. W. and Mary D. Kittle and C. W. Brandon, defendants, on a note for two hundred dollars, plaintiff recovered a judgment against all defendants for the full amount of the note, interest and costs.

Defendants, Mary D. Kittle, wife of V. W. Kittle, and C. W. Brandon, though joint makers, were in fact sureties for V. W. Kittle, and they alone appealed, the judgment of the justice against V. W. Kittle, principal, remaining in full force, and unappealed from.

On the trial of the appeal in the circuit court, the court on defendants' motion, struck out plaintiff's evidence, and directed a verdict in their favor, and from the judgment below, of nil capiat, and for costs, the plaintiff obtained this writ of error.

The defense of the sureties before the justice, and in the circuit court on appeal, was, that the bank, at the time of note sued on, had required of V. W. Kittle, principal, additional security, and who then, September 20, 1905, assigned to the bank, to use the language of the assignment, "two hundred dollars of the amount due me by the county court of Barbour County for work done under contract with said court for court square paving, as collateral security, for the payment of said note;" and that by the negligence of the bank in failing to give notice of said assignment, and to take such steps as was necessary to preserve its own rights and the rights of defendants as sureties, the same had been lost, or surrendered, and the sureties thereby discharged.

For the bank it was replied, that Mary D. Kittle was estopped from denying her lia-

bility, on the grounds, first, that after the trial and judgment by the justice, she had, on October 1, 1906, joined with her husband, V. W. Kittle, in a deed to one Golden for a house and lot belonging to her, by which deed the grantee, in part consideration, had covenanted to pay said judgment, then a lien on said lot; second, that subsequently, in a chancery suit of George against her, said debt had been reported, and decreed as a debt and lien on said house and lot; third, that subsequently in a suit by Howell against said Golden's administrator, and others, said judgment was reported and decreed as a personal debt against said Golden, and decreed to be paid out of his estate; and that if said debt or any part of it, should be paid out of that estate, Mary D. Kittle would be relieved pro tanto therefrom.

And as applicable to both defendants, it was said, that the bank was not bound to the utmost, or even active diligence, while the sureties remained passive; and that in as much as said assignment was only collateral, and that on October 13, 1905, before said note fell due, orders were issued and paid as follows: one to V. W. Kittle, for \$247.50; another for \$76.84; and another to V. W. Kittle, for the use of said Charles W. Brandon, for \$336.76; and that on April 10, 1906, three days after Kittle's assignment to the bank had been filed in the clerk's office of said court, said court, disregarding said assignment, had paid directly to V. W. Kittle, \$112.50, for extra work on said court square, the defendants have not been prejudiced by any neglect or want of diligence on the part of plaintiff.

The fact of said collateral assignment is not denied, but fully established by the proof; and it is scarcely denied that the bank was negligent, grossly negligent, in failing to present said assignment, or give notice to the county court thereof, and demand payment. If it had done so, there is no reason to believe, and it is not shown, or pretended, that the county court would not willingly and without objection, have paid the bank the money which it did pay directly to Kittle. It is contended, however, that the county court was not bound to accept and pay a partial assignment of the amount due Kittle; but in equity, if not at law, it was. At all events, it is not shown that the county court declined to honor said assignment. The assignment was never presented, and the court given an opportunity to honor and pay, until it had actually paid out the money actually assigned to Kittle and others. We must say, therefore, on the evidence, that the bank lost this security, by its negligence.

We see nothing in the suggestion of counsel, in argument, based on *Railway Co. v. Coal Co.*, 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414, that the justice had no jurisdiction to try the rights of defendants as sure-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ties, because equitable in nature. The fact that it might have been necessary for the bank or the sureties finally to enforce its or their rights by a suit in equity, furnishes no excuse for the negligence of the bank. That loss by its negligence constituted a legal defense to the action against the sureties.

But was the bank bound to active diligence? The authorities cited and relied on by plaintiff's counsel, hold, that a creditor is not bound to active diligence in pursuing his principal debtor, unless required by the sureties to do so. But this proposition, and the authority cited for it, we think, inapplicable to the duty of a creditor, respecting collateral securities in his hands. With respect to such securities the authorities all hold the creditor bound to use proper care and diligence in the management and collection of such collateral, and that a surety is released, to the extent of the loss, actually sustained, by the negligence of the creditor, to the same extent as if lost by the positive act of the creditor. This proposition we think fully sustained by the following: 1 Brandt on Suretyship (3d Ed.) §§ 480, 481, 482, and 498; Clow v. Derby Coal Co., 98 Pa. 432; Phares v. Barbour, 49 Ill. 370; Hall v. Hoxsey, 84 Ill. 616; Bank v. Parsons, 42 W. Va. 137, 24 S. E. 554; 32 Cyc. 216, and many cases cited in notes; Davenport v. Banking Co., 115 Am. St. Rep. 100, note page 100.

If the bank had given due notice to the county court, or filed said assignment in time to preserve its and the sureties rights thereunder, the bank might not have been bound, in order to preserve its rights against defendants, to have pursued the county court by suit. It was, however, in the interest of the sureties, bound to preserve those rights by diligence. It is shown in this case to have neglected that duty.

It is very clear therefore, unless Mrs. Kittle is estopped by her acts, as claimed, from denying her liability; or she and her co-defendant Brandon have not been prejudiced by the negligence of the plaintiff in the premises, that they have both presented complete defenses to the action.

We do not find any element of estoppel in the fact that in the deed to Golden, Golden covenanted to pay the bank, the judgment recovered before the justice, then pending in the circuit court on appeal, by Mrs. Kittle and Brandon; nor in the fact that in the subsequent decrees in the two chancery cases referred to, that judgment was allowed and decreed. Those decrees were involuntary on her part. The plaintiff was in no way prejudiced by anything done or omitted by Mrs. Kittle. When she sold her property to Golden the lien of the judgment existed. Some provision had to be made to protect the purchaser. The parties chose to make such provision in the deed. The bank was no

party to that agreement, did not rely thereon to its prejudice. For this reason plaintiff is not in a position to plead estoppel.

For a like reason it may be said with respect to the decrees in the chancery suits. The judgment of the bank had been recovered. It was a lien as it stood, though appealed from, certainly as to V. W. Kittle. Evidently nothing was ever realized by the bank in those suits, and we do not see anything in the record thereof, so far as presented, estopping Mrs. Kittle in this action.

But were defendants prejudiced by the negligence of the plaintiff? They were not, if as intimated in the record and in argument, either got the money, or the benefit thereof, paid out on orders of the county court to Kittle, subsequent to said assignment. That Mrs. Kittle is the wife of V. W. Kittle, without more, is not sufficient to show that she was benefited in such a way as to excuse the bank from loss due to its negligence. It is not proven, or attempted to be, that Brandon did not have a bona fide debt against Kittle for the amount of the order of the county court to his use; or that he was in any way benefited by the orders issued in favor of Kittle individually; or that either Mrs. Kittle or Brandon knew, as a fact, that the bank had not presented its assignment to the county court, and protected its own rights as creditor, and their rights as sureties.

For these considerations, we conclude that that the judgment below was right, and should be affirmed.

(99 W. Va. 158)

TUNNEY v. WHEELING STEEL & IRON CO.

(Supreme Court of Appeals of West Virginia.
April 18, 1911.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF (§ 38*)—TIME FOR SAVING—ADJOURNED TERM OF COURT.

A bill of exceptions in relation to a judgment entered at a term which is adjourned thereafter to an adjourned term must be saved either before the adjournment to the adjourned term or within thirty days after that adjournment.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 49-53; Dec. Dig. § 38.*]

2. EXCEPTIONS, BILL OF (§ 41*)—TIME FOR SAVING—ADJOURNED TERM OF COURT.

The thirty days allowed for the taking of a bill of exceptions, when the exceptions relate to a judgment entered at a term which is adjourned to an adjourned term, run from the date of that adjournment, and not from the end of the adjourned term.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 69; Dec. Dig. § 41.*]

Error to Circuit Court, Ohio County.

Action by Martin Tunney against the Wheeling Steel & Iron Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hubbard & Hubbard, for plaintiff in error. T. S. Riley, for defendant in error.

ROBINSON, J. In an action for the recovery of damages for personal injury received by the plaintiff while in the employment of the defendant, based on allegations of breach of duty on the part of the latter, the plaintiff has judgment, through the verdict of a jury. The defendant complains thereof and seeks to have the same reversed.

The assignment that the court erred in overruling the demurrer to the declaration is not well taken. A careful consideration of that pleading proves it to be one stating sufficiently a good cause of action.

The other assignments, relating to the evidence and the instructions to the jury, cannot be considered. The bill of exceptions embracing these matters was not signed within the time required by law; so the evidence and instructions have not been made a part of the record.

[1] A bill of exceptions must be signed and made a part of the record during the term or within thirty days after its adjournment. From a supplemental record, brought up by certiorari according to the usual practice, it appears that there was an adjournment of the term at which the judgment was entered to an adjourned term, and that the bill of exceptions was signed and certified more than thirty days after that adjournment. When a term is adjourned to an adjourned term, a judgment theretofore entered at the term becomes final for execution or enforcement. An adjournment of that character affects a judgment just as a final adjournment does. Code 1906, c. 112, § 4. The term is finally ended as far as the judgment is concerned. *Helms v. Cold Storage Co.*, 65 W. Va. 203, 63 S. E. 1089. [2] The thirty days for the taking of bills of exceptions in relation thereto must run from that time. The exceptions cannot be saved within thirty days after the end of the adjourned term, as has been undertaken in this case.

Prior to the enactment of the statute giving thirty days for bills of exceptions, it was necessary to take them before the adjournment of the term. They had to be made a part of the record during the term at which the judgment was entered. Under the old law, they had to be taken before an adjournment to an adjourned term. *Wickes v. Railroad Co.*, 14 W. Va. 157. Now, the new law giving thirty days is one merely extending the former time. "Extension of time is the substance of it. It contemplates nothing else. That is its main object." *Layne v. Railway Co.*, 66 W. Va. 611, 67 S. E. 1103. So the extension must run from the time that formerly barred the taking of exceptions. The adjournment contemplated

in the statute of extension is the adjournment at which the term is ended in relation to the judgment as to which bills of exceptions are to be taken. It was not intended to give more than thirty days after the finality of the judgment.

The record calls for an affirmance; it will be entered.

(69 W. Va. 163)

SHAFFER v. SHAFFER et al.

(Supreme Court of Appeals of West Virginia.
April 18, 1911.)

(Syllabus by the Court.)

1. PARTITION (§ 32*)—ACTION BY GUARDIAN.

A widow, entitled to dower, may maintain a suit as guardian for her infant children to have land inherited and owned by such infants and adults partitioned, and to have her dower therein assigned to her.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 83; Dec. Dig. § 32.*]

2. PARTITION (§ 8*)—DEED BETWEEN TENANTS IN COMMON—EFFECT.

A deed between tenants in common, cotenants or coparceners, by which in an effort at partition, they each convey or quit claim to the others, the portions allotted to them respectively, conveys no title to the grantee; it amounts simply to a severance of the unity of possession.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 20; Dec. Dig. § 8.*]

3. JUDGMENT (§ 747*)—CONCLUSIVENESS—JUDGMENT IN PARTITION.

Although section 1, chapter 79, Code 1906, confers jurisdiction on a circuit court in a partition suit, to adjudicate all questions of law affecting the legal title, that may arise therein, a decree or judgment in such suit is as conclusive as in other suits; nevertheless, if no issues affecting the title are presented for decision, or the decision of which was necessarily involved therein, such judgment and decree invests no title in the partitioners.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1286; Dec. Dig. § 747.*]

4. JUDGMENT (§ 747*)—CONCLUSIVENESS—JUDGMENT IN PARTITION.

A decree in a suit brought by a husband and wife, partitioning land, and of which the bill alleges the wife's father died seized and possessed, and which decree divides and partitions to the husband and wife jointly the part inherited by the wife, without pleadings putting in issue any conflicting rights between plaintiffs, invests no title in the husband to the wife's land.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1286; Dec. Dig. § 747.*]

5. JUDGMENT (§ 747*)—CONCLUSIVENESS—PARTITION.

But such a decree will not afterwards estop the husband or his heirs from showing right and title to an interest in the land so partitioned, acquired by deed from the wife's father in his life time, such decree not being inconsistent with such deed.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1286; Dec. Dig. § 747.*]

6. EVIDENCE (§ 182*)—SECONDARY EVIDENCE—PROOF OF LOSS OF ANCIENT DEED.

If an ancient deed be lost, but its existence and contents be proven by oral evidence, and it be also proven to have been recently in the possession of and produced by the grantee,

and such account thereof is given, as might be reasonably expected, under all the circumstances, such oral evidence is admissible to establish such deed or grant, without otherwise proving the due execution and delivery thereof; and such deed will be treated as presumptively genuine, until such presumption is overcome by evidence to the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 601-604; Dec. Dig. § 182.*]

Appeal from Circuit Court, Preston County. Bill by Hannah S. Shaffer, individually and as guardian of her children, against Charles H. Shaffer and others. From the decree, certain defendants appeal. Affirmed.

F. E. Parrack and A. G. Hughes, for appellants. P. J. Crogan, for appellee.

MILLER, J. Hannah S. Shaffer, widow of Draper C. Shaffer, in her own right, and as guardian of her infant children, Dessie G., Asa J., and Alston G., aged respectively, twelve, nine and six years, sued defendants Charles H. and David C. Shaffer, and Vernie M. Pifer, and Samuel Pifer, her husband, making her said infant children also defendants to the bill, seeking partition of a tract of 120 acres of land in Preston County. She alleges that her said husband, at the time of his death, was the owner of an undivided one half interest in said tract, and that the other undivided half interest therein was then owned jointly by said adult defendants, by inheritance from their mother, Mary E. Shaffer, a former wife of said Draper C. Shaffer, and who, with her said infant children, on the death of her said husband, inherited from him, in equal moieties, his one half undivided interest in said land, and of which he so died seized and possessed, subject only to her right of dower therein, and that she and her said infant children were entitled to a partition of said land, and she to have dower assigned to her, according to their respective rights and interests therein.

After defendants had appeared at rules and filed their demurrer, plea and answer to said bill, said infants, by said Hannah S. Shaffer, as next friend, intervened by petition, setting up their rights, substantially as alleged in the bill, and praying that the same might be read in connection therewith, and the two causes heard together, and the land partitioned according to the prayer of said bill. The adult defendants appeared to said petition, and filed an amended plea and answer thereto, and also to said bill. The original and amended pleas were rejected, and the demurrer to the bill was overruled. To the answer and amended answer there was a general replication by plaintiff.

On final hearing, on bill, answers and proofs taken, the decree appealed from adjudged that the said Draper C. Shaffer, as alleged, died seized of an undivided one half interest in said land; that the same was

subject to partition among his heirs, as prayed for in the bill, and that partition thereof should be made; and that the commissioners appointed should go upon the land and divide the same into two equal parts, having due regard to quality and quantity, and assign one part thereof to the heirs of Mary E. Shaffer, and the other to the heirs of Draper C. Shaffer; and directed said commissioners to also assign dower to the widow Hannah S. Shaffer in the part allotted to Draper C. Shaffer, giving her a full one third part thereof, having due regard to quality and quantity; and to further divide and partition that part equally between the heirs of the said Draper C. Shaffer, namely, Dessie G., Asa J., Alston G., Charles H. and David C. Shaffer, and Vernie M. Pifer, giving to each a one sixth part, with like regard to quality and quantity; also directing said commissioners to make due report to the court showing said partition, made by metes and bounds, together with a plat thereof. From this decree the adult defendants have appealed.

The errors relied on here are: (1), overruling the demurrer to the bill; (2), striking out defendants' pleas of estoppel; (3), decreeing that Draper C. Shaffer died seized of a one half undivided interest in said land.

[1] First, as to the demurrer. The point made on the demurrer is that Hannah S. Shaffer, as guardian, cannot sue for and on behalf of said infants, and that they should have been sued by their next friend. There is no merit in these propositions. A guardian may maintain a suit for partition of lands owned and held by infants and adults, as in this case. *Zirkle v. McCue*, 26 Grat. (Va.) 517; *Redd v. Jones*, 30 Grat. (Va.) 123; *Snively v. Harkrader*, 29 Grat. (Va.) 112; *Suter v. Suter*, 70 S. E. 705. *Hull v. Hull*, 26 W. Va. 1, does not assert a contrary proposition. That was a suit by a widow seeking partition of land of which her husband died seized. She did not sue as guardian for her infants, as did the plaintiff in this case, and that case is distinguished from this, and other cases cited, in this particular. It is proper to make infants defendants in person, but a guardian ad litem must be appointed in the suit to make defense. The demurrer we think was properly overruled.

The questions which the defendants sought to present by pleas in estoppel, are fully covered by their answer. They go to the merits of the case, and need not be considered separately. The question of merit involved is, do the title papers exhibited with bill and answers, and proofs taken, show title in Draper C. Shaffer to an undivided half interest in said tract of land, which descended to his heirs as alleged, entitling plaintiff and petitioners to the partition prayed for?

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

Two sources of title are alleged. The first is, that this tract, prior to 1869, was conveyed by Samuel Elsey, to said Draper C. and Mary E. Shaffer, by deed duly recorded, but that the record thereof had been destroyed by the burning of the court house of Preston county in 1869. It is not only alleged, but proven, that subsequently, and before suit brought, said deed was lost; second, that after the death of said Elsey, occurring about the year 1871, in a friendly suit, brought by said Draper C. and Mary E. Shaffer, against Sarah Elsey and others, a partition of the lands of said Samuel was decreed; that by said decree, pronounced therein on August 21, 1872, said tract, with another tract of eighty five and a quarter acres, were, as reported by said commissioners, partitioned jointly to the said Mary E. and Draper C. Shaffer, and that a special commissioner was thereby also appointed to execute deeds of special warranty to the parties for the lands allotted to them respectively. The fact of the execution and existence of a deed from Samuel Elsey, to Draper C. and Mary E. Shaffer, was denied by the answer and vigorously controverted on the trial.

[2] We will first dispose of the question of title by decree in partition. Did that decree invest in Draper C. Shaffer title to a half interest in said tract? The rule seems well established that a deed between tenants in common, co-tenants, or coparceners, in an effort at voluntary partition, and by which they each convey, or quit claim to the others, the portions allotted to them respectively, conveys no title to the grantee; that it amounts simply to a severance of the unity of possession. *Whitsett v. Wamack*, 159 Mo. 14, 59 S. W. 961, 81 Am. St. Rep. 339; *Harrington v. Rawls*, 131 N. C. 39, 42 S. E. 461; *Brown v. Humphrey*, 43 Tex. Civ. App. 23, 95 S. W. 23; *Hays v. Marsh*, 123 Iowa, 81, 98 N. W. 604; *Carson v. Carson*, 122 N. C. 645, 30 S. E. 4; *Harrison v. Ray*, 108 N. C. 215, 12 S. E. 993, 11 L. R. A. 722, 23 Am. St. Rep. 57; *Yancey v. Radford*, 86 Va. 638, 10 S. E. 972. And so in *Hays v. Marsh*, where land of the wife, who was not a party to the suit, was allotted to her husband who was, it was held that she was not bound by the decree, but that subsequent possession by both of the land so allotted to him with the implied consent of the co-tenants, amounted to a parol partition to her of her share in severalty. In *Whitsett v. Wamack*, it was decided that a deed of release and quit claim, made by two coparceners, to a third and her husband, in an effort at voluntary partition of their jointly inherited estate, conveyed no title to him. And in *Yancey v. Radford*, (Va.), it was held that a similar deed operated only, (1) as a partition and allotment of the wife's share of the ancestor's realty; (2) that it conveyed no estate to the husband as against the heirs of his wife.

In *Carson v. Carson*, the third point of the syllabus is: "A deed by heirs to land, which the wife inherited, being made to the husband alone could not be color of title, since it did not convey the wife's interest;" this because, as decided in the third point, the wife's interest, having vested by descent, was not divested by the conveyance to the husband, she not joining in the deed.

[3] But is the law different where there is a suit and a decree of partition? Our statute, section 1, chapter 79, Code 1906, says: "Tenants in common, joint tenants and coparceners, shall be compellable to make partition, and the circuit court of the county wherein the estate, or any part thereof, may be, shall have jurisdiction, in cases of partition, and in the exercise of jurisdiction, may take cognizance of all questions of law affecting the legal title, that may arise in any proceedings." This section clearly gives right to the court to settle any conflicts or questions as to title, certainly as between partitioners who may be compelled to partition, when put in issue by proper pleadings. The pleadings in the partition suit, however, presented no question of right or title as between the plaintiffs. But it is very earnestly insisted in argument that as the bill filed by them jointly alleged that the tract here involved was one of the tracts, among others, of which the wife's father died seized and possessed, plaintiff in this suit, and her wards claiming under him, are estopped by the allegations of that bill, and the decree thereon, from setting up in this suit as against the adult defendants, heirs of said Mary E. Shaffer, a different state of facts, or the fact alleged that prior to said former suit, her father had deeded the land of which partition is here sought to her and her husband jointly.

As to the effect of such a decree, *Freeman on Cotenancy and Partition*, Second Edition, section 531, page 705, says: "It is, perhaps, unfortunate that judges so often remark that partition confers no new title, but only divides that which the parties previously possessed, because the remark justifies the inference that a judgment in partition has little or no effect upon the title. The truth is that a judgment in partition is as conclusive as any other. It does not create or manufacture a title, nor divest the title of any one not actually or constructively a party to the suit; but it operates by way of estoppel; it prevents any of the parties from relitigating any of the issues presented for decision, and the decision of which necessarily entered into the judgment; and it divests all titles held by any of the parties at the institution of the suit." Note the language, "any of the issues presented for decision, and the decision of which necessarily entered into the judgment." The same doctrine is promulgated in *Hart v. Steedman*, 98 Mo. 452, 11 S. W. 993, and *Lindell Real Estate Co. v. Lindell*, 142 Mo.

51, 43 S. W. 368, point nine of the syllabus. Of course if the wife is not a party to the suit in which land inherited by her is partitioned, she is not bound by the decree, no matter what the pleadings may have been. *Hays v. Marsh*, supra.

[4] Our conclusion from these authorities is, that a proper interpretation of said decree of 1872 standing alone, would be that it invested no title in Draper C. Shaffer, to the share allotted and decreed him and his wife jointly. As against the other parties to that suit it was conclusive, to the extent at least of the allotment to Mrs. Shaffer of her share. But as between the plaintiffs to that suit, that decree decided nothing. No issues, as between them, were there presented, or necessarily involved.

[5] By bringing into hotch pot in that partition suit, land previously deeded to them jointly, and having it so partitioned, we do not think Draper C. Shaffer, or his heirs, became thereby thereafter estopped from asserting his or their rights under the prior deed. If a prior deed invested title to the land in them jointly, there is nothing in the decree inconsistent therewith. We do not think therefore that that decree is conclusive of the rights of the parties under the prior deed, if such deed as alleged has been established by proof.

The question remains then, has the making and delivery of such prior deed been established by legal and competent evidence? While said decree of partition may not be legal and competent evidence on this question, it is at least suggestive of some interest of Draper C. Shaffer. That such a deed was in existence as late as 1904 and 1907, and had been recorded in the proper county, prior to 1869, when the records of that county were in that year wholly destroyed by fire; and that in both of those years it was found in the possession of Draper C. Shaffer, and delivered by him to J. W. Hill, a justice, first, in 1904, to aid him in preparing a deed from said Pifer and wife, conveying to said Charles H. Shaffer, their one third of the one half undivided interest in said tract; and next in 1907, when said justice was then called upon to prepare for David C. Shaffer, a deed conveying to said Charles H. Shaffer, his one third of the one half undivided interest in said tract of land, are facts fully established by the evidence of Justice Hill. Both of these deeds describe the interests conveyed as the interests inherited by the grantors from their mother, said Mary E. Shaffer, deceased, as the owner of a one half undivided interest in said tract. These deeds do not estop the grantors from asserting a larger interest in said tract; but they are at least admissions or declarations by them of the interests then claimed, and evince knowledge on their part at that time, of the right or claims of plaintiffs in this suit. Notwithstanding the fact that the existence of said deed was contro-

verted, not one of the defendants was put upon the stand to deny knowledge thereof. They are all shown to have lived on the land with Draper C. Shaffer, their father; and Charles H. Shaffer, who was living on the land, with his wife, at the time of his father's death, and who testified, was not asked a single question about his knowledge of said deed.

[6] But the contention is that the loss of the deed and its due execution have not been sufficiently proved. Counsel for the parties stipulated on the trial that "the deed alleged to have been made by Samuel Elsey to D. C. Shaffer and wife, and concerning which the witness, J. W. Hill, * * * testified, is not a matter of record in the office of the Clerk of the County Court of Preston County * * * and the same cannot be found or produced." We do not regard this stipulation as an admission of the execution and delivery of said deed; but it is an agreement that if the deed was established, it was lost and could not be produced. Was this not enough to admit oral evidence of the due execution, and contents of the deed? We think so. The evidence of the witness Hill, and the corroborating facts, prove that a deed purporting to have been made by Elsey to Draper C. and Mary E. Shaffer, in the handwriting of a notary public, known to and proven by him, and purporting to have been signed and acknowledged by the grantors, before said notary, and having indorsed upon it the certificate of recordation by the clerk of the county court of said county, in office prior to 1869, when the records of said county were so destroyed by fire, and conveying to said Shaffer and wife jointly said tract of land, was so found in the possession of said Draper C. Shaffer, one of the grantors, in the years 1904 and 1907, and after being used by said Hill in the preparation of said deeds, was in each instance returned by him to said Shaffer. This deed at the time of the trial must then have been over forty years old. If plaintiff had been in possession of said deed and been able to produce it in evidence on the trial below, because of its age and other facts and circumstances shown, it would have been rightly admitted in evidence, without proof of its execution. *Caruthers v. Eldridge*, 12 Grat. (Va.) 670. On like principle, in our opinion, the correct rule, applicable to a case like this one, is that, if an ancient deed be lost, but its existence and contents be proven by oral evidence; and it be also proven to have been recently in the possession of and produced by the grantee, and such account thereof is given, as might be reasonably expected, under all the circumstances, such oral evidence is admissible to establish such deed or grant, without otherwise proving the due execution and delivery thereof; and such deed will be treated as presumptively genuine, until such presumption is overcome by evidence to the contrary.

So our opinion is that the decree below was right and should be affirmed, and it will be so ordered.

(69 W. Va. 211)

SMITH v. REPPARD.

(Supreme Court of Appeals of West Virginia.
April 18, 1911.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS (§ 53*)—
PRESIDENT OF BOARD OF EDUCATION—VACANCY—APPOINTMENT OF COUNTY SUPERINTENDENT.

Points of syllabus in *Kline v. McKelvey*, 57 W. Va. 29, 49 S. E. 896, reaffirmed and applied.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 53.*]

Error to Circuit Court, Tyler County.

Mandamus by G. W. Smith against M. M. Reppard. Judgment for relator, and respondent brings error. Affirmed.

T. P. Jacobs and Moore & Conaway, for plaintiff in error. J. M. Underwood and B. Engle, for defendant in error.

WILLIAMS, P. M. M. Reppard was elected president of the board of education for Ellsworth district, Tyler county, at the general election in 1902, for the full term of four years, beginning on the 1st of July, 1903, but for some reason did not qualify. He was then appointed by the county superintendent of free schools to fill said office, and qualified by taking the oath required by law, and was in office, claiming the right to hold it, at the institution of this proceeding. At the general election in 1906, F. R. Hickman was elected president of said board of education, for the term of four years, beginning on the 1st of July, 1907; but Hickman failed to qualify, and on the 11th of October, 1907, G. W. Smith was appointed by the county superintendent for the unexpired term for which F. R. Hickman had been elected. Reppard refused to surrender the office to Smith, and claims that, under the law (section 2, c. 45, Code 1906), he had a right to hold the office until his successor was *elected and qualified*; that, although Hickman was elected, his failure to qualify did not create a vacancy, because he (Reppard) was rightfully in office; and that the county superintendent had no right to appoint as for a vacancy. On application by Smith to the circuit court of Tyler county, a peremptory writ of mandamus was awarded on the 27th of February, 1908, placing him in the office; and Reppard obtained this writ of error.

The sole question presented is, Had the county superintendent the power to appoint relator as for a vacancy? A majority of the court are of opinion that he had such power, and that his appointment of Smith conferred upon him the right to the office. They hold

that the law of this case is settled in *Kline v. McKelvey*, 57 W. Va. 29, 49 S. E. 896, construing section 2, c. 45, Code 1906. They still adhere to that decision as a correct construction of the statute.

If the statute had not been so construed in that case, I would have been of the opinion that the county superintendent had no power to appoint, so long as there was an incumbent rightfully holding. Section 5, c. 45, authorizes the county superintendent to appoint only in case of a vacancy; and I do not see how there could be a vacancy if one was in office who had a right to it. The office of president of the board of education is created by the Legislature, not by the Constitution, and the Legislature had the power to prescribe the term of office, and the manner of election, or appointment. It did so in section 2 by saying a president of board of education shall be elected by the voters of the district, and that his "term of office shall commence on the 1st day of July next after his election, and continue for four years, and until his successor is elected and qualified according to law." There is no provision in this section for *appointing* his successor, and he is expressly given the right to hold the office, not only until his successor is elected, but until he is *elected and qualified*. I do not see how the election of Hickman as Reppard's successor, when he failed to qualify, could have created a vacancy, thereby authorizing the county superintendent to appoint; because it appears to me that the statute is designed to meet just such a contingency by providing that the incumbent who was elected and qualified, should continue to hold the office until his successor should be both elected and qualified. It therefore seems to me that Reppard was rightfully in office when Smith was appointed, and that there was then no vacancy. But the statute has since been amended, so as to authorize the appointment of a successor to a president, or a commissioner, of the board of education, who has served out the regular term for which he was elected, and the question here involved is not likely again to arise. See section 3, c. 27, Acts 1908.

The judgment of the lower court will be affirmed.

(69 W. Va. 200)

TETER et al. v. IRWIN et al.

(Supreme Court of Appeals of West Virginia.
April 18, 1911.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT (§ 76*)—TERMINATION OF RELATION—DEATH OF CLIENT.

Death of a client ends the power of his attorney at law.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 127; Dec. Dig. § 76.*]

2. ABATEMENT AND REVIVAL (§ 75*)—CONSENT OF HEIRS OF DECEASED DEFENDANT.

Revival of a cause against heirs of a deceased defendant by consent of such heirs dispenses with process to revive, and makes them parties.

[Ed. Note.—For other cases, see Abatement and Revival, Dec. Dig. § 75.*]

3. JUDGMENT (§ 90*)—CONSENT DECREE GIVEN BY ATTORNEY—VACATION—BURDEN OF PROOF.

To overthrow a decree by consent given by an attorney at law on the ground of his want of authority, the burden to prove such want is on the party asserting it, and must be clear and full.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 148, 149; Dec. Dig. § 90.*]

4. JUDICIAL SALES (§ 53*)—CONCLUSIVENESS.

One about to purchase property under a decree of a court having jurisdiction is not bound to inquire into the authority of an attorney representing a party.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 104-107; Dec. Dig. § 53.*]

5. ATTORNEY AND CLIENT (§ 85*)—AUTHORITY OF ATTORNEY—CONSENT TO DECREE BY CLIENT.

The relation of client and attorney at law authorizes the attorney to consent to a decree binding his client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 137; Dec. Dig. § 85.*]

6. ATTORNEY AND CLIENT (§ 72*)—AUTHORITY OF ATTORNEY—EVIDENCE.

Authority of an attorney to act for his client in consent by the attorney to a decree binding his client may be shown by the conduct of the client, his acquiescence therein, or other circumstances proving it.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 102-104; Dec. Dig. § 72.*]

7. ATTORNEY AND CLIENT (§ 103*)—UNAUTHORIZED ACTS OF ATTORNEY—ACQUIESCENCE BY CLIENT.

If an attorney at law act without authority in consenting to a decree, and the client afterwards recognize his authority, or, with knowledge of it, acquiesce in it, and make no objection to it when he knows that other persons are acting upon faith of the attorney's authority, it is a ratification making the decree binding on the client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 154; Dec. Dig. § 103.*]

Appeal from Circuit Court, Barbour County.

Bill by Daniel P. Teter and others against James Irwin and others. Decree of dismissal, and plaintiffs appeal. Affirmed.

J. M. N. Downes, for appellants. Blue & Dayton, for appellees Teter and Valley Coal & Coke Co.

BRANNON, J. Joseph Teter owned a large and valuable estate in lands in Barbour county. He became deeply involved in debt, so that we may regard him at his death as utterly insolvent. Two chancery suits were brought against him. One of them was brought by Samuel Woods to subject a tract of 303 acres of land known in this cause

as the "R. T. Talbott farm" to a purchase-money lien. He also owned other tracts of 939 acres, 260 acres, and some coal interests. The other suit was brought by Crimm, the holder of various judgment liens, to subject Teter's land to the payment of liens. This was a creditor's lien suit. In Teter's lifetime an order of reference was made in the Crimm suit referring the case to a commissioner to ascertain liens against Teter. Before a convention of lienors was made under this order, Teter died intestate, leaving a number of sons and daughters. In February, 1899, an order was made reviving the Crimm case against the administrator and heirs of Teter. This order was made by consent of said administrator and heirs, which consent was given by Charles F. Teter, one of the heirs, acting for himself and as attorney at law for other heirs. Charles F. Teter acting for himself and his coheirs made a contract with James Irwin selling the "R. T. Talbott farm" for \$12,000. This contract was reported to the court, and by a decree entered in the two causes of Woods v. Teter's Heirs and Crimm v. Teter's Heirs this contract was approved and confirmed, and a deed directed to be made to Irwin. Irwin paid the money to the court, and the land was conveyed to him by deed June 6, 1899. This decree was made June 2, 1899, upon a consent given by Charles F. Teter and Fred O. Blue as attorneys for the heirs. Charles F. Teter for himself and coheirs made a contract with N. T. Arnold selling at \$9 per acre all coal and minerals, except oil and gas, in other lands of Joseph Teter aggregating about 2,000 acres. This contract was reported to the court, and by decree October 18, 1899, was approved and confirmed by the court. This decree was upon consent of the heirs given by Charles F. Teter and Fred O. Blue as attorneys at law for them. A deed was made to Arnold for such coal under decree of court dated November 18, 1899; the total price for the coal being \$14,136.48. Irwin conveyed May 31, 1900, the "Talbott farm" to the Southern Transportation Company, and it made very extensive and costly coal developments and improvements upon it. Arnold conveyed the coal which he acquired to Valley Coal & Coke Company. In May, 1902, Daniel P. Teter and others of the children and heirs of Joseph Teter filed a bill in equity against Irwin, Southern Transportation Company, the Valley Coal & Coke Company, Arnold, Charles F. Teter, and others to annul the decrees made in the said causes of Woods v. Teter's Heirs and Crimm v. Teter's Heirs, reviving them against the heirs of Joseph Teter, and confirming the sales to Irwin and Arnold above stated. The ground of this suit was upon the allegation that Charles F. Teter and Fred O. Blue had no authority as attorneys to represent the heirs of Joseph

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Teter, or revive the causes, or to consent to the decrees approving and confirming the sales to Irwin and Arnold. The bill is upon the theory that those heirs were never parties to the suit, because there was no revival process served on them, and they did not appear, and that the court had no jurisdiction over them, and therefore the decrees were void. The result of this suit was a decree dismissing the bill, from which Daniel P. Teter and others appeal.

[2] Did these complaining heirs appear in the case? The suits were pending in the lifetime of Joseph Teter. Of course, his death suspended them and revival against the heirs was necessary. Though no process of revivor was served on them, yet, if they appeared by an authorized attorney, that dispensed with such process, and they became parties to the cause.

[1] The great, the decisive, question, then, is: Did Charles F. Teter have authority to appear for them? Did he and Fred O. Blue have authority to appear for them and consent to the sale to Irwin and Arnold? Charles F. Teter, one of the heirs, was a practicing lawyer, the only lawyer of the family. His evidence and claim is that he had been his father's attorney during his father's lifetime in the suits pending against him, and counsel say that that fact authorized him to continue as attorney and represent them as heirs. This proposition we cannot admit. True, we are cited to 4 Cyc. 938, a very reliable work, stating that, "where revival is merely a matter of procedure the attorney may consent to revival after the death of a party." Referring to the one authority there cited, *Clark v. Parish*, 1 Bibb (Ky.) 547, we find it explicitly holding that by the death of the client the power of his attorney is gone, and asserting in broad language that it is clear that it would have been unwarrantable assumption of power in the attorneys to attempt by their consent to revive the suit; but the court said that from the ambiguity of the order it could not say but that the attorneys represented the executor, and therefore held the revival good. We are also cited to *Wilson v. Smith*, 22 Grat. (Va.) 496, saying that in a suit for partition the counsel employed by the ancestor will be presumed to be continued as counsel, and that a decree for sale upon his consent is valid. To the same effect we are cited to *Marrow v. Brinkley*, 85 Va. 62, 6 S. E. 606. We cannot hold that the powers of an attorney of a client continue after the client's death. The law is very decided to the contrary. "The death of the client, or, in case of a corporation or partnership, its dissolution, operates as an immediate termination of the relation. Although the case for which he was employed may be still pending, the attorney has no authority to appear for the heirs or the personal representative unless employed by them." To the same effect, see 4 Cyc. 958.

The grave question then is: Were Charles F. Teter and Fred O. Blue retained as attorneys at law by and for the heirs? Upon this vital question we have hundreds of pages of printed evidence from many witnesses, and in irreconcilable conflict. It comes chiefly from members of the family, witnesses deeply involved in self-interest. Charles F. Teter swears that on the day after the funeral of his father, at his home, the children, except two, held a conference, in which the affairs of the estate were talked over; that it was known to all that the estate was deeply indebted, and that those suits were pending; and that it was agreed that Charles F. Teter, being the only lawyer member of the family, should act as administrator, but, while he declined to do this, he agreed to act as counsel for the estate, and for his brothers and sisters, and explained to them how the suit would ordinarily have to be revived by *scire facias*, but that he could appear for them all and save costs by consenting to a revival, and that this course was agreed upon, not exactly as a formal conference, but as simply a family talk as brothers and sisters would have upon such an occasion; and that, in pursuance of such understanding, he consented to the revival, and that he felt that he was empowered to act for the children in the complications of the estate springing from these circumstances. Is this version of Charles F. Teter, under the solemnity of his oath, plausible, reasonable? A reading of the voluminous record of this case considering the circumstances in which the estate stood, and as the parties stood (which we may consider), I think would answer this question to almost any mind in the affirmative. Reflect that the father was just dead, and his estate embroiled in consuming debts, with two suits pending against it involving costs and devouring interest; that the land must be sold in them was beyond question; that a revival of the suits was inevitable; that there was no disputing of the many debts against it, which would probably consume it; that by speedy action the estate might be made to pay out and leave something from the wreck, but at that time this was doubtful. What more natural than that the heirs wanted to save expenses of revival, and would want the suit to be proceeded with and the land sold? It had to come to this. There was no evasion of this result. Is it not reasonable to say that these brothers and sisters, who were then in friendship, would consent that Charles F. Teter should take these matters pending in suit in hand, and do the best he could for all under such troubling circumstances? I state these things as showing to reasonable men that it is probable that Charles F. Teter's oath in this matter is true, and it is corroborated by some other members of the family. This is rendered probable by other considerations which I state as supplemental to those just mentioned. All the members of the family lived on or close to these lands, except

two in the West, and they visited Barbour county and were informed of what was going on. Is it probable that these heirs would not keep an eye on what was being done with this fine landed estate of their father? What was being done? The suits were revived in open court. Charles F. Teter, as we may plausibly say, struggling to sell the property at private sale by advantageous contract to keep the property from a sacrifice sale under the hammer, made two important contracts selling a valuable farm to Irwin for the large sum of \$12,000, proven to be a large price, and selling the coal in about 1,600 acres at \$9 an acre, then a fair price, and these contracts were reported to the open court and there confirmed in the public hearing. Did these other heirs know nothing of these things? How can they fairly say they did not? Will reasonable men believe that they were in ignorance of these doings so important to them? And they let nearly three years go by after these important transactions before they brought this suit. So, we say, if we had to decide on the oral evidence, that it seems plausibly established that Charles F. Teter had the authority which he assumed, and was acting in good faith for the best interest of all. But, if different men might differ on that question, then there comes the rule in appellate courts that "where a decree is based upon depositions conflicting and contradictory so that it is difficult to determine on which side they preponderate, and hard to draw proper decision therefrom, and different judges might reasonably disagree upon the facts proved, the appellate court will refuse to reverse the decree of the court below, although the testimony may be such that the appellate court might have rendered a different decree if it had acted upon the case in the first instance." *Richardson v. Ralph Snyder*, 40 W. Va. 15, 20 S. E. 854.

[3] Another principle must be remembered. This suit is an application to overthrow solemn decrees of a court 2½ years after they were made. The books say that, when an accredited attorney appears at the bar of the court as representing clients, there is a presumption of his authority, and, after the court has acted, the burden is upon the party denying his authority to clearly show the want of authority. *Connell v. Galligher*, 36 Neb. 749, 55 N. W. 229. The evidence must be clear. *Winters v. Means*, 25 Neb. 241, 41 N. W. 157, 13 Am. St. Rep. 489. This is held in *Lumber Co. v. Lance*, 50 W. Va. 636, 41 S. E. 123. This overthrow of solemn proceedings in an open court of the country is asked nearly three years later after parties have purchased on the faith of their validity and spent hundreds of thousands of dollars in coal development. Here it is apropos to quote from 1 Black on Judgments, § 325: "At any rate, the claim for a party for whom an appearance has been entered to deny the authority of attorney and ask relief is view-

ed with great disfavor by the courts wherever innocent third persons have acquired rights under the judgment or decree sought to be annulled. And relief will be denied where the fact of the attorney's authority is not fully negatived, but left in doubt under the testimony, and there is no allegation of a meritorious defense to the action." 1 Black, § 374, speaking of proceedings to annul a decree for the want of attorney's authority, says: "The complainant must make it appear that the judgment is inequitable in itself, by reason of some fraud or trick or collusion, or that the result would or might have been different if there had been a full and fair trial upon the merits." I would not like to say that, where a clear case of want of authority appears, the court would make it a prerequisite to relief that it should appear that no harm was done; but in this particular case I do say that a sale of this property was inevitable for a large volume of debts, and that it could not be avoided, and that it appears that the sales that were made were happy sales for the estate, very advantageous to it, and that such facts must be considered by a court of equity, in connection with other facts, as going to deny relief and as saying equity does not see its way to undo these things. As stated above, on the faith of these court proceedings persons made purchases and paid large sums of purchase money, and very large sums in improvements, and they clearly occupy the place of purchasers for valuable consideration without notice of any want of authority, and they are protected under that principle which says that against a purchaser for valuable consideration a court of equity will take no step to his harm. "A purchaser for value without notice having obtained a conveyance will not be affected by latent equity, whether by lien, incumbrance, trust, fraud, or any other claim." "From a purchaser for value without notice this court takes nothing away." This rule, everywhere held, is sustained by many authorities cited in *Dunfee v. Childs*, 59 W. Va. 226, 248, 53 S. E. 209. There is no evidence that these purchasers had any notice of any want of power in these attorneys to consent to these decrees. All the circumstances tend otherwise.

[4] It is well established that a purchaser under decree need not inquire as to the attorney's authority. *Williams v. Johnson*, 112 N. C. 424, 17 S. E. 496, 21 L. R. A. 848, 34 Am. St. Rep. 513; 2 Freeman on Judgments, §§ 509, 510; *Low v. Settle*, 22 W. Va. 387.

[5] It seems to be well established that, when the relation of client and attorney exists, the attorney has power to confess judgment or consent to a decree. 3 Am. & Eng. Ency. L. 368; 4 Cyc. 936.

[6] In addition to what is said above against the overthrow of the decrees, I will add another consideration seeming strong to me for the same result. As remarked

above, the revival of the suits was an act in open court; so the entry of the decrees selling this large area of valuable property. Everybody in the courthouse would know of it—the sale of large landed estates. We may say that almost everybody in the county would know of it. It would be the common talk of the whole neighborhood, if not the whole county. And here were five or six of these heirs right around the land. It is wholly unreasonable, even preposterous, to say that these heirs did not know of these transactions. Our knowledge of the affairs of men denies this. Here we may fitly apply the usual doctrine of notice. We said in *Lafferty v. Lafferty*, 42 W. Va. 792, 26 S. E. 265, that: "The law is that, where one has means of knowledge of a fraud or sufficient notice to put him on inquiry, it is enough to count time against him. Where he has means of knowing or ascertaining, where he is put on inquiry, where ordinary prudence for his interest suggests that he inquire, he must do so or else time runs." This doctrine shows that a party must look out for his interests. We there borrowed language from the United States Supreme Court. "The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, hard to disprove, and hence the tendency of the courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts. Especially is this the case where the party complaining is a resident of the neighborhood in which the fraud is alleged to have taken place." We borrowed the further language: "They do not pretend that the facts of the fraud were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard, etc. * * * Parties cannot thus, by their seclusion from means of information, claim exemption from the laws that control human affairs, and set up a right to open all transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with a knowledge of their status and condition, and of the vicissitudes to which they are subject." We applied these principles in *Herold v. Barlow*, 47 W. Va. 750, 36 S. E. 8. They made no protest against it in court nor to Charles F. Teter nor to the purchasers, so far as appears. Besides, they let about 2½ years or 3 years go by before they brought this suit. Now, if we should say that Charles F. Teter had no authority to act as counsel, then we could support his action upon the doctrine of ratification.

[?] Ratification retroacts, and is equivalent to original authority conferred upon the agent and validates his act. These heirs

were silent, acquiesced, while their brother was making sales and parties were buying these lands by large outlay, and these open proceedings were taking place. We find it written in *Curry v. Hale*, 15 W. Va. 867, as follows: "But, if the agent exceeds his authority, the act may be ratified by the principal. It is not necessary that there should be any positive and direct confirmation. Where with a knowledge of the facts the principal acquiesces in the acts of the agent, under such circumstances as would make it his duty to repudiate such acts if he would avoid them, such acquiescence is a confirmation of the acts of the agent. It is not necessary that such knowledge shall be shown by positive evidence. It may be deduced or inferred from the circumstances and facts of the case." Syl. points 3, 4, 5. "While an unauthorized act cannot take effect as the act of the principal unless it be ratified, and hence need not be rescinded, it is evident that his failure to express dissent upon being informed of a transaction may reasonably give ground for inferring assent. If, for example, an agent should make an unauthorized sale of his principal's property, and the principal, after being informed, should remain silent, knowing that the purchaser was dealing with the property as his own, the principal's silence would speak his assent as clearly as words." *Tiffany on Agency*, p. 68. *Ruffner v. Hewitt*, 7 W. Va. 605. Under the circumstances of this case, these parties must have known of these transactions, and that Charles F. Teter and purchasers from him under those contracts were relying in good faith upon those proceedings, and we assert that it was the duty of those parties to speak out, and promptly do so. Mere silence does not always create estoppel; but when, as I think is the case in the present instance, the circumstances demand that a party speak out, he cannot remain silent. If he does not, an estoppel arises. These parties could not lie silent 2½ years or 3 years before suing. Under the circumstances this is laches also. "Acquiescence in a transaction may bar a party of the relief in a very short period. Where one has knowledge of an act, or it is done with his full approbation, he cannot undo what has been done; and, if he stands by and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. Where his silence permitted or encouraged others to part with their money or property, he cannot complain that his interests are affected; his silence is acquiescence, and it estops him." *Despard v. Despard*, 53 W. Va. 443, pt. 4, syl., 44 S. E. 448.

There are some other matters presented to us by counsel for appellant. He suggests that in the suits of Woods and Crimm the court committed certain errors, in this: that it was error to decree the sale of the coal to Arnold without having advertised the sale;

that it was error not to ascertain liens before sale; that it was error to correct the decree in the Crimm case of the Shettleworth debt; that it was error to transfer the vendor's lien from the Talbott tract to the Zebb's creek tract. We need not further explain these irrelevant matters. Now, it is obvious that, if there was error in this respect, it was the subject of an appeal, and not of a separate suit attacking collaterally for such errors. This is not an appeal. While those decrees stand unreversed, we cannot effect them for such errors. The court had jurisdiction in the cases in Joseph Teter's lifetime and against his heirs afterwards, and any mistakes in these respects were mere errors, remediable by appeal. But, being consent decrees, no appeal would lie, and, unless you can find ground for setting them aside in equity, there can be no relief for such alleged errors. Complaint is made on this line. Charles F. Teter in the pressure of debts upon his father paid for his father, \$5,628. Joseph Teter and Charles F. Teter and W. S. Teter met and W. S. Teter made the calculation and drew a contract which was signed by the father reciting that in consideration of \$7,000, of which \$5,628 had been paid and the residue was to be paid thereafter, Joseph Teter sold a tract of land containing 65 acres, sometimes called 70 acres, to Charles F. Teter. This is proven by the evidence of W. S. Teter, one of the heirs. In the suit of Orimm a commissioner reported this contract, and that all the purchase money had been paid by Charles F. Teter, and the court entered a decree that the legal title of this land be and was vested in Charles F. Teter, and that the decree be made a link in the chain of title of said land from Joseph Teter to Charles F. Teter in lieu of a deed, and that the estate of Joseph Teter be released and discharged from the debts which had been paid by Charles F. Teter for him.

In this present suit in the final decree a deed was decreed to be made by the heirs to Charles F. Teter for said land. The bill in this present case set up that contract between Joseph Teter and Charles F. Teter and attacked it, and assigned as error the former decree in the Crimm Case. Charles F. Teter answered, relying upon that contract, and the court made a decree for the deed as stated. Now, in the first place, the decree in the Crimm Case adjudicated Charles F. Teter's right to that land. It did not direct a deed, it is true, but it adjudicated the rights of the parties upon that contract, and declared that the decree should constitute title in Charles F. Teter as a deed. I do not say that this is a deed, but it settles the rights of the parties, and operates to pass title on the principle of *res judicata*; but, whether so or not, the later decree for the deed was only in execution of that for-

mer decree which was never appealed from, if erroneous. While that former decree stood unreversed, Charles F. Teter had right to the land by its force. If there was error by the former decree in that respect, there was no appeal from it. That part of the former decree declaring Charles F. Teter entitled to the land under the contract with his father as above stated was not by consent, but an adjudication by the court upon the contract, and the record touching it, including the commissioner's report touching that contract, and the payment of the liens by Charles F. Teter. It does not rest upon a consent by Charles F. Teter. The appellants' counsel says there was no prayer in Teter's answer for a deed. This is a very refined objection in view of the fact that the former decree had settled the right of Charles F. Teter to the land.

It is not inappropriate when a court of equity is called upon to resurrect and rip up decrees of courts and acts on which property rights rest to divine the motive. The evidence shows that these heirs approved and were satisfied, gratified, with the sales when made; but when great coal development took place in Barbour county, and there was what may be called a "craze" for coal land, and prices rose, and this land was developed and found rich, the project of recovery of the land or profit in some way begat this suit.

We affirm the decree.

(69 W. Va. 213)

BUFORD et al. v. CHICHESTER et al.

(Supreme Court of Appeals of West Virginia.
April 18, 1911.)

(Syllabus by the Court.)

1. REFORMATION OF INSTRUMENTS (§ 16*)—
MUTUAL MISTAKE.

Equity has jurisdiction to reform a written agreement by supplying any material matter omitted by mutual mistake of the contracting parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. § 16.*]

2. REFORMATION OF INSTRUMENTS (§ 1*)—DIS-
CRETION OF COURT.

Such equitable remedy is not absolute, but depends upon whether the reformation sought is essential to the ends of justice.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. REFORMATION OF INSTRUMENTS (§ 1*)—
WHEN RELIEF DENIED.

If the omission which is sought to be supplied would give the agreement no different meaning, or legal effect, from what it had before, the omission is immaterial, and the remedy will be denied.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. EQUITY (§ 365*) — DISMISSAL WITHOUT PREJUDICE.

A general demurrer to a bill which on its face shows no ground of equity jurisdiction, and which cannot be cured by amendment, should be sustained, and the bill should be dismissed. But, if the bill shows a cause of action which would be good in a court of law, the dismissal should be without prejudice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 769-771; Dec. Dig. § 365.*]

Appeal from Circuit Court, Wood County.

Action by W. M. Buford and others against W. T. Chichester and others. Judgment for defendants, and plaintiffs appeal. Reversed, and appeal dismissed.

J. W. Vandervort, for appellants. William Beard, for appellees.

WILLIAMS, P. This is a suit by W. M. Buford (née W. M. Brevard) and L. E. Brevard, partners in the mail contracting business, against J. M. Hinton, subcontractor, and W. T. Chichester and J. W. Ryder, his sureties, for the purpose of reforming a written contract made by said Hinton, whereby he agreed to carry the mail on route No. 31,244 from Marietta, Ohio, to Heslop in said state, and back, six times per week, beginning August 1, 1902, and ending on June 30, 1903, for \$450 per annum; and also to recover damages for an alleged breach of the contract by said Hinton. A demurrer to the bill was overruled, and defendants answered. On the 13th of December, 1907, the cause was heard upon the pleadings, exhibits, and depositions of witnesses, and the court granted the relief prayed for in respect to reforming the contract, and refused to award damages, and relegated plaintiffs to such action at law on the contract as they might lawfully be entitled to. From this decree plaintiffs have appealed. Defendants also cross-assign errors.

[1] The demurrer to the bill raises the question of jurisdiction. Does the bill present a cause for equitable relief? There is no doubt of equity jurisdiction to reform a written instrument so as to make it speak the true agreement between parties, when the mistake sought to be corrected is a mutual one, and is essential to give complete legal effect to the instrument.

[2] But this remedy is not absolute. It is discretionary with the courts, and depends upon whether the reformation is essential to the ends of justice. 34 Cyc. 907. "A court will not reform an instrument merely for the sake of reforming it, and it is a good defense to point out, whether on demurrer or answer, that the reformation would be useless and of no effect. There is no necessity for reformation where the party against whom action is brought is willing to rectify, or where the legal construction put on the instrument would be the same as before reformation." 34 Cyc. 946.

The only reformation of the written agreement which the bill seeks to have made is to have the names of the subcontractor and his sureties inserted in the blank spaces left, for that purpose, in the body of the printed form of contract. The contract is exhibited with the bill, and that portion of it containing the blank spaces reads as follows, viz.: "This article of agreement, made the 18 day of July, nineteen hundred and two, between W. M. Brevard, of Huntingdon, county of Carrol, and state of Tenn., contractor with the United States, party of the first part and ———, of Marietta, county of Washington, and state of Ohio, subcontractor, party of the second part, and ——— of ———, his sureties." This agreement was signed and sealed by J. M. Hinton, with the designation, after his signature, of "Subcontractor," and by W. T. Chichester and J. W. Ryder, with the designation of "Surety" after the signature of each, and by W. M. Brevard with the designation, after his signature, of "Contractor with the United States." Would the insertion of the names of the subcontractor and his sureties in the blanks add anything to the legal force or effect of the written contract? Would the agreement have any different meaning, or effect, after the names were inserted from what it had before? Certainly not.

[3] Then, if the insertion of the names would not change the meaning or legal effect of the writing, it necessarily follows that reformation is immaterial and unnecessary. It would be idle to reform a writing that would be susceptible of no different interpretation after it is reformed than could properly be given to it before. The manner in which the contract was signed shows that J. M. Hinton was party of the second part, and was the subcontractor, and that the other two defendants were his sureties. The agreement, taken as a whole and including the signatures, furnishes all necessary proof of what names were intended to be used in the blank spaces. After the contract was signed, no other names than the names of the defendants could have been properly filled in the blanks. The contract conveys the same meaning whether the blanks be filled or not, and the omission to insert the names in those blanks at the time the instrument was signed is an immaterial matter; and, it being altogether an immaterial matter, relief in equity is not essential to further the ends of justice. Equity jurisdiction is therefore not sustained on the ground of reforming a written agreement.

The only other relief asked is damages for an alleged breach of the contract, and for this plaintiffs have a complete remedy at law. [4] The demurrer to the bill should have been sustained; and, for the reason that it clearly appears from the nature of the case that the bill cannot be cured by

amendment, it should have been dismissed, but without prejudice to plaintiffs' right to sue at law on the contract.

The decree complained of will be reversed, and this court will enter a decree dismissing the bill without prejudice to plaintiffs' right to sue at law.

(136 Ga. 236)

WATSON v. STATE.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 407*)—ADMISSIBILITY OF EVIDENCE—DECLARATIONS OF THIRD PERSON—PRESENCE OF ACCUSED.

Where, on his trial for murder, the defendant admitted that he bore the same name as the alleged slayer, but denied any knowledge of the homicide, and there was evidence that the defendant was the actual slayer, testimony of a witness that immediately after the homicide two persons, one of them corresponding in appearance with the defendant, came near the house of the witness, located about 350 yards from the scene of the homicide, and while there the companion of the defendant told the witness the name of the defendant and that he was the slayer, under circumstances authorizing an inference that the defendant heard him, was not open to the objection that the same was inadmissible, because it did not positively appear that the defendant heard the statement of his companion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 968; Dec. Dig. § 407.*]

2. CRIMINAL LAW (§ 1169*)—WRIT OF ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of immaterial evidence, which is not calculated to harm the defendant, is not cause for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8137; Dec. Dig. § 1169.*]

3. HOMICIDE (§ 302*)—MURDER—INSTRUCTION—JUSTIFIABLE HOMICIDE IN DEFENSE OF HABITATION.

The evidence did not authorize an instruction on the law of justifiable homicide in defense of habitation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 634; Dec. Dig. § 302.*]

4. CRIMINAL LAW (§ 828*)—TRIAL—INSTRUCTION—REQUEST.

Where, on a trial for murder, the evidence authorized an inference that the killing was in resistance of an arrest by an officer and posse without a warrant, and the court correctly charged the law of voluntary manslaughter and justifiable homicide, it is no ground for new trial that the court failed to concrete the charge with reference to a particular phase of the case; there being no written request therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.*]

5. CRIMINAL LAW (§ 828*)—MURDER—TRIAL—INSTRUCTIONS.

The defense of alibi only was made by the defendant's statement; and it was not error for the judge to omit a charge thereon, in the absence of a written request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.*]

6. CRIMINAL LAW (§ 828*)—TRIAL—INSTRUCTIONS—REQUEST.

The charge covered all the main and substantial issues in the case, and it is not ground

for new trial that the court failed to charge the law relative to threats made by the deceased against the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.*]

7. VERDICT AUTHORIZED BY EVIDENCE.

The evidence supported the verdict.

Error from Superior Court, Bulloch County; B. T. Rawlings, Judge.

Andrew Watson was convicted of murder, and he brings error. Affirmed.

Homer C. Parker, J. L. Renfro, and Francis B. Hunter, for plaintiff in error. Alfred Herrington, Sol. Gen., Hines & Jordan, H. A. Hall, Atty. Gen., and R. D. Moore, for the State.

EVANS, P. J. Andrew Watson was convicted of the murder of Andrew Kennedy, and recommended to mercy. He was refused a new trial, and brings error.

The trial occurred about 12 years after the homicide. It is inferable from the testimony of the state that about daybreak an officer with a posse of seven men came to the house of Sam Jackson for the purpose of arresting Andrew Watson, who was supposed to be in the house, for an alleged burglary of the storehouse of Andrew Kennedy. Their approach caused the dogs at the house to bark, and Sam Jackson came to the door of the house, saying, "Here is dogs, and it's negro dogs." He then drew near the posse, who told him to go back into the house and build a fire. When he went back into the house, Andrew Watson said to him, "What do they want?" to which he replied, "They want a fire." Watson then said, "If a fire is what they want, I will give them a fire." Upon his making this statement, a woman's voice was heard to exclaim two or three times, "Don't shoot." Watson then came to the door, and shot four or five times with a rifle, killing Andrew Kennedy, and wounding the officer. After the shooting, Watson ran off, and at a distance of about 50 yards from the house he fired his gun again, and he was fired upon by the posse. The defendant offered witnesses whose testimony tended to show that the Andrew Watson, who was accused of burglary and also of the murder of Kennedy, and who at the time of the commission of these alleged crimes lived in that community, was a person other than the defendant on trial, and that the defendant in his statement denied that he was the Andrew Watson, the slayer of Kennedy.

[1] 1. The evidence was voluminous, and in the main was directed to establishing the identity of the man on trial as the slayer. Among the witnesses offered by the state was W. B. De Loach, who testified: That he spent the night at Morgan De Loach's house, located 350 yards away from the house where the killing occurred. That he had just arisen,

and was dressing himself, when he heard four or five shots and some cries. He immediately came out of the house, and while on the steps, arranging his clothes, Sam Jackson came running up the road from his house, and, when he reached the witness, he told witness that two white men had been killed at his house. Just then another man, armed with a gun or rifle, ran up and called Sam Jackson. After a brief interchange of words, this man ran off. The witness asked Sam Jackson who the man was, and Sam Jackson replied that it was "Andrew Watson who did the shooting." The witness testified: "I wouldn't swear that Andrew Watson heard it, or didn't hear it. I don't know about that, because I couldn't tell. He could or should have heard it. It is reasonable that he could have heard it, from the distance that he was. It was possible that he didn't hear it, and possible that he could have heard it, both of them." The witness testified that he did not know Andrew Watson, but that the man on trial corresponded in appearance and size with the man who was with Sam Jackson on the occasion referred to in his testimony. The testimony of this witness as to the conversation between him and Sam Jackson was objected to, on the ground that it did not occur in the presence of Andrew Watson, and the defendant would not be bound by any statement by Sam Jackson, unless it was positively shown that it was made in the defendant's presence. There is no dispute in the evidence that Kennedy was killed by a man called Andrew Watson. The defendant admitted that his name was Andrew Watson, and most of the evidence on the trial was directed to the issue of the identity of the accused with the slayer. There was testimony of eyewitnesses to the homicide that the defendant on trial was the slayer of Kennedy, and the testimony of this witness also bore on the issue of identification. If the jury should find that the defendant was the same man who killed Kennedy, and who came up to De Loach's house almost immediately after the homicide, then it would be competent to show an unchallenged statement in his presence that he was the slayer. It was for the jury to say whether the statement of Jackson was made in the presence of the defendant, and the court properly allowed the evidence to go to the jury.

[2] 2. The sheriff of the county was allowed to testify that he had held the office of sheriff for nine years, during which time he held a warrant for the defendant, which warrant may have been in his office or in the clerk's office. The objection to the evidence was that the exhibition of the warrant would be the best evidence of it, and that the crime was alleged to have been committed three years before the sheriff's induction into office. Upon reading the testimony of the sheriff, it clearly appears that

he was referring to the warrant against the accused for murder; and, even if this testimony was inadmissible, it related to an immaterial subject, not calculated to harm the defendant.

[3] 3. Complaint is made that the court's charge on the law of justifiable homicide did not embrace an instruction that one may justifiably take life to prevent persons in a riotous and tumultuous manner from entering his habitation, for the purpose of offering personal violence to any person dwelling or being therein. The evidence did not authorize such an instruction.

[4] 4. It is urged that the defendant should have a new trial, because the court failed to charge the following principle of law: "Where, in a trial for murder, the defense relied on was lawful resistance to a felonious attempt to arrest without authority, the law of justifiable homicide in self-defense was not alone applicable; but the court should have charged the jury the law relating to the right of the defendant to resist an attempt to arrest him illegally." There was no written request for such a charge. The court correctly charged the law of voluntary manslaughter and justifiable homicide; and if the accused had desired further elaboration, or a concrete application of the law to a particular phase of the case, he should have made a timely written request. *Rogers v. State*, 128 Ga. 67, 57 S. E. 227, 10 L. R. A. (N. S.) 999, 119 Am. St. Rep. 364.

[5] 5. One assignment of error is to the effect that the court omitted to charge the law applicable to the defense of alibi. In his statement the defendant claimed that he was at another place at the time of the commission of the alleged crime; but no testimony was introduced tending to show that he was at a place other than the scene of the homicide at the time of its alleged commission. This court has frequently decided that the judge may construct his charge upon the various issues made by the evidence, and that, if a defense is set up in the statement alone, it is not error for the judge to omit submitting the law appropriate to such defense, in the absence of a timely request.

[6] 6. Complaint is made of the failure of the court to charge the jury the law relating to threats made by the deceased against the defendant. What particular principle of law the counsel for the accused desired the court to give in charge is not made to appear. If the accused desired any particular instructions upon any collateral issue, he should have submitted a timely written request. *Watts v. State*, 120 Ga. 496, 48 S. E. 142.

[7] 7. The evidence was sufficient to authorize the verdict, and no error of law requiring a new trial is made to appear.

Judgment affirmed. All the Justices concur.

(186 Ga. 258)

GEORGIA COTTON CO. v. HOGG et al.
(Supreme Court of Georgia. May 10, 1911.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

The judge did not err in disallowing the proposed amendment, or in dismissing the petition upon demurrer.

(Additional Syllabus by Editorial Staff.)

2. SALES (§ 411*)—CONTRACT.

In an action for breach of contract for sale of cotton, the petition setting out a letter from plaintiff to defendant H., reciting that plaintiff had contracted to buy of H. 150 bales of cotton, and a letter in response thereto from H., reciting that he confirmed such contract and would deliver the cotton as agreed, which last letter embraced an indorsement reciting that the undersigned agreed to deliver to H. the number of bales of cotton opposite their names in pursuance of the contract between plaintiff and defendant H., and signed by defendant R., whose name was followed by "15 B. C." set out a complete contract between plaintiff and defendant H. for the purchase and sale of 150 bales of cotton, but not a contract of defendant R. to deliver 15 bales to plaintiff; and, the action being to recover from H. and R. damages for breach of contract to sell 15 bales of cotton, it was properly dismissed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1161-1164; Dec. Dig. § 411.*]

3. SALES (§ 411*)—BREACH OF CONTRACT—AMENDMENT.

A requested amendment of such petition, alleging that plaintiff was not purchasing cotton in small lots, but that defendant R. and others engaged defendant H. to make sales of small lots of cotton for them to plaintiff, sufficient in the aggregate to amount to 150 bales, and that it was in pursuance of such agreement that defendant R. sold the 15 bales to plaintiff, did not show a contract of purchase and sale from R. to plaintiff of 15 bales of cotton, but was, at most, explanatory of why there was a separate contract with H. for 150 bales, rather than one with R. for 15 bales, and an attempt to treat the entire contract as divisible, so as to hold R. liable as a principal of H. only for a fractional part, and was properly disallowed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1161-1164; Dec. Dig. § 411.*]

Error from Superior Court, Schley County; Z. A. Littlejohn, Judge.

Action by the Georgia Cotton Company against H. W. Hogg and another. Judgment of dismissal, and plaintiff brings error. Affirmed.

The Georgia Cotton Company in its petition alleged that the defendants, H. W. Hogg and R. E. Hill, were indebted to plaintiff, a corporation, in a specified amount on account of the breach of the contract for the sale of 15 bales of cotton. Copies of certain correspondence, relied on as constituting the contract, were made a part of the petition, and were as follows:

"Americus, Ga., 12th May, 1909.

"Mr. H. W. Hogg, Ellaville, Ga.—Dear Sir: In consideration of one dollar in hand paid, and for value received, we have this day contracted to purchase of you as follows: One hundred and fifty bales of cot-

ton, basis good middling, nothing below middling, Liverpool classification, at ten cents (10 cents) per pound, f. o. b. cars at Ellaville, Ga. Cotton to be delivered to us during the month of October, 1909, to be delivered, reweighed, and in good merchantable bales, averaging in weight five hundred (500) pounds per bale. Prevailing Savannah differences between grades existing at time of delivery to apply. Please confirm the above purchase. Yours very truly, P. P. Georgia Cotton Company, W. A. Slaton."

To this letter there was this response:

"Ellaville, Ga. 14th May, 1909.

"Messrs. Georgia Cotton Company, Americus, Ga.—Dear Sir: I beg to confirm the above contract of purchase, and will deliver said cotton as above agreed. Yours very truly, H. W. Hogg."

Indorsed on this was the following:

"May 14, 1909.

"We, the undersigned, agree to deliver to H. Willis Hogg the number of bales of cotton opposite our names, in pursuance to the terms of the contract, as set forth on the opposite page, between the Georgia Cotton Company and H. Willis Hogg, as specified in said contract on opposite page, to wit: ten cents per pound. Witness our hands and seal, this May 14, 1909. [Signed] R. E. Hill, 15 B/C."

R. E. Hill demurred. Whereupon the plaintiff offered to amend by dismissing the case as to H. W. Hogg and alleging: "That H. W. Hogg was the agent of the defendant R. E. Hill, at the time of the sale of said cotton, and acted as such agent in the making the sale to plaintiff of said 15 bales of cotton. That plaintiff was not purchasing cotton in small lots, and the defendant R. E. Hill and several others procured and engaged the services of said H. W. Hogg to make the sale of certain cotton for them to plaintiff; the said defendant R. E. Hill agreeing to sell to plaintiff through his (Hill's) agent, H. W. Hogg, said 15 bales of cotton, and the others agreeing to sell to plaintiff through said Hogg as their agent a certain number of bales each, sufficient to aggregate 150 bales, in pursuance whereof the said R. E. Hill sold to plaintiff, through said Hogg, said 15 bales of cotton, and the said others sold to plaintiff through said Hogg the balance of said lot of 150 bales." Upon objection, the court disallowed the amendment and sustained the demurrer, dismissing the case. The plaintiff excepted, assigning error upon each ruling.

E. A. Hawkins and J. H. Cheney, for plaintiff in error. Shipp & Sheppard and C. R. McCrory, for defendants in error.

ATKINSON, J. [2] The plaintiff must recover, if at all, upon the strength of the written contract as made. The writings relied

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

upon as constituting a contract were set forth in the petition, and consequently the sufficiency of the petition to set forth a cause of action will depend upon the substance of the writings set forth. If the plaintiff's offer to buy, dated May 12th, was an offer to buy anything from any person, it was an offer to buy from H. W. Hogg 150 bales of cotton—no more, nor any less. The acceptance of the offer of May 14th was an agreement to sell the number of bales of cotton above mentioned. Upon its face this was a complete contract between the parties mentioned. The indorsement on the paper signed by R. E. Hill was not a contract to deliver to the Georgia Cotton Company any cotton whatever, but amounted to a promise to deliver to H. Willis Hogg, not the 150 bales of cotton which he had contracted to sell to the plaintiff, but 15 bales of cotton, conformably to the specifications of the contract between Hogg and the Georgia Cotton Company. This indorsement did not amount to a contract between Hill and the Georgia Cotton Company. That company did not at any time bind itself to buy 15 bales of cotton from H. W. Hogg, nor did it bind itself to buy any number of bales from Hill. By amendment to the petition it was sought to eliminate H. W. Hogg from the case, and to charge R. E. Hill as principal in the contract, charging that it was he, and not H. W. Hogg, who had really contracted to sell 15 bales of cotton to the Georgia Cotton Company. But such allegations are not borne out by the contract. As pointed out above, the Georgia Cotton Company did not contract to buy 15 bales of cotton; its only agreement being to purchase from H. W. Hogg 150 bales. If Hogg could be regarded as a mere intermediary between Hill and the Georgia Cotton Company, in such manner as that any contract which might be made would be a contract between those two, rather than separate transactions in which Hogg should participate as a party, the stipulations embodied in the writings would be insufficient to show a meeting of the minds; the agreement of Hill to deliver 15 bales of cotton being no acceptance of the proposal of the Georgia Cotton Company to buy 150 bales of cotton. This is the necessary construction of the writings relied upon by the Georgia Cotton Company to show the contract upon which the suit was founded.

[3] In drafting the amendment to the petition, the plaintiff was impressed with this construction of the petition, and it was therein alleged that the plaintiff was not purchasing cotton in small lots, but that Hill and others procured and engaged the service of Hogg to make the sales of small lots of cotton for them to the plaintiff, sufficient in the aggregate to amount to 150 bales, and that it was in pursuance of this agreement that Hill sold the 15 bales in question to the

Georgia Cotton Company. But this mere contradictory allegation in opposition to the substance of the writings set forth will not suffice to show a contract of purchase and sale from Hill to the Georgia Cotton Company of 15 bales of cotton. At most it was explanatory of why there was a separate contract with Hogg for 150 bales, rather than one with Hill for 15 bales. It is not claimed that Hogg was the principal of Hill to make the entire contract for 150 bales which he actually made with the company; but the effort of the company now is to treat the entire contract as divisible, and divide it in such manner as to hold Hill liable as a principal of Hogg only for a fractional part. This cannot be done.

[1] The amendment was properly disallowed, and there was no error in dismissing the petition on demurrer.

Judgment affirmed. All the Justices concur.

(126 Ga. 180)

WASHINGTON TRUST CO. v. PITTSBURG-BARTOW MIN. & MFG. CO. et al.

(Supreme Court of Georgia. March 15, 1911.)

(Syllabus by the Court.)

1. DISCRETION—ABUSE—INTERLOCUTORY INJUNCTION.

Under the pleadings and evidence submitted on the hearing, the court did not abuse his discretion in refusing the interlocutory injunction as prayed by the plaintiff in its petition.

2. MORTGAGES (§ 338*)—FORECLOSURE—INJUNCTION.

It appearing that the mortgagee, a corporation, as trustee for another corporation and as holder of a certain mortgage, which contained a power of sale, was proceeding to exercise this power by advertising the property mortgaged in the newspaper in which it was provided in the mortgage that the advertisement should appear, and that the contingency, upon the happening of which the right to advertise and sell the property under the mortgage should accrue, had actually happened, and there being no evidence, save certain hearsay testimony without probative value, of any collusion on the part of the mortgagee or the beneficiary with the mortgagor, or of any inequitable conduct on the part of the trustee or the beneficiary, or of any hardship that would be inflicted other than that ordinarily resulting from the foreclosure of a mortgage and the exercise of a power of sale like that contained in this mortgage, the court erred in granting the injunction prayed for in the cross-petition of the defendants, which had the effect of destroying the plain legal right of the mortgagee to proceed in the exercise of the power of sale as contained in the mortgage itself.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1026-1035; Dec. Dig. § 338.*]

3. MORTGAGES (§ 338*)—FORECLOSURE—POWER OF SALE—EXERCISE—INJUNCTION—FINAL RELIEF.

In so far as the order granted by the judge provided for the restraining of the mortgagee in exercising the power of sale contained in the mortgage, and provided for the payment of the indebtedness secured by the mortgage in certain installments by persons holding under

the mortgagor and conducting mining operations upon the lands included in the mortgage, under agreements made with the mortgagor, the order was of the nature of a final injunction and granted relief final in its nature, although it was stated in the order that it should continue of force "until the further order of the court," and the court was without authority to grant such an order on interlocutory hearing.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 338.*]

Error from Superior Court, Bartow County; A. W. Flte, Judge.

Suit by the Washington Trust Company against the Pittsburg-Bartow Mining & Manufacturing Company and others. From a judgment granting an injunction against the foreclosure of complainant's mortgage on defendants' cross-petition, complainant brings error. Reversed in part, and affirmed in part.

Thos. W. & Watt H. Milner, for plaintiff in error. Jno. T. Norris, for defendants in error.

BECK, J. Judgment reversed in part, and affirmed in part.

FISH, C. J., absent. The other Justices concur.

(136 Ga. 149)

WRIGHTSVILLE & T. R. CO. v. JOINER.
(Supreme Court of Georgia. April 12, 1911.)

(Syllabus by the Court.)

1. CARRIERS (§ 321*)—TRIAL (§ 260*)—INJURIES TO PASSENGERS—ACTION—INSTRUCTIONS.

Upon the trial of a suit for damages against a railroad company by one for injuries sustained while a passenger on one of the trains of the company, the latter in writing duly requested the court to charge as follows: "Plaintiff must recover upon proof of the acts of negligence and carelessness set out in the declaration, and proof of any other act or acts of negligence or carelessness of the employees of the defendant will not authorize a recovery, unless the jury is satisfied from the evidence that the acts of negligence set forth in the declaration have been satisfactorily proven." Held, that the charge requested was not a correct charge, because, if given, it might have led the jury to believe that the plaintiff would be entitled to recover if the defendant was guilty of any act of negligence other than those set out in the plaintiff's declaration and the plaintiff's injuries were caused thereby, if the jury believed that the acts of negligence charged in the declaration had been proven. Even if the charge requested had been entirely accurate, the refusal to give it would not have been error requiring a new trial, in view of the instruction given by the court to the jury in other portions of his charge, to wit: "I charge you in this case that, if the plaintiff recovers, he should recover on the allegations of negligence set out in the plaintiff's petition."

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.* Trial, Cent. Dig. §§ 851-859; Dec. Dig. § 260.*]

2. TRIAL (§ 260*)—INSTRUCTIONS.

The charge referred to in the second division of the opinion was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716; Dec. Dig. § 260.*]

3. WITNESSES (§ 379*)—CONTRADICTION—PREVIOUS STATEMENTS.

Nor was there error in the admission of testimony referred to in the third division of the opinion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.*]

4. CARRIERS (§ 318*)—INJURIES TO PASSENGERS—EVIDENCE—VERDICT.

The evidence was sufficient to support the verdict, and the court committed no error in refusing a new trial.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.*]

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Action by W. L. Joiner against the Wrightsville & Tennille Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Daley & Daley, for plaintiff in error. J. L. Kent and Hines & Jordan, for defendant in error.

HOLDEN, J. The defendant in error (hereinafter called the plaintiff) sued the plaintiff in error (hereinafter called the defendant) for damages. The petition as amended, and after certain portions thereof were stricken on demurrer, made, among others, substantially the following allegations: The plaintiff was injured while a passenger on the train of the defendant. "The train on which your petitioner was such passenger was a regular passenger train of the defendant, but had a freight box next to the engine, heavily loaded with meat, and at the time of said derailment was running at a great rate of speed, to wit, 30 to 40 miles an hour. Petitioner shows that defendant was negligent in not having sound cross-ties in its roadbed and under its rails at the place and time of said derailment, whereby said derailment was caused. Defendant was further negligent in having its roadbed so poorly constructed, at the place and time of said derailment, and that spikes were out of the rails, and that its roadbed was not properly surfaced up and ballasted, and in that were out of sidebars in the rails, whereby said derailment was caused. Defendant was further negligent in pulling said heavily laden freight car, so loaded with meat, in its passenger train, at such rapid rate, whereby said derailment was caused; the reason being that the running of said heavily loaded freight car at such rapid, unusual, and unnecessary rate of speed would derail said box car and thus wreck said passenger train. By reason of said derailment as above narrated, your petitioner, who was riding in the

smoking car, which was the rear end and at the time was suddenly and violently thrown off and between the seats, knocked down, and rendered unconscious." The plaintiff set forth the nature and extent of his alleged injuries. The defendant filed an answer, denying that the plaintiff was injured because of any acts of negligence alleged, and that "the cause of said derailment was and is totally unknown to defendant company, not due to any of the causes alleged in the plaintiff's petition, and the same was an accident pure and simple, which it was neither possible for defendant company, its agents, servants, and employes, to foresee or prevent, was and is entirely unaccountable, and for which defendant company was in no wise liable or responsible." Upon the trial of the case, the jury rendered a verdict in favor of the plaintiff, and to the order of the court refusing it a new trial the defendant accepted.

[1] 1. One ground of the amendment to the motion for a new trial is as follows: "Because the court erred in refusing to charge to the jury fully the following request to charge, the same having been submitted to the court in writing before the jury retired: 'Plaintiff must recover upon proof of the acts of negligence and carelessness set out in the declaration, and proof of any other act or acts of negligence or carelessness of the employes of the defendant will not authorize a recovery, unless the jury is satisfied from the evidence that the acts of negligence set forth in the declaration have been satisfactorily proven.' Said request was a correct proposition of law applicable to the issue involved, and the charge of the court as given was not sufficient to cover the points involved." The charge requested was not entirely clear and free from objection, and, if the court had given the same, it might have misled the jury into the belief that the plaintiff would be entitled to recover if the defendant was guilty of any act of negligence other than those charged in the petition and plaintiff's injuries were caused thereby, if the jury believed that the acts of negligence charged in the petition had been proven. See, in this connection, *Central R. & Bnk. Co. v. Nash*, 81 Ga. 580, 585, 7 S. E. 808. The court charged the jury: "I charge you in this case that, if the plaintiff recovers, he should recover on the allegations of negligence set out in the plaintiff's petition." Even if the charge requested had been entirely accurate, the refusal to give it would not have been error requiring a new trial, in view of the charge given by the court as above quoted.

[2] 2. Another ground of the amendment to the motion for a new trial was as follows: "Because the court erred in charging the jury as follows: 'In arriving, therefore, at the amount which should be allowed the plaintiff

on account of loss arising from diminished ability to labor, you should take all these matters into consideration and give them due weight.' Said charge was error, because the same tended to impress upon the jury the fact that they should find for the plaintiff for some amount; the same being a positive statement of the court, without the use of any qualifying words, tending to impress upon the jury the fact that it was an opinion of the court." There was no error in giving this charge. The court was dealing at the time with the question of the amount of recovery in the event the plaintiff was entitled to recover at all, and specially instructed the jury that his instructions regarding the amount of recovery should be disregarded by them, if they found that the plaintiff was not entitled to recover.

[3] 3. Another assignment of error is as follows: "Because the court erred in admitting the following evidence over the objection of the defendant's counsel: 'I saw Mr. Kessler on the occasion of this wreck at the scene of the wreck. Mr. Kessler was asked what he thought was the cause of the wreck, and he said that it was the heavily loaded box car. He said that he had asked the railroad officials not to run them with passenger trains, and he said that they went on and did it over his protest, and now they had the wreck. That is the statement that he made.' Movants objected to the introduction of this evidence on the grounds that it was an attempt to prove contradictory statements of Mr. Kessler as to the cause of the wreck, for the purpose of impeaching Mr. Kessler's testimony, and that such evidence was incompetent on the ground that it was not relevant, and a witness could not be impeached unless it was on a matter relevant. Movant further objected on the ground that any statement which Mr. Kessler might have made as to the cause of the wreck was not binding on the defendant, and therefore incompetent. Such a statement would be a mere opinion, and irrelevant to the issue involved, immaterial, and incompetent. Said objections were overruled by the court, and movant hereby assigns same as error." The witness Kessler was asked if he had made the statements referred to in the above testimony, and denied having made the same; and in another ground of the amendment to the motion for a new trial error is assigned on the ruling of the court in permitting such questions to be propounded to the witness Kessler, and in admitting his answers thereto.

The testimony as to statements made by the witness Kessler was not admitted to prove that what was therein stated was true, but for the purpose of discrediting the witness. Kessler was supervisor of the defendant company, charged with the duty of seeing that the track was safe for all trains. While the demurrer to the allegation of the

petition that defendant "was negligent in having a freight car loaded with meat made up in" the train, "and placed next to the engine" was sustained, the allegation that the defendant was negligent "in pulling said heavily laden freight car, so loaded with meat, in its passenger train at such rapid rate" of speed of 30 to 40 miles per hour, was not stricken. There was evidence that the train at the time of the derailment was running at a speed of about 40 miles an hour. The freight car, which was loaded with meat, and was in front of the passenger coaches and next to the engine, was derailed, and was at the scene of the wreck when the witness Kessler appeared thereat five or ten minutes after it occurred. He evidently saw the derailed freight car. The allegation of negligence above referred to was not simply that the train was being run at too rapid rate of speed, but that it was run at such rate of speed with the "heavily laden freight car, so loaded with meat, in its passenger train." The running of the train at such speed might not have been negligent, but for the fact that the heavily loaded freight car was "in its passenger train." The witness Kessler testified to the effect that he inspected the track at the scene of the accident soon after its occurrence, and that it was all right in every way. He also testified: "I could not discover any cause for the wreck whatever. * * * As to what caused that wreck, in my opinion I couldn't see any cause for it whatever. I made a close examination, and I couldn't discover any cause at all." In view of the testimony delivered by the witness Kessler, the testimony regarding his previous statements—at least, his statement that the heavily loaded box car caused the wreck—was admissible for the purpose of discrediting his testimony delivered on the trial in behalf of the defendant, and the court committed no error in allowing the same.

4. The evidence was sufficient to warrant the verdict. The jury found a verdict for \$750, and the amount of the recovery was not excessive.

Judgment affirmed.

FISH, C. J., and EVANS, P. J., disqualified.

(136 Ga. 163)

FITZGERALD v. STATE.

(Supreme Court of Georgia. April 13, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§ 309*)—TRIAL—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

The only eyewitness to the homicide testified in behalf of the state, in substance, as follows: Gus Fitzgerald, cousin of the accused, and George Austin were quarreling, when Gus drew his knife on George, who thereupon struck Gus with his fist, when the accused

ran up to them out of the dark, and shot George with a pistol, thereby killing him at once. The only defenses set up by the accused on the trial were alibi, and that the homicide was not committed in the county of Fayette, as charged in the indictment. The court, therefore, did not err in failing to instruct the jury on the subject of voluntary manslaughter. See *Kendrick v. State*, 113 Ga. 759, 39 S. E. 286, and cases cited; *Robinson v. State*, 118 Ga. 45, 44 S. E. 804.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

2. CRIMINAL LAW (§ 815*)—TRIAL—INSTRUCTIONS.

In connection with instructions on the defense of alibi, the court charged the jury: "If you have a reasonable doubt from the evidence that this is the man who committed this offense, if one was committed by some one, it would be your duty to acquit him." This charge was not justly subject to the criticism that it took from the jury the right to consider whether the accused, if he committed the offense, was justifiable, or only guilty of voluntary manslaughter. Moreover, as stated in the foregoing headline, according to the evidence of the sole eyewitness to the homicide, the person who did the killing was guilty of murder.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.*]

3. INSTRUCTIONS ON ALIBI.

The instructions given on the subject of alibi, to which exception was taken, were in the language stating the law on that subject in *Harrison v. State*, 83 Ga. 129 (3), 9 S. E. 542.

4. CRIMINAL LAW (§ 815*)—TRIAL—INSTRUCTIONS.

The following instruction to the jury: "Does your mind reach the conclusion from the evidence that the allegations are true beyond a reasonable doubt? If it does, then you are authorized to find it true." This instruction was not cause for a new trial, on the ground "that it took from the jury the right to consider the statement of the defendant, and confined them in reaching a conclusion to the evidence in the case"; the court having fully and correctly instructed the jury as to the statement made them by the accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.*]

5. CRIMINAL LAW (§ 772*)—TRIAL—INSTRUCTIONS.

According to the evidence for the state, both the accused and the deceased, George Austin, were in the county of Fayette when the former shot and killed the latter. According to the evidence for the accused, the deceased was shot and killed in the county of Clayton. Therefore it was not cause for a new trial that the court instructed the jury as follows: "If the defendant indicted a mortal wound on George Austin, where the wound was inflicted is the place where jurisdiction is."

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 772.*]

6. CRIMINAL LAW (§ 655*)—TRIAL—CONDUCT OF TRIAL—EXPRESSION OF OPINION BY JUDGE.

While the case was being argued before the jury, the court in the presence of the jury submitted the following query to the counsel for both sides: "Suppose that this jury should decide that the defendant is guilty of the offense charged in the indictment, but should conclude that it did not occur in this county, but that it happened in some other county,

what do you say about the jury returning this kind of a verdict: 'We, the jury, find the defendant not guilty, on the ground that the crime was not committed in Fayette county.' Counsel for the accused replied that he did not think the jury could properly return such a verdict. The solicitor general stated that in his opinion they could, and that the accused could then be tried in the county where the homicide occurred, if it did not occur in the county of Fayette. The judge replied: "I didn't know much about that, but asked you gentlemen to see what you thought about it. Have either of you any authority on that point?" Counsel for both sides replied that they had no authority on the subject. The judge did not again refer to the point. What the judge said in this colloquy was not cause for a new trial, on the ground that it impressed the jury with the idea that he was of the opinion that the accused was guilty, and should be held for trial in some other county, if not in Fayette county.

[Ed. Note.—For other cases, see Criminal Law Cent. Dig. §§ 1520-1535; Dec. Dig. § 655.*]

7. EVIDENCE AUTHORIZED CONVICTION.

There was evidence to authorize the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Fayette County; L. S. Roan, Judge.

Dock Fitzgerald was convicted of crime, and he brings error. Affirmed.

J. W. Culpepper and Daley & Chambers, for plaintiff in error. J. W. Wise, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(136 Ga. 221)

IVEY v. CABLE CO.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

DIRECTING VERDICT.

The evidence demanded a verdict in favor of the defendant, and the court did not err in directing the jury to find in its favor.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Tina Ivey against the Cable Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Lowndes Calhoun, for plaintiff in error. J. W. & J. D. Humphries, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 164)

BARNES v. MADDOX.

(Supreme Court of Georgia. April 13, 1911.)

(Syllabus by the Court.)

1. EVIDENCE (§ 370*)—BOUNDARIES (§§ 35, 40*)—PROCEEDINGS TO ESTABLISH—SUFFICIENCY OF EVIDENCE.

Where the dividing line between two adjoining tracts of land was in controversy, both

plaintiff and defendant claiming under a common source of title, a deed, drawn from the possession of the plaintiff by notice to produce, in which the common predecessor in title conveyed the tract to her with boundaries as contended for by the defendant, was admissible in evidence without proof of execution, although the plaintiff stated that she did not claim the land under the deed, but under a previous parol gift from the maker of it and possession for 30 years. Louisville & Nashville R. Co. v. Yundelson, 135 Ga. 731, 70 S. E. 576; Brinkley v. Bell, 126 Ga. 480, 55 S. E. 187.

(a) Under such circumstances, the deed was admissible; but the grantee could introduce other evidence of her title, and the ultimate question of what constituted her title was for the jury.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 370; Boundaries, Dec. Dig. §§ 35, 40.*]

2. REVIEW ON APPEAL.

The verdict was supported by the evidence, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Action between S. E. Barnes and D. H. Maddox. From the judgment, Barnes brings error. Affirmed.

Doyle Campbell, for plaintiff in error. W. S. Florence, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(128 Ga. 146)

SOUTHERN RY. CO. v. ROBERSON.

(Supreme Court of Georgia. April 12, 1911.)

(Syllabus by the Court.)

ACTION (§ 28*)—NATURE AND FORM—ACTION EX CONTRACTU—SUFFICIENCY OF PETITION.

The petition in this case was a suit ex contractu for the value of the property of the plaintiff, taken and carried away by the defendant without the plaintiff's consent, without alleging that the defendant had converted the same into money; and, under the ruling in Woodruff v. Zaban, 133 Ga. 24, 65 S. E. 123, 134 Am. St. Rep. 186, the petition was subject to general demurrer.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196-215; Dec. Dig. § 28.*]

Error from Superior Court, Wayne County; P. E. Seabrook, Judge.

Action by W. M. Roberson against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Bennet, Twitty & Reese and Littlefield & Poppell, for plaintiff in error. Jas. R. Thomas and Jos. A. Morris, for defendant in error.

HOLDEN, J. W. M. Roberson brought suit against the Southern Railway Company; his petition, after alleging the defendant to be a corporation having a line of railroad and place of business in the county in which the suit was brought, making the following allegations: "That said defendant is

indebted to your petitioner in the sum of four hundred and forty-eight dollars (\$448.00) by reason of the following facts, to wit: That on or about the twenty-fourth (24th) day of September, 1907, in the county aforesaid and in the town of Jesup, and at a point about one-half ($\frac{1}{2}$) mile north of the depot in said town and on said railroad, said defendant took and carried away, without your petitioner's consent, one thousand and one hundred and twenty (1,120) hewn cross-ties, both pine and cypress, of the value of forty cents (\$.40) each. That your petitioner purchased said cross-ties and paid therefor the sum of thirty-nine cents (\$.39), with the expectation of selling same to said railroad company at and for the market price thereof, to wit, forty cents (\$.40) each; but without any notice to your petitioner the work train on said defendant's line of railway loaded said ties, by its agents, servants, and employes, and carried same away, and have since that time failed and refused to pay your petitioner the true value of said ties, which is, as aforesaid, the sum of four hundred and forty-eight dollars (\$448.00). Wherefore petitioner prays that process do issue, directed to said defendant, requiring it to be and appear at the next term of this court, then and there to answer your petitioner's complaint, and he will ever pray," etc. The railway company filed a general and a special demurrer, which the court overruled, and the company excepted. Upon the trial of the case, the court directed a verdict in favor of the plaintiff, and to the order of the court overruling the defendant's motion for a new trial it excepted.

We do not think there was any merit in the special demurrer, but the general demurrer should have been sustained. The petition, properly construed, is a suit *ex contractu*. It is alleged that the defendant took and carried away the cross-ties belonging to the plaintiff, and refused to pay him the value thereof on demand. Allegations showing a tort are not inconsistent with a suit *ex contractu*. There is no allegation as to what disposition the company made of the ties, and no allegation that it refused to return them to the plaintiff, or that the latter ever made any demand on the company for their return. There is no allegation that the plaintiff has been damaged, and the suit is not in terms for any damages done by the defendant. The plaintiff alleges that the defendant "is indebted" to him. Properly construed, the allegations to show that the defendant is indebted to the plaintiff mean that the plaintiff bought the ties, intending to sell them to the defendant at 40 cents each; but the defendant, without the plaintiff's consent, took possession of them and carried them away, and refused, upon demand, to pay the plaintiff 40 cents each

for them, which was their value. The plaintiff does not allege that the company had used or in any way disposed of the ties, or that the company had refused to return them. The only demand alleged to have been made by the plaintiff was for the value of the ties. The allegations do not disclose any bailment. The suit was one *ex contractu*, and not *ex delicto*. See *Spencer v. Hewett*, 20 Ga. 426. It was held in the case of *Southern Ry. Co. v. Born Steel Range Co.*, 122 Ga. 658, 50 S. E. 488, that the suit there involved was an action *ex delicto*; but the facts alleged were different from those alleged in the present case, especially that in the *Born Case* it was alleged that the railway company had failed to comply with a demand of the plaintiff for the return of the articles shipped by it, in consequence of which they "have been wholly lost to the plaintiff, to its damage," etc. The allegations of the petition show the commission of a tort by defendant. The suit in the present case being one *ex contractu*, and the plaintiff not alleging that the defendant had sold the ties, the general demurrer should have been sustained, under the ruling in the case of *Woodruff v. Zaban*, 133 Ga. 24, 65 S. E. 123, 134 Am. St. Rep. 186, and the decisions therein cited, which this court had under review and refused to overrule. The writer was one of the Justices who was then of the opinion that the request to overrule these decisions (*Spencer v. Hewett*, 20 Ga. 426, *Barlow v. Stalworth*, 27 Ga. 517, and *Cragg v. Arendale*, 113 Ga. 181, 38 S. E. 399), should be granted, and still adheres to the view that they are erroneous, in so far as they lay down the doctrine that an action of assumpsit will not lie where there has been a conversion of articles of personalty, unless the property tortiously taken has been converted into money by the wrongdoer. The court having erred in not sustaining the general demurrer, everything which occurred in the case thereafter was nugatory.

Judgment reversed. All the Justices concur.

(126 Ga. 181)

FEW v. SUPREME LODGE K. P.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. INSURANCE (§ 721*)—MUTUAL BENEFIT SOCIETIES—CONDITIONS.

A fraternal beneficiary society issued to one of its members a certificate of membership in the nature of a policy of life insurance, dated November 1, 1907, containing, among others, the following provisions: "The contract evidenced hereby shall not begin until 12 o'clock noon of the day of the date hereof, and then the Supreme Grand Lodge of Knights of Pythias, hereinafter called the 'society' will not be liable unless the said member has actually paid the membership fee and made the first monthly payment required while said member is in good health."

Also: "Said monthly payments will be due and payable to the secretary of the section to which the member belongs, without notice in advance, on the 1st day of each and every month. Failure to make any such payment on or before the 20th day of the month for which the same is due shall ipso facto, from and after such date, forfeit this certificate, subject to the provisions contained in paragraph 7 hereof." Also: "All of the conditions and provisions of the contract between the member and society are conditions precedent to any liability of the society hereunder, and are to be deemed to be assented to and accepted without the necessity for the member's signature being affixed hereto." *Held*, the provisions of the certificate above quoted make the payment of the first monthly payment while the insured is "in good health" a condition precedent to any liability of the insurer on the contract. *Reese v. Fidelity Mutual Life Association*, 111 Ga. 482, 36 S. E. 637; *Clark v. Mutual Life Ins. Co.*, 129 Ga. 571, 59 S. E. 283.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1857; Dec. Dig. § 721.*]

2. INSURANCE (§ 724*)—BENEFIT CERTIFICATE—PAYMENT OF ASSESSMENTS—WAIVER—ESTOPPEL.

The certificate containing the further provision that "no officer or representative thereof, or of any subordinate body thereof, has any right or power, by any statement, agreement, promise, or manner of transacting business, to waive the provisions or requirements of the contract between the member and the society, or of the laws, rules, and regulations of the society," if the first monthly payment was made, not at the inception of the contract, but subsequently to the date of the certificate and while the member was not in good health, acceptance of such payment by a representative of the society, authorized to collect premiums for the latter, with knowledge at the time on the part of the representative that the insured was not then in good health, would not be a waiver by the society, or estop it from contending that it was not liable, because the insured was not in good health when the payment was made. *Springfield Fire, etc., Ins. Co. v. Price*, 132 Ga. 687, 64 S. E. 1074; 3 *Cooley's Briefs on Insurance*, 2513. *Aliter*, if delivery of the certificate and acceptance of the premium were contemporaneous. *Mechanics' & Traders' Ins. Co. v. Mutual Real Estate & Building Association*, 98 Ga. 262, 25 S. E. 457; *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92, followed in *Athens Mutual Ins. Co. v. Evans*, 132 Ga. 703-711, 64 S. E. 993.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1866-1868; Dec. Dig. § 724.*]

3. INSURANCE (§ 825*)—CERTIFICATE—DELIVERY—PAYMENT—PAYMENT OF PREMIUM—GOOD HEALTH OF INSURED—QUESTION FOR JURY.

Under the evidence submitted, it was for the jury to determine whether the insured was in good health when the first monthly payment was made on November 20, 1907; and, if not, then whether the representative of the society, to whom such payment was made, had notice of the fact, and whether the delivery of the certificate and acceptance of the first monthly payment were contemporaneous.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 2009; Dec. Dig. § 825.*]

4. DIRECTION OF VERDICT.

The judge erred in directing the verdict.

Error from Superior Court, Morgan County; D. W. Meadow, Judge.

Action by M. M. Few against the Supreme Lodge Knights of Pythias. Judgment for

defendant, and plaintiff brings error. Reversed.

M. C. Few and F. C. Foster, for plaintiff in error. Garrard & Gazan and Percy Middlebrooks, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(136 Ga. 212)

KING v. YARBRAV.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. MALICIOUS PROSECUTION (§ 10*)—ABUSE OF LEGAL PROCESS.

There is a malicious abuse of legal process, where a party employs civil process wrongfully and unlawfully, and for a purpose not intended by law, and for such abuse of civil process an action will lie. Such a case is made by the petition.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 11, 12; Dec. Dig. § 10.*]

2. MALICIOUS PROSECUTION (§ 54*)—ABUSE OF CIVIL PROCESS—PLEADING—AMENDMENT.

In an action for abuse of civil process, where all the facts upon which the action is based are fully pleaded, it is proper to allow an amendment declaring that the act of the defendant in the wrongful institution and prosecution of the civil process as therein alleged was malicious and without probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 105; Dec. Dig. § 54.*]

(Additional Syllabus by Editorial Staff.)

3. MALICIOUS PROSECUTION (§ 34*)—ABUSE AND MALICIOUS USE OF LEGAL PROCESS.

An action for malicious abuse of legal process may be maintained before the action in which such process was issued has terminated; but an action for the malicious use of legal process, where no object is contemplated to be gained by such use, other than the proper execution of the process, cannot be commenced until the action on which the process issued is finally determined in favor of defendant therein.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 70; Dec. Dig. § 34.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by T. T. Yarbray against A. R. King. Judgment for plaintiff, and defendant brings error. Affirmed.

Walter A. Sims, for plaintiff in error. Heyward & Garrett and T. C. Battle, for defendant in error.

EVANS, P. J. Yarbray sued King to recover damages, alleging that King sued him in a justice court, and caused a summons of garnishment to be served on his employer; that, before the suit was brought, plaintiff informed King, who was threatening to sue him and garnish his wages, that his wages as a locomotive engineer were not subject to process of garnishment, but that his employer (a railroad company) would suspend him until the debt upon which the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

garnishment issued was paid, if he was garnished, whereupon King replied that he was well aware of the rule of his employer that an employé would be suspended in case his wages were garnished until he paid the debt, but that he wanted his money, and, unless the debt was paid by a stated time, he would bring suit and garnish the plaintiff's employer. The plaintiff alleged that he could not pay the debt by the stipulated time, and that the defendant sued him, and garnished his employer, who suspended plaintiff from work, and, as he was unable to pay the debt, he lost his job and was compelled to go through bankruptcy. At the time of his suspension the plaintiff was earning \$105 per month, and was discharged from his employment because of the legal proceedings of the defendant. The institution of the garnishment proceeding was alleged to be an abuse of legal process. The plaintiff was allowed to amend his petition, over the objection of the defendant, by alleging that the institution of the garnishment proceedings was done maliciously and without probable cause. The defendant demurred to the sufficiency of the petition, and his demurrer was overruled. The exceptions are to the allowance of the amendment and to the overruling of the demurrer.

The plaintiff's claim for damages is predicated upon an alleged wrongful use of legal proceedings, and the main point of difference between the parties is their characterization of the nature of the suit. The plaintiff alleges that his suit is for malicious abuse of legal process, and the defendant contends that the allegations of fact in the petition show an attempt to recover because of a malicious use of legal process. The differentiation between an action for malicious abuse of legal process and one for malicious use of legal process, however refined and technical, is recognized by the law.

[3] An action for malicious abuse of legal process may be maintained before the action in which such process was issued has terminated; but an action for the malicious use of legal process, where no object is contemplated to be gained by such use, other than the proper effect and execution of the process, cannot be commenced until the action on which the process issued has been finally determined in favor of the defendant therein. *Mullins v. Matthews*, 122 Ga. 286, 50 S. E. 101. It has been said that "an action for malicious abuse of legal process will lie, where legal process has been employed for some other object than that which it was intended by law to effect; for example, where a man has been arrested, or his goods seized, in order to extort money from him, even though it be to pay a just claim other than the one in suit, or in order to compel him to give up possession of a deed, or other thing of value, not the legal object of the

process. * * * In such an action it is not necessary to allege want of probable cause. The malicious use of legal process may give rise to an action, where no object is contemplated to be gained by it, other than its proper effect and execution." *Porter v. Johnson*, 96 Ga. 145, 23 S. E. 123; *Brantley v. Rhodes-Haverty Furniture Co.*, 131 Ga. 276, 62 S. E. 222.

[1] The case as made by the petition is that the defendant knew that the plaintiff's wages as engineer were not subject to the process of garnishment, and that the garnishment proceeding was instituted maliciously and without probable cause, and was not intended to collect wages exempt by law from such legal process. The monthly wages of a locomotive engineer in the employment of a railroad company are not subject to the process of garnishment. *Smith v. Walker*, 119 Ga. 615, 46 S. E. 831. If the defendant maliciously and without probable cause employed the process of garnishment, not for the collection of the wages in the hands of the garnishee, but for an ulterior purpose, then he would be liable in an action for an abuse of legal process.

[2] The facts upon which the action rested were alleged in the original petition, and it was proper to allow an amendment, denouncing the acts of the defendant in prosecuting the garnishment suit as being malicious and without probable cause.

Judgment affirmed. All the Justices concur.

(126 Ga. 241)

HOLTZENDORFF v. DILLARD.

(Supreme Court of Georgia. May 9, 1911.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 156*)—MOTION—POSTPONEMENT.

A verdict was found and judgment rendered thereon on February 9, 1909. A motion for a new trial was filed on February 11th, during the term. A rule nisi was granted, requiring the adverse party to show cause on March 13th, in vacation, why a new trial should not be granted. At the same time another order was taken, which recited that it was impossible to make out and complete a brief of the testimony before the adjournment of court, and provided that the movant might amend his motion at any time before the final hearing, and should have until the final hearing, whenever it might be, to prepare and present for approval the brief of evidence, and that, if for any reason the motion was not heard at the time and place fixed, it should be heard and determined at such time and place in vacation as counsel might agree upon, and upon their failure to so agree at such time and place as the presiding judge might fix on application of either party, and that, if for any reason the motion was not heard and determined before the beginning of the next term of court, then it should stand on the docket until heard and determined at such term or thereafter. *Held*, that the motion for a new trial did not become functus officio, because it was not heard on the day named in the rule nisi, and no brief of evidence was then tendered for

approval, and no further order was taken continuing the hearing. When such motion was not heard during the vacation, it stood for hearing and determination in term time, subject to again be set for a hearing in vacation by special order passed during the term.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 316; Dec. Dig. § 156.*]

2. NEW TRIAL (§ 156*)—MOTION.

Where at a later term of court such motion was again set for a hearing by a special order, the presiding judge had jurisdiction at the time so fixed to deal with the motion and with the approval of the brief of evidence; and there was no error in refusing to dismiss the motion, because the brief of evidence had not been sooner presented, under the facts shown as to the cause of delay.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 156.*]

3. MOTION FOR NEW TRIAL—POSTPONEMENT OF HEARING.

Nor was there any abuse of discretion in again postponing the case for a week.

4. NEW TRIAL (§ 156*)—CONTINUANCE OF HEARING—ORDER NUNC PRO TUNC.

Where by order a motion for a new trial was set for hearing on a day named in vacation, and on the day preceding such named date the judge telegraphed to counsel that the hearing was continued to another fixed date, but did not pass a written order of continuance, there was no error, on the later day so fixed, in signing the order of continuance nunc pro tunc; the continuance having in fact been made by the judge, but the order therefor not having been at the time reduced to writing.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 156.*]

5. NEW TRIAL (§ 156*)—CONTINUANCE OF HEARING—ORDER NUNC PRO TUNC.

On the last date so fixed for the hearing, the presiding judge had jurisdiction to approve the brief of evidence, then presented for that purpose, and to pass on the motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 156.*]

6. NEW TRIAL (§ 132*)—APPROVAL OF BRIEF OF EVIDENCE.

Although some months had elapsed between the trial of the case and the hearing of the motion for a new trial, and the presiding judge could not from memory certify to the accuracy of the brief of evidence, yet where the evidence and the charge of the court were taken down by the official stenographer at the time of the trial, and were transcribed, and from this the presiding judge approved them, this court will not reverse his judgment for so doing, and declining to dismiss the motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 132.*]

7. REVIEW ON APPEAL.

There was no error in refusing to dismiss the motion for a new trial on any of the grounds contained in the motion therefor.

8. NEW TRIAL PROPERLY GRANTED.

The verdict was not demanded by the evidence, and the presiding judge did not abuse his discretion in granting a first new trial.

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action between K. D. Holtzendorff, as administratrix, and J. B. Dillard. From the judgment, Holtzendorff brings error. Affirmed.

See, also, *infra*.

J. D. Sparks, for plaintiff in error. Hatton Lovejoy and Crovatt & Whitfield, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 242)

HOLTZENDORFF v. DILLARD.

(Supreme Court of Georgia. May 10, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 78*)—DECISIONS REVIEWABLE—FINALITY OF DETERMINATION.

At the time set for the hearing of a motion for a new trial, a motion was made to dismiss it on various grounds. The presiding judge said that if the motion were pressed he would have to sustain it. Counsel for the party moving for a new trial moved for a postponement of the hearing to a later date, which was granted over objection by adverse counsel. "The court refused to then pass upon said motion to dismiss," and by order continued the hearing to a later date. To this respondent filed a bill of exceptions, and brought the case here. *Held*, that this constituted no such final judgment as to authorize a direct bill of exceptions, and, the judge not having passed upon the motion to dismiss, direct exception could not be taken on the ground that he erroneously overruled it, and that, had he sustained it, the judgment would have been final. On motion, the writ of error must be dismissed. Civil Code 1910, § 6138.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 78.*]

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action between K. D. Holtzendorff, as administratrix, and J. B. Dillard. From the judgment, Holtzendorff brings error. Dismissed.

See, also, 71 S. E. 132.

J. D. Sparks, for plaintiff in error. Hatton Lovejoy and Crovatt & Whitfield, for defendant in error.

LUMPKIN, J. Writ of error dismissed. All the Justices concur.

(136 Ga. 228)

MARTIN v. HALE.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 494*)—TRIAL (§ 25*)—RIGHT TO OPEN AND CLOSE.

Where suit is brought by the holder of a promissory note payable to the order of the payee, an indorsed by him to the plaintiff without recourse, and the defendant in his plea admits the execution of the note and its ownership by the plaintiff, the burden is on the defendant to establish his defense, and consequently he is entitled to open and conclude.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 494; Trial, Cent. Dig. § 47; Dec. Dig. § 25.*]

2. TRIAL (§ 296*)—INSTRUCTIONS.

It is not cause for a new trial that the court read in charge to the jury a Code section, part of which was applicable to the case and

part not; it not appearing that the reading of the inapplicable part was calculated to mislead the jury or was prejudicial to the rights of the losing party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716; Dec. Dig. § 296.*]

3. TRIAL (§ 296*)—INSTRUCTIONS.

A charge that "counsel may differ among themselves as to what the evidence is, but that will not control you; you look to all the evidence of the witnesses, and determine what the truth is, and arrive at the truth as best you can in this transaction," is not erroneous, as excluding consideration of the documentary evidence, where it appears from the context that the court's instruction concerned a difference between counsel as to the testimony of witnesses, and he further charged the jury that their verdict was to be reached after a consideration of all the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

4. REVIEW ON APPEAL.

The charge was fair and comprehensive, and adapted to the evidence, and the evidence was sufficient to support the verdict.

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action by A. F. Martin, Jr., against W. F. Hale. Judgment for defendant, and plaintiff brings error. Affirmed.

W. E. Mann, for plaintiff in error. Maddox, McCamy & Shumate, for defendant in error.

EVANS, P. J. A. F. Martin, Jr., brought suit against W. F. Hale upon a note for the principal sum of \$1,092, claiming only \$500 principal to be due thereon. The note was payable to the Bank of Ringgold, and transferred without recourse by the payee to the plaintiff. The defendant admitted the execution of the note, and that the plaintiff was the owner thereof. By way of defense he alleged that the plaintiff was the cashier of the Bank of Ringgold, and came to the home of the defendant, who at the time was sick in bed, and represented to the defendant that a note given by him to the Bank of Ringgold had been lost, and that he wished the defendant to give a duplicate of the note; the plaintiff stating that he had secured a better position, and was intending to sever his connection with the bank of Ringgold, and desired the duplicate note to place of the lost note, so that he might settle his affairs with the bank. The defendant averred that he was sick at the time, and having no cause to suspect anything wrong, and believing that the plaintiff would not knowingly misrepresent the facts, and relying upon his representations, he executed a duplicate note, which is the note in suit. He averred that the plaintiff's representations were false, and were fraudulently made for the purpose of procuring the note from the defendant; that as soon as he recovered from his illness he ascertained that he had signed the note on account of the deception and fraud of the plaintiff, and at once noti-

fied the Bank of Ringgold that he had been deceived in signing the note and that he would not pay the same; that since the execution of the note the plaintiff had stated that he had been mistaken when he procured the defendant to sign the note—that it was a note for \$500 which had been lost, instead of a note for \$1,092, which explains why plaintiff claims only \$500 principal in the suit against defendant. The defendant further averred that no \$500 note given by him to the Bank of Ringgold had been lost, and that he is not indebted to the plaintiff.

On the trial it was the contention of the plaintiff that a note for \$500 had been lost by him as cashier of the bank, and that the note sued on was taken as a duplicate for the same, the plaintiff erroneously believing at the time that the lost note was for the amount of the duplicate note, and that in his settlement with the bank he had paid the \$500 note, which was lost, and that the bank transferred the duplicate note to him. The defendant, on the other hand, contended that the truth of the transaction was as expressed in his plea, that he had paid every note which he had given to the bank, that none had been lost, and that the bank refused to accept the duplicate note, upon his notice as to the manner in which the plaintiff procured it. The trial resulted in a verdict for the defendant.

[1] 1. In his motion for new trial, the plaintiff complained that the court allowed the defendant to assume the burden of proof, and accorded him the right to open and conclude. The defendant in his answer having admitted the execution of the note, and that the plaintiff was the owner and holder thereof, the burden was upon him to make good his defense, and he was entitled to open and conclude the argument. *Montgomery v. Hunt*, 93 Ga. 438, 21 S. E. 59.

[2] 2. The court read to the jury sections 4622, 4623, and 4625 of the Code of 1910, defining actual and constructive fraud, misrepresentation, and how fraud may be consummated. Complaint is made that these sections are inapplicable to the pleadings and the evidence. So much of section 4622 as defines constructive fraud may not have been strictly applicable to the issue raised by the pleadings and evidence. The defendant clearly made the issue of actual fraud by the plaintiff misrepresenting that the duplicate note was in substitution for a lost note held by the bank, and the Code sections relative to actual fraud and misrepresentation were clearly applicable. But even if the definition of constructive fraud, which is defined in the Code section to be "any act of omission or commission contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another," be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

inapplicable (which is to be doubted), the reading of the entire section containing this definition could not have been prejudicial to the defendant, because the charge of the court was explicit that the plaintiff was entitled to recover, unless he practiced a fraud upon the defendant in the procurement of the note, as averred in his plea. *Eagle & Phenix Mills v. Herron*, 119 Ga. 389, 46 S. E. 405.

[3, 4] 3, 4. The charge complained of in the third headnote was not erroneous for the reason therein stated. The instruction of the court was fair and comprehensive, and adapted to the evidence, and the evidence was sufficient to support the verdict.

Judgment affirmed. All the Justices concur.

(136 Ga. 222)

MADDISON & JOHNSON v. PIEDMONT STONE CO.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The court committed no error in his rulings excluding testimony, nor in his failure to charge as complained of. The evidence was sufficient to support the verdict, and the judgment is affirmed.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between Maddison & Johnson and the Piedmont Stone Company. From the judgment, Maddison & Johnson bring error. Affirmed.

Mark Bolding, for plaintiffs in error.
Walter A. Sims, for defendant in error.

HOLDEN, J. Affirmed. All the Justices concur.

(136 Ga. 153)

WHITE v. STATE.

(Supreme Court of Georgia. April 12, 1911.)

(Syllabus by the Court.)

SODOMY (§ 1*)—NATURE AND ELEMENTS OF OFFENSE.

The Court of Appeals certified to this court the following question: "Can sodomy be committed by the mouth, or otherwise than per anum?" Under the ruling in the case of *Herring v. State*, 119 Ga. 709, 46 S. E. 876, the foregoing question is answered in the affirmative. After a review, upon request by counsel for plaintiff in error, of the case of *Herring v. State*, this court is of the opinion that the ruling made in that case should not be reversed, and the law as there stated, applicable to the instant case, must stand as the rule in this state.

[Ed. Note.—For other cases, see *Sodomy*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*

For other definitions, see *Words and Phrases*, vol. 7, p. 6539.]

Certified Question from Court of Appeals.

F. M. White was convicted of sodomy, and he brings error to the Court of Appeals. On certified question. Question answered.

Geo. W. Owens, for plaintiff. W. C. Hart-ridge, Sol. Gen., for the State.

BECK, J. Question certified answered in the affirmative. All the Justices concur.

(136 Ga. 223)

GASS v. CUMMINGS et al.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977*)—REVIEW—GROUND OF NEW TRIAL.

In view of the confused state of the record, it cannot be said that the evidence demanded the verdict; and, as the judgment complained of is the first grant of a new trial, the discretion of the judge will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action between G. L. Gass and William Cummings and others. From an order granting a new trial, Gass brings error. Affirmed.

Foust & Payne and Maddox, McCamy & Shumate, for plaintiff in error. W. U. Jacoway, J. P. Jacoway, and R. F. Tatum, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(136 Ga. 225)

DAVIS v. MOORE.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

While some of the charges complained of may have been slightly inaccurate, none of them embody harmful error against the plaintiff, requiring a new trial. The evidence was sufficient to warrant the verdict in favor of the defendant, and no error appears requiring a reversal of the judgment refusing a new trial.

Error from Superior Court, Lumpkin County; H. H. Dean, Judge pro hac vice.

Action by J. M. Davis against Hughes Moore. Judgment for defendant, and plaintiff brings error. Affirmed.

Johnson & Johnson, for plaintiff in error. O. J. Lilly and Howard Thompson, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 224)

BLUE RIDGE LUMBER CO. v. GREENWOOD et al.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

ACCOUNT, ACTION ON (§ 8*)—APPEAL AND ERROR (§ 518*)—NECESSITY FOR BILL OF EXCEPTIONS—SUFFICIENCY OF EVIDENCE.

The petition alleged that the defendants were indebted to the plaintiff in a named sum

petition that defendant "was negligent in having a freight car loaded with meat made up in" the train, "and placed next to the engine" was sustained, the allegation that the defendant was negligent "in pulling said heavily laden freight car, so loaded with meat, in its passenger train at such rapid rate" of speed of 30 to 40 miles per hour, was not stricken. There was evidence that the train at the time of the derailment was running at a speed of about 40 miles an hour. The freight car, which was loaded with meat, and was in front of the passenger coaches and next to the engine, was derailed, and was at the scene of the wreck when the witness Kessler appeared thereat five or ten minutes after it occurred. He evidently saw the derailed freight car. The allegation of negligence above referred to was not simply that the train was being run at too rapid rate of speed, but that it was run at such rate of speed with the "heavily laden freight car, so loaded with meat, in its passenger train." The running of the train at such speed might not have been negligent, but for the fact that the heavily loaded freight car was "in its passenger train." The witness Kessler testified to the effect that he inspected the track at the scene of the accident soon after its occurrence, and that it was all right in every way. He also testified: "I could not discover any cause for the wreck whatever. * * * As to what caused that wreck, in my opinion I couldn't see any cause for it whatever. I made a close examination, and I couldn't discover any cause at all." In view of the testimony delivered by the witness Kessler, the testimony regarding his previous statements—at least, his statement that the heavily loaded box car caused the wreck—was admissible for the purpose of discrediting his testimony delivered on the trial in behalf of the defendant, and the court committed no error in allowing the same.

4. The evidence was sufficient to warrant the verdict. The jury found a verdict for \$750, and the amount of the recovery was not excessive.

Judgment affirmed.

FISH, C. J., and EVANS, P. J., disqualified.

(136 Ga. 163)

FITZGERALD v. STATE.

(Supreme Court of Georgia. April 13, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§ 309*)—TRIAL—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

The only eyewitness to the homicide testified in behalf of the state, in substance, as follows: Gus Fitzgerald, cousin of the accused, and George Austin were quarreling, when Gus drew his knife on George, who thereupon struck Gus with his fist, when the accused

ran up to them out of the dark, and shot George with a pistol, thereby killing him at once. The only defenses set up by the accused on the trial were alibi, and that the homicide was not committed in the county of Fayette, as charged in the indictment. The court, therefore, did not err in failing to instruct the jury on the subject of voluntary manslaughter. See *Kendrick v. State*, 113 Ga. 759, 39 S. E. 286, and cases cited; *Robinson v. State*, 118 Ga. 45, 44 S. E. 804.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

2. CRIMINAL LAW (§ 815*)—TRIAL—INSTRUCTIONS.

In connection with instructions on the defense of alibi, the court charged the jury: "If you have a reasonable doubt from the evidence that this is the man who committed this offense, if one was committed by some one, it would be your duty to acquit him." This charge was not justly subject to the criticism that it took from the jury the right to consider whether the accused, if he committed the offense, was justifiable, or only guilty of voluntary manslaughter. Moreover, as stated in the foregoing headnote, according to the evidence of the sole eyewitness to the homicide, the person who did the killing was guilty of murder.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1922, 1936; Dec. Dig. § 815.*]

3. INSTRUCTIONS ON ALIBI.

The instructions given on the subject of alibi, to which exception was taken, were in the language stating the law on that subject in *Harrison v. State*, 83 Ga. 129 (3), 9 S. E. 542.

4. CRIMINAL LAW (§ 815*)—TRIAL—INSTRUCTIONS.

The following instruction to the jury: "Does your mind reach the conclusion from the evidence that the allegations are true beyond a reasonable doubt? If it does, then you are authorized to find it true." This instruction was not cause for a new trial, on the ground "that it took from the jury the right to consider the statement of the defendant, and confined them in reaching a conclusion to the evidence in the case"; the court having fully and correctly instructed the jury as to the statement made them by the accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1922, 1936; Dec. Dig. § 815.*]

5. CRIMINAL LAW (§ 772*)—TRIAL—INSTRUCTIONS.

According to the evidence for the state, both the accused and the deceased, George Austin, were in the county of Fayette when the former shot and killed the latter. According to the evidence for the accused, the deceased was shot and killed in the county of Clayton. Therefore it was not cause for a new trial that the court instructed the jury as follows: "If the defendant inflicted a mortal wound on George Austin, where the wound was inflicted is the place where jurisdiction is."

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 772.*]

6. CRIMINAL LAW (§ 655*)—TRIAL—CONDUCT OF TRIAL—EXPRESSION OF OPINION BY JUDGE.

While the case was being argued before the jury, the court in the presence of the jury submitted the following query to the counsel for both sides: "Suppose that this jury should decide that the defendant is guilty of the offense charged in the indictment," but should conclude that it did not occur in this county, but that it happened in some other county,

what do you say about the jury returning this kind of a verdict: 'We, the jury, find the defendant not guilty, on the ground that the crime was not committed in Fayette county.' Counsel for the accused replied that he did not think the jury could properly return such a verdict. The solicitor general stated that in his opinion they could, and that the accused could then be tried in the county where the homicide occurred, if it did not occur in the county of Fayette. The judge replied: "I didn't know much about that, but asked you gentlemen to see what you thought about it. Have either of you any authority on that point?" Counsel for both sides replied that they had no authority on the subject. The judge did not again refer to the point. What the judge said in this colloquy was not cause for a new trial, on the ground that it impressed the jury with the idea that he was of the opinion that the accused was guilty, and should be held for trial in some other county, if not in Fayette county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520-1535; Dec. Dig. § 655.*]

7. EVIDENCE AUTHORIZED CONVICTION.

There was evidence to authorize the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Fayette County; L. S. Roan, Judge.

Dock Fitzgerald was convicted of crime, and he brings error. Affirmed.

J. W. Culpepper and Daley & Chambers, for plaintiff in error. J. W. Wise, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(136 Ga. 221)

IVEY v. CABLE CO.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

DIRECTING VERDICT.

The evidence demanded a verdict in favor of the defendant, and the court did not err in directing the jury to find in its favor.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Tina Ivey against the Cable Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Lowndes Calhoun, for plaintiff in error. J. W. & J. D. Humphries, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 164)

BARNES v. MADDOX.

(Supreme Court of Georgia. April 13, 1911.)

(Syllabus by the Court.)

1. EVIDENCE (§ 370*)—BOUNDARIES (§§ 35, 40*)—PROCEEDINGS TO ESTABLISH—SUFFICIENCY OF EVIDENCE.

Where the dividing line between two adjoining tracts of land was in controversy, both

plaintiff and defendant claiming under a common source of title, a deed, drawn from the possession of the plaintiff by notice to produce, in which the common predecessor in title conveyed the tract to her with boundaries as contended for by the defendant, was admissible in evidence without proof of execution, although the plaintiff stated that she did not claim the land under the deed, but under a previous parol gift from the maker of it and possession for 30 years. Louisville & Nashville R. Co. v. Yudson, 135 Ga. 731, 70 S. E. 576; Brinkley v. Bell, 126 Ga. 490, 55 S. E. 187.

(a) Under such circumstances, the deed was admissible; but the grantee could introduce other evidence of her title, and the ultimate question of what constituted her title was for the jury.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 370; Boundaries, Dec. Dig. §§ 35, 40.*]

2. REVIEW ON APPEAL.

The verdict was supported by the evidence, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Action between S. E. Barnes and D. H. Maddox. From the judgment, Barnes brings error. Affirmed.

Doyle Campbell, for plaintiff in error. W. S. Florence, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(236 Ga. 146)

SOUTHERN RY. CO. v. ROBERSON.

(Supreme Court of Georgia. April 12, 1911.)

(Syllabus by the Court.)

ACTION (§ 28*)—NATURE AND FORM—ACTION EX CONTRACTU—SUFFICIENCY OF PETITION.

The petition in this case was a suit ex contractu for the value of the property of the plaintiff, taken and carried away by the defendant without the plaintiff's consent, without alleging that the defendant had converted the same into money; and, under the ruling in Woodruff v. Zaban, 133 Ga. 24, 65 S. E. 123, 134 Am. St. Rep. 186, the petition was subject to general demurrer.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196-215; Dec. Dig. § 28.*]

Error from Superior Court, Wayne County; P. E. Seabrook, Judge.

Action by W. M. Roberson against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Bennet, Twitty & Reese and Littlefield & Poppell, for plaintiff in error. Jas. R. Thomas and Jos. A. Morris, for defendant in error.

HOLDEN, J. W. M. Roberson brought suit against the Southern Railway Company; his petition, after alleging the defendant to be a corporation having a line of railroad and place of business in the county in which the suit was brought, making the following allegations: "That said defendant is

Action by Mrs. J. W. Pounds against J. W. Pounds and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. H. Terrell, for plaintiff in error. Alonzo Field, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 222)

WILLIAMSON et al. v. YOUMANS.
(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. TENANCY IN COMMON (§ 55*)—JOINT ACTION FOR RECOVERY OF LAND.

Where tenants in common bring a joint action for the recovery of land, if it appears upon the trial of the case that the defendant has a good title by prescription as against one of the plaintiffs, there can be no recovery in the case. *De Vaughan v. McLeroy*, 82 Ga. 713, 10 S. E. 211; *Powell on Actions for Land*, § 27.

(a) If the evidence did not show in the defendant a good title as against all of the plaintiffs, the uncontradicted evidence shows a good title by prescription by reason of adverse possession under color of title for seven years in the defendant as against one or more of the plaintiffs; and, under the ruling announced in the preceding note, the court committed no error in directing a verdict in favor of the defendant.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 146; Dec. Dig. § 55.*]

2. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The deed under which defendant claims title was admissible as color of title, if not admissible for any other purpose. Even if the admission of other evidence over the objection of the plaintiffs was error for any reason assigned, the admission of such evidence does not constitute error requiring a new trial, as competent evidence admitted demanded a verdict in favor of the defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by Mary Williamson and others against J. S. Youmans. Judgment for defendant, and plaintiffs bring error. Affirmed.

Hines & Jordan, Alfred Herrington, Lee Godfrey, and Walter F. Gray, for plaintiffs in error. Williams & Bradley, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 187)

RODDENBERRY v. PATTERSON.
(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 682*)—RECORD—BILL OF EXCEPTIONS—SUFFICIENCY.

Where, on motion, the judge dismissed the defendant's plea to a suit on an open account, and, on evidence being given that the account

was correct, directed a verdict for the plaintiff, and a judgment was entered thereon, a bill of exceptions, which excepted to such final judgment and assigned it as error, and excepted to the striking of the plea, and duly assigned error thereon, was sufficient to bring before the Supreme Court the question of the correctness of the latter ruling, and the writ of error will not be dismissed. *Lyndon v. Georgia Ry. & Electric Co.*, 129 Ga. 353, 58 S. E. 1047.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2885-2886; Dec. Dig. § 682.*]

2. APPEAL AND ERROR (§ 725*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Where the bill of exceptions recited that a motion to dismiss the defendant's plea of recoupment was made on certain stated grounds, based on what appeared on the face of the plea, and that the motion was sustained, an assignment of error on such ruling in the following words was sufficient: "To this order of the court the defendant then and there excepted, and now excepts and assigns error thereon, and says that the court erred in sustaining the motion of the plaintiff and in striking the defendant's plea."

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 725.*]

3. SALES (§ 348*)—RECOUPMENT.

Where suit was brought on an open account for the price of bricks alleged to have been sold and delivered by the plaintiff to the defendant, the latter could file a plea of recoupment alleging that the plaintiff contracted to deliver to him a stated number of bricks at a named price, that those delivered were only part of the number contracted for, that the plaintiff failed to deliver the balance, that the market value of such bricks at the time and place for delivery was a specified sum per thousand, being greater than the contract price, and that by reason of the breach the plaintiff was indebted to him the difference between the contract price and the market price, allowing a credit for the bricks delivered.

(a) Such a plea does not involve a rescission of the contract, or a necessity on the part of the defendant to return the bricks received.

(b) The plea filed was sufficient to withstand the motion to dismiss, and the sustaining of such motion was error.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 973-986; Dec. Dig. § 348.*]

Error from Superior Court, Grady County; Frank Park, Judge.

Action by L. F. Patterson against W. B. Roddenberry. Judgment for plaintiff, and defendant brings error. Reversed.

Roscoe Luke, for plaintiff in error. T. S. Hawes and Russell & Fleming, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(136 Ga. 226)

GEORGIAN CO. v. KUHNEN.
(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

CONTRACTS (§ 352*)—ACTION—SUFFICIENCY OF EVIDENCE.

The action was to recover an amount alleged to be due for the publication of certain ad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

vertisements in the plaintiff's newspaper. There was evidence to show that the advertisements were published in pursuance of a contract with the defendant's agent, that the defendant acknowledged the authority of his agent to make the contract, that the sum claimed was a reasonable price, and that the defendant requested the plaintiff's forbearance in the collection of the indebtedness after it had been incurred. It was error to grant a nonsuit.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 352.*]

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by the Georgian Company against N. Kuhn. Judgment of nonsuit, and plaintiff brings error. Reversed.

A. A. McCurry, for plaintiff in error. Sam Kinzey and J. B. Jones, for defendant in error.

EVANS, P. J. Judgment reversed. All the Justices concur.

(136 Ga. 166)

BLACKMON v. TAYLOR.

(Supreme Court of Georgia. April 13, 1911.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 349*)—REMEDIES OF PURCHASER—DEFICIENCY IN QUANTITY OF LAND—ACTION—SUFFICIENCY OF PETITION.

A deed purported to convey: "That tract or parcel of land known and described as lot No. 1 in the Ninth district of said county [Muscogee], containing 201 acres, more or less. The north half of lot No. 2 in the Ninth district, containing 102½ acres, more or less, same being all of lot No. 2 except 100 acres conveyed to Thomas Huff by the grantor herein. Said deed recorded in Book II, folio 18, in the clerk's office, Muscogee county records. Also 96½ acres off fractional lots Nos. 15 and 16, being in the Eighteenth district of said county; being in all about 400 acres, more or less." It also contained a clause of general warranty of title. A suit was subsequently instituted by the grantee against the grantor, setting forth the deed and alleging in substance that the land therein mentioned was sold to the plaintiff as a "certain tract or parcel of land," and that about the same date another tract or parcel of land, containing 301 acres, more or less, was sold to another person, and that the defendant represented that the two tracts constituted "one farm" of about 700 acres; that subsequently a division of the 700 acres was had between the respective grantees (the same not having been previously surveyed), and upon a survey of the 400 acres, more or less, so sold to petitioner, it was ascertained to contain 250 acres. It was further alleged that the plaintiff paid for the land \$6.23 per acre, his actual loss being \$934.50, and that the grantor warranted the title to the property under his hand and seal. Upon ascertaining the deficiency he immediately notified the grantor and demanded the sum above mentioned for his damages, which was refused. Judgment was prayed for the recovery of that amount. The petition was dismissed on general demurrer. *Held*, that the petition, properly construed, alleged a sale by the tract, and the action was for a recovery of damages on account of a deficiency in the quantity of the land, and under the ruling in the case of *Montgomery v. Robertson*, 134 Ga. 66, 67 S. E. 431,

and authorities cited, there was no allegation of actual fraud perpetrated by the grantor, and no sufficient case alleged to authorize a recovery.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 349.*]

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Action by W. K. Blackmon against T. O. Taylor. Judgment for defendant, and plaintiff brings error. Affirmed.

Carson & McOutchen, for plaintiff in error. T. T. Miller, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(136 Ga. 337)

WITHROW v. STATE

(Supreme Court of Georgia. April 12, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 452*)—EVIDENCE—OPINION EVIDENCE—FOUNDATION.

Where a witness testified that he had known the accused for several years, had had conversations with him, and at one time, as an officer, had had him under arrest, and that from his knowledge and observation of the defendant he believed him mentally capable of distinguishing right from wrong, it was not error to admit such evidence over the objection that no sufficient foundation was laid to permit the witness to express such opinion. In this connection, see *Herndon v. State*, 111 Ga. 178, 36 S. E. 634; *Taylor v. State*, 83 Ga. 647, 10 S. E. 442.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1053-1055; Dec. Dig. § 452.*]

2. REVIEW ON APPEAL.

While, in charging on the impeachment of witnesses and the corroboration of witnesses sought to be impeached, the judge did not employ the exact language of the Code upon that subject, when the entire charge in regard to the subject is considered together, there is no such error as requires a new trial. Nor was there error in declining to give the requested instructions in regard to the impeachment and corroboration of witnesses. In so far as they correctly stated the law, they were sufficiently covered by the charge.

3. CRIMINAL LAW (§ 1169*)—TRIAL—RECEPTION OF EVIDENCE—WITHDRAWAL OF EVIDENCE.

Where, in answer to questions propounded by the Solicitor General, certain evidence was elicited from a witness, but upon objection by counsel for the accused such evidence was excluded, and the presiding judge instructed the jury that it was withdrawn from their consideration, and should have no weight with them, and should be given no consideration by them, there was no error in declining to grant a mistrial upon motion, because such evidence had been heard by the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8141; Dec. Dig. § 1169.*]

4. HOMICIDE (§ 171*)—MURDER—TRIAL—ADMISSIBILITY OF EVIDENCE.

Where the accused was upon trial under an indictment charging him with the murder of his wife, the jury having authority, in case of a conviction, to find him guilty without a recommendation to mercy, or to recommend him to life imprisonment (Penal Code 1910, § 63), it was competent to introduce evidence

tending to show that at the time of the homicide the woman was in an advanced and apparent state of pregnancy, as bearing upon the enormity of the offense and furnishing ground for the consideration of the jury in determining whether or not a recommendation to life imprisonment would be proper.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 171.*]

5. MOTION FOR NEW TRIAL—SUFFICIENCY.

Some of the grounds of the motion for new trial complained of the admission of evidence, but did not sufficiently state the ground of the objection which was urged to its admission.

6. CRIMINAL LAW (§ 665*)—COMPETENCY—WITNESS NOT SEQUESTERED.

Where, on the trial of a criminal case, the rule for the sequestration of witnesses was invoked, the fact that a witness who had been subpoenaed by the state was not called and sent out does not render him incompetent as a matter of law to testify, and it was not sufficient cause for the grant of a new trial that the court allowed him to testify as to the bad character of a witness for the defendant; the evidence being offered for the purpose of impeaching such witness. See, in this connection, *Taylor v. State*, 132 Ga. 235, 63 S. E. 1118, *Davis v. State*, 120 Ga. 843, 48 S. E. 305, and cases cited.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1559-1564; Dec. Dig. § 665.*]

7. REVIEW ON APPEAL.

None of the other grounds of the motion for new trial are of such character as to require a new trial or elaboration.

Error from Superior Court, Fannin County; N. A. Morris, Judge.

John J. Withrow, Jr., was convicted of murder, and he brings error. Affirmed.

O. R. Dupree and Gober & Griffin, for plaintiff in error. J. P. Brooke, Sol. Gen., J. Z. Foster, and H. A. Hall, Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(136 Ga. 222)

NORMAN et al. v. WYNNE, Judge.
(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 162*)—OFFICERS—COMPENSATION—SOLICITOR OF CITY COURT.

Where an act providing a city court provides that the fees of the solicitor of such court shall be as follows: "For every case founded on accusation finally disposed of in [the] city court, ten dollars. For every indictment or special presentment finally disposed of in said court, five dollars. For all other services not provided for by this act, the same fees as are allowed solicitors general for like services and cases in the superior courts"—the solicitor of the city court is entitled to only \$10 for a joint accusation against two or more persons tried jointly.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 162.*]

Error from Superior Court, Wilkes County; D. W. Meadow, Judge.

Mandamus by R. C. Norman, Solicitor, and

others, against William Wynne, Judge of the City Court of Washington. Judgment for defendant, and petitioners bring error. Affirmed.

W. D. Tutt, for plaintiffs in error. F. H. Colley, for defendant in error.

FISH, C. J. Norman, as solicitor, and Binns, as clerk, of the city court of Washington, Ga., filed a petition in the superior court of Wilkes county for mandamus to compel the judge of such city court to approve for payment an insolvent cost bill, arising from the trial and disposition of cases founded on accusation. This bill was based on 11 accusations tried in the city court. Each accusation was against two defendants jointly, and the defendants in each case were tried jointly.

The act establishing the city court of Washington provides for the payment of the solicitor of such court as follows: "For every case founded on accusation finally disposed of in [the] city court, ten dollars. For every indictment or special presentment finally disposed of in said court, five dollars. For all other services not disposed of by this act, the same fees as are allowed solicitors general for like services and cases in the superior courts. For representing the state in every case carried to the Supreme Court from said city court, fifteen dollars." Acts 1905, p. 403, § 12. It was claimed by the solicitor that the clause, "For every case founded on accusation finally disposed of in [the] city court, ten dollars," entitled him to a fee of \$10 for each person named and tried upon joint accusation. The judge of the city court held that this clause meant that the solicitor was entitled to only \$10 for the entire trial of the joint accusation. The fees claimed by the solicitor of the city court were in cases tried prior to the passage of the act of August 3, 1910 (Acts 1910, p. 221), amending the act of August 9, 1905 (Acts 1905, p. 403), establishing the city court of Washington. There being no issue of fact, the case was heard without the intervention of a jury, and the court rendered judgment refusing a mandamus absolute, and to this judgment petitioners excepted.

One of the contentions of the plaintiffs in error is that the Legislature must have intended to allow this fee for each person prosecuted, since such is allowed the solicitors general by Penal Code 1910, § 1126, and since most other acts creating city courts allow the solicitors "the same as allowed to solicitors general." We think this does not follow. Rather is it to be noticed that, in creating this court, most of the fees are laid down as being the same as solicitors general; but in certain particulars the fees are made different. It would appear to be the legislative intent to clearly except from the general rule the fees for certain services, and the provi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sion of \$10 "for every case" is the first one mentioned in this section of the act. It was held in *Re Kenan*, 109 Ga. 819, 821, 35 S. E. 312, 313, that, "if two persons are indicted jointly for an offense and tried together, there is but one case." So in *Officers of Court v. Wyatt*, 62 Ga. 172, it was ruled that, "where four defendants are jointly indicted and jointly tried, the clerk of the court, under section 3695 of the Code [for every bill of indictment, when the defendant is arraigned, tried and found guilty, including all services, \$5.00], is only entitled to \$5 costs."

We have dealt with the only question referred to in the brief for counsel for plaintiffs in error. Accordingly it results that the mandamus was properly refused.

Judgment affirmed. All the Justices concur.

(136 Ga. 194)

KEEN v. TANNER.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. EVIDENCE (§ 158*)—PAROL EVIDENCE—JUDICIAL PROCEEDINGS.

It was not error to exclude parol evidence, offered for the purpose of showing that in a certain suit orders had been taken dismissing the same. If such orders had actually been granted by the court, and taken, there was higher and better evidence of the fact than that which was tendered and rejected.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 481; Dec. Dig. § 158.*]

2. EVIDENCE (§ 183*)—BEST AND SECONDARY—JUDICIAL ACTS—LOSS OF ORIGINAL RECORD.

Where a record in a case pending in a court has been lost, and a copy thereof, including the exhibits to the petition, has been established in lieu of the lost original record, such established copy takes the place of the lost original record, and may be used for any of the purposes for which the original could be used. But this would not render exhibits to the lost petition competent evidence, in the absence of proof of a loss or destruction of the originals, as affirmative and independent proof of the contents of the writings of which the exhibits purported to be copies.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

3. EJECTMENT (§ 119*)—INJUNCTION—ADMISSIBILITY OF EVIDENCE.

The material issue in this case being as to whether the petitioner was entitled to an injunction against the enforcement of a writ of possession, based upon a verdict in an ejectment suit in favor of the defendant in this case against the petitioner, upon the ground that petitioner had not been duly served in the ejectment case, and that the judgment against him had been obtained by fraudulent practice of the plaintiff in the ejectment case, by proceeding in that case in the absence of the defendant after having agreed to dismiss the case, the court did not err in ruling out, as immaterial, testimony tending to show that certain evidence which had been submitted in the trial of the ejectment case was not competent for the purpose for which it was adduced on the trial.

[Ed. Note.—For other cases, see *Ejectment*, Dec. Dig. § 119.*]

4. REVIEW ON APPEAL.

Under the evidence in this case the petitioner is not entitled to the relief sought, and the court did not err in directing a verdict in favor of the defendant.

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Action by J. W. Keen against B. H. Tanner. Judgment for defendant, and plaintiff brings error. Affirmed.

Hendricks & Christian and Benj. T. Allen, for plaintiff in error. Quincy & McDonald and Lankford & Dickerson, for defendant in error.

BECK, J. J. W. Keen brought his equitable petition against B. H. Tanner, seeking to obtain an injunction to restrain the enforcement of a writ of possession issued from the superior court of Coffee county, based upon a verdict and judgment in favor of the defendant Tanner against petitioner in the superior court of said county. It is alleged in the petition that the plaintiff had never been served with a copy of the suit in ejectment, and that he had never had his day in court. It appears from the evidence that Tanner was the purchaser of a lot of land at sheriff's sale, which was had under a *fi. fa.* in favor of B. H. Tanner against D. W. Henderson. Petitioner shows that he had title to the lot of land in controversy, and that D. W. Henderson, the defendant in the *fi. fa.*, had never had title to the property, but that he, the petitioner, had derived title through other parties, and that D. W. Henderson was an entire stranger to the title. Defendant Tanner answered the petition, showing that he had purchased at the sale referred to in the petition, and that he had brought complaint in the statutory form for this land, and had recovered a judgment in his favor for the same. He also averred in his answer that plaintiff had been duly served in the ejectment suit.

[1-3] 1-3. No elaboration is required of the principles stated in headnotes 1, 2, 3.

[4] 4. On a comparison of the record in the case of *B. H. Tanner v. J. W. Keen*, the same being a complaint for land, brought by the defendant in the present case against the plaintiff therein, it sufficiently appears that the judgment in favor of the plaintiff in the ejectment suit covered the land in controversy in the present case. The petitioner failed entirely to sustain his allegation that he had not been served and had not had his day in court in the ejectment suit, which resulted in a judgment for the defendant in the present case. Nor is there any evidence in the record to show that Tanner, the plaintiff in the ejectment suit, or his counsel, had practiced such fraud in procuring the judgment in the ejectment case as would render the judgment void. While petitioner by amendment made the additional

allegation that counsel for plaintiff in the ejectment suit had agreed to dismiss that case, and instead of doing so had, in the absence of petitioner, taken a verdict and judgment against him, this allegation, contained in the amendment, was not supported by the evidence. Having thus failed to establish his contention that the judgment in the ejectment suit was the result of fraud practiced upon him, and that he had never been served as alleged in the petition, the petitioner was not entitled to the injunctive relief sought, and the court did not err in so holding.

Judgment affirmed. All the Justices concur.

(136 Ga. 187)

CANNON v. GORHAM.

(Supreme Court of Georgia. April 13, 1911.)

(Syllabus by the Court.)

1. EVIDENCE (§ 341*)—OFFICIAL DOCUMENTS—CERTIFIED COPIES.

Where an execution for unpaid taxes was issued by the Comptroller General against a certain tract of unreturned wild land, under the act of February 28, 1874 (Acts 1874, p. 105), and a sale of the land was made thereunder, and the execution was returned to the Comptroller's office with the official entries thereon, it became an office paper, and a certified copy of such execution and entries was admissible in evidence in lieu of the original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1289-1292; Dec. Dig. § 341.*]

2. TAXATION (§ 760*)—TAX SALES—DEEDS—RECITALS.

The inclusion in a form of sheriff's deed, in describing the tax execution, of the expression "transferred to of county," did not vitiate the sale, or render the deed inadmissible in evidence, where it appeared from the entries on the execution that no transfer of it was in fact made, and no evidence to the contrary was adduced.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1509; Dec. Dig. § 760.*]

3. CORPORATIONS (§ 432*)—EVIDENCE (§ 186*)—DEEDS—EXECUTION—AUTHORITY OF PRESIDENT—PRESUMPTION.

Where a deed, purporting to have been made by a corporation, recited that its corporate name was signed by the president and the corporate seal attached by the secretary, and the name of the corporation was signed by the president and followed by "(L. S.)," this was prima facie evidence of authority on the part of the president to execute such deed.

(a) If the deed was duly recorded and lost, a certified copy from the record was admissible in evidence, without further proof of the authority to execute it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717-1763; Dec. Dig. § 432; Evidence, Cent. Dig. §§ 661-673; Dec. Dig. § 186.*]

4. TAXATION (§ 651*)—UNIMPROVED LAND—SALE—CONDITIONS PRECEDENT—PUBLICATION—NOTICE.

Under the act of February 28, 1874 (Acts 1874, p. 105), amended by the act of March 2, 1875 (Acts 1875, p. 119), the prescribed advertisement of unreturned wild or unimproved land was necessary before the issuance of execution for the tax assessed against it. An execution issued without such precedent advertisement

was void, and no valid sale could be made thereunder.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1319-1323; Dec. Dig. § 651.*]

5. TAXATION (§ 651*)—SALE FOR TAXATION—PUBLICATION OF NOTICE.

If the Comptroller General failed to publish the requisite notice as to a lot of wild land for one year, and later issued an execution for a single amount, as including the taxes due on the lot for that and two other years, a sale under such execution was invalid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1319-1323; Dec. Dig. § 651.*]

6. TAXATION (§ 660*)—SALE FOR TAXES—NOTICE—PUBLICATION.

Where a legislative act required the publication of a notice "in one newspaper at the capital" once a week for four weeks, as a condition precedent to the issuance of an execution for taxes against a tract of wild or unimproved land, this requirement was not met by the publication of such notice twice in a daily newspaper and twice in a weekly, though both were published by the same publisher, and the weekly was made up largely of news items taken from the daily; the two having different advertising accounts, being sent to different sets of subscribers, mainly in different localities, and being shown to be like two separate newspapers, except as stated.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1338-1340; Dec. Dig. § 660.*]

(Additional Syllabus by Editorial Staff.)

7. SEALS (§ 5*)—"L. S."

The letters "L. S.," placed after the signature of a person or corporation, are an abbreviation of "locus sigilli," meaning "the place of the seal," and are usually inserted within brackets in copies of documents to indicate the position of the seal in the original.

[Ed. Note.—For other cases, see Seals, Cent. Dig. § 8; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 5, p. 3947.]

8. TAXATION (§ 651*)—SALE—EXECUTION—PUBLICATION OF NOTICE—DELAY.

Where notice to pay taxes assessed on unimproved or wild land has been duly published as required by Acts 1874, p. 105, as amended by Acts 1875, p. 119, mere delay for two or three years in issuing an execution for the tax of a specified year, for which publication was made, would not invalidate it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1319-1323; Dec. Dig. § 651.*]

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Ejectment by W. M. Gorham against Oscar Cannon. Judgment for plaintiff, and defendant brings error. Reversed.

M. B. Cannon, J. G. Cranford, E. K. Wilcox, and Edgar Watkins, for plaintiff in error. Hal Lawson and E. H. Williams, for defendant in error.

LUMPKIN, J. Gorham brought an action of ejectment against Cannon. The plaintiff claimed by virtue of a chain of title beginning with a tax sale under an execution issued by the Comptroller General against the land in dispute as wild or unimproved land, under the act of 1874 (Acts 1874, p. 105), amended by the act of 1875 (Acts 1875, p. 119). The defendant claimed under a chain

of title extending back to the original grant from the state. The case turned upon the validity of the tax sale. The presiding judge directed a verdict in favor of the plaintiff.

[1] 1. Objection was made to the introduction in evidence of a transcript of the execution and entries thereon certified by the Comptroller General, in whose office the execution was on file after the sale. The act of 1874 provided that the Comptroller General should issue the execution, and that the sheriff should make the sale and make returns thereof. When this was done, the paper became a document or paper of file in the Comptroller General's office, and a certified copy of the execution and entries was admissible in evidence. Civil Code 1910, § 5798; 17 Cyc. 329.

[2] 2. The sheriff apparently used a form of deed, in which was a clause for use if the execution had been transferred. After describing the execution, the deed contained these words: "Which said execution has been duly transferred by said comptroller to of county." The execution, with the entries upon it, showed no transfer, nor was there any other evidence of one. This furnished no ground for excluding the deed from evidence.

[3] 3. Several points were raised as to the introduction of a certified copy of an established copy of a deed. But a certified copy of the original deed from the record was introduced, and the only material questions were whether it sufficiently appeared that the corporate seal of the company named as the grantor was attached to the deed, and that the person signing as president had authority to execute it. There was evidence that the person so signing was the president of the company. The certified copy from the record contained a statement that the corporation had caused its corporate name to be signed by its president and its corporate seal to be attached by its secretary. It was signed, "The Savannah, Americus & Montgomery (L. S.), by S. H. Hawkins, President (L. S.)," and was duly attested. The absence of the original being sufficiently accounted for, a certified copy from the proper record is admissible to show the existence, genuineness, and contents of the deed. *Eady v. Shivey*, 40 Ga. 684; *Holtzclaw v. Edmondson*, 114 Ga. 171, 39 S. E. 849. If a deed is executed in the name of a corporation by its proper officer, with the corporate seal attached, a presumption of authority on his part to execute it arises, and this is a sufficient *prima facie* showing to admit the deed in evidence. *Solomon's Lodge v. Montmollin*, 58 Ga. 547; *Carr v. Georgia Loan & Trust Co.*, 108 Ga. 757, 33 S. E. 190; *Dodge v. American Freehold, etc., Co.*, 109 Ga. 394, 34 S. E. 672; *Almand & George v. Equitable Mortgage Co.*, 113 Ga. 983, 39 S. E. 421.

[7] Section 5 of the Code of 1910 declares that the word "seal" shall include impressions on the paper itself, as well as impres-

sions on wax or wafers. With the exception of official seals, a scrawl, or other mark intended as a seal, shall be held as such." No distinction is made in this statute between the seal of a corporation and that of an individual. The letters "L. S." are an abbreviation of "*locus sigilli*," the place of the seal; and it has been said that they are "usually inserted within brackets in copies of documents to indicate the position of the seal in the original." *Century Dictionary*. A clerk, in recording a deed of a corporation on which a seal is impressed, probably would not often attempt to make an exact reproduction of the seal, with all the insignia, marks, or emblems which might be upon it. It would hardly be held that his inability to do so would destroy the right to introduce certified copies of such deeds. But, treating the copy as in this respect identical with the original, it is a matter of common knowledge that these letters, with the inclosing parentheses or brackets, are often used in this state, at least by individuals, as a seal, without more. Numerous instances of such use appear in the Reports of this court. The deed reciting that the seal was attached, these letters, with the inclosing parentheses, following the signatures, were apparently intended as a seal.

In *Johnston v. Crawley*, 25 Ga. 316, 71 Am. Dec. 173, it was held that if an agent of a corporation has authority to execute a mortgage, and affixes thereto anything which the law recognizes as a seal when affixed by a natural person, it will be a good execution presumptively by the corporation. The seal there held to be sufficient was the same as that now under consideration. In the opinion it was said: "If they adopt a seal different from their corporate seal for a special occasion, or if they have no corporate seal, the seal adopted is the corporate seal for the time and the occasion. If a corporate body choose to adopt a scroll as their common seal, why may it not do it? It cannot, at common law, because a scroll cannot, by that law, be a seal. But a scroll is made a seal by statute in this state, and there is no reason why it may not be adopted by a corporation here, either as a common seal, or as a seal for a special purpose." See, also *Jones v. Ezell*, 184 Ga. 553 (3), 68 S. E. 303; *Nelson v. Spence*, 129 Ga. 35, 58 S. E. 697; *New York Life Ins. Co. v. Rhodes*, 4 Ga. App. 25, 60 S. E. 828; *American Investment Co. v. Cable Company*, 4 Ga. App. 106, 60 S. E. 1037; *Powell on Actions for Land*, § 221. In other states the strictness for common-law rule as to corporate seals has been relaxed either by statute or by judicial construction. *Angell & Ames on Corp.* (11th Ed.) § 226; *Brown v. Cohn*, 85 Wis. 1, 54 N. W. 1101, 20 L. R. A. 182, and citations; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Reynolds v. Glasgow Academy*, 6 Dana (Ky.) 37; *Phillips v. Coffee*, 17 Ill. 154, 63 Am. Dec. 357.

[4] 4, 5. Under the sixth section of the act of 1874 (Acts 1874, p. 105), the provision for the publishing of an advertisement for a prescribed time and in the prescribed manner, before the issuance of an execution against a lot of wild or unimproved land, was mandatory. This is made plain by the seventh section, which declares that, "on the expiration of the time of advertisement, the Comptroller General shall issue execution against all unimproved or wild lands not returned for state and county tax." The advertising of the notice calling on the owners to come forward and give in and pay the tax was a necessary step precedent to the issuing of executions. The time for which such advertisement should be made was changed by the act of March 2, 1875 (Acts 1875, p. 119), from 30 days to once a week for 4 weeks. [5] An execution issued without such advertisement was illegal. [6] If the advertisement was duly made, mere delay for two or three years in issuing the execution for the tax for a certain year would not render it invalid. But if the Comptroller General delayed for several years, and then issued an execution for a single sum as including taxes for three years, and an advertisement had been made for two of them, but not for the third, the execution for the single sum thus sought to be summarily enforced was invalid.

[8] 6. The acts above cited required that the advertisement, calling on the owners of unimproved or wild lands to come forward and give in and pay the taxes thereon, should be published "in one newspaper at the capital of the state" once a week for 4 weeks. The evidence showed that the same company published a daily and a weekly paper, or a daily and weekly edition of a paper, which were referred to in the evidence as the Atlanta Daily Constitution and the Atlanta Weekly Constitution; that there were separate subscription lists and separate advertising accounts for the two papers, although the same persons had authority to contract for advertisements in either and to employ agents for both; that very few, if any, persons were subscribers for both papers; that the weekly paper was largely, though not entirely, made up of news matter compiled from the columns of the daily, but that in other respects the two papers were treated as distinct; and that weekly editions of daily newspapers generally circulate in rural districts. It was shown that the advertisements in regard to the land in controversy were published in the Atlanta Daily Constitution on August 31 and September 7, 1877, and in the Atlanta Weekly Constitution on September 11th and 18th.

One question was whether this was a sufficient compliance with the law. In *Hull v. Chicago, etc., R. Co.*, 21 Neb. 371, 32 N. W. 162, it was held that a similar publication of a notice of an intention to exercise the

right of eminent domain in the condemnation of the real estate of a nonresident was not legal, and that proceedings dependent thereon for the purpose of jurisdiction were void. In the opinion Reese, J., stated that the statute required the condemning corporation to give four weeks' notice to the landowner "by publication four consecutive weeks in some newspaper published in the county" where the real estate sought to be appraised was situated. He then said: "Did the publication referred to comply with this requirement of law? Clearly not. As well might the publication have been in four 'different and separate' newspapers as in two. The fact that the papers were published by the same publishing company could have no bearing upon the question." In *Tully v. Bauer*, 52 Cal. 487, it was held that, "when a statute requires that the delinquent tax list, together with the time and place of sale of the property for the delinquent tax, shall be published in a paper in the city or county, or in a supplement to such paper, such list, time, and place, if published in a supplement, must be published in one the circulation of which is coextensive with that of the paper both in and out of the city and county." Advertisements of this character precedent to assessing taxes are matters of statutory requirement, and must be made as the statute prescribes. 27 Am. & Eng. Enc. Law (2d Ed.) 826; *Ronkendorff v. Taylor's Lessee*, 4 Pet. 349, 7 L. Ed. 882; *Bussey v. Leavitt*, 12 Me. 378.

The decision in *Bentley v. Shingler*, 111 Ga. 780, 36 S. E. 935, was cited as holding that an advertisement similar to the one made in the present case was sufficient. But no question was there raised as to publishing the advertisement for a part of the time in a daily and partly in a weekly newspaper. The ruling made was that a statutory requirement, that a given advertisement shall be published in a designated paper "once a week for four weeks" before a particular thing can lawfully be done, was complied with if the advertisement was inserted in that paper 4 times in as many separate consecutive weeks, and the first insertion was made in an issue of the paper published 28 or more days before the thing in question was done.

In the brief of counsel for defendant in error it was stated broadly that, if the proceeding involved in the present case was held to be invalid, this would overrule former decisions holding similar titles valid. No decision of this court was cited in which the grounds upon which we hold this proceeding invalid were advanced and determined, and we know of none. The act of 1874, as amended by that of 1875, was attacked as unconstitutional. But the point does not appear to have been passed upon in the trial court.

Judgment reversed. All the Justices concur.

(136 Ga. 254)

COBB v. HALL et al.

(Supreme Court of Georgia. May 10, 1911.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 588*)—MOTION FOR NEW TRIAL—BRIEF OF EVIDENCE—RECORD.**

The approved brief of evidence, which was considered on the hearing of the motion for a new trial, constituted a part of the record in the case, although not filed after the hearing and judgment on the motion, within the time prescribed by the judge's order, but before the bill of exceptions was sued out.—*Mitchell v. Masury*, 132 Ga. 360, 64 S. E. 275.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 588.*]

2. CHATTEL MORTGAGES (§ 140*)—WIDOW'S SUPPORT—PRIORITY OF PURCHASE-MONEY MORTGAGE.

Where C. purchased four mules on credit, and, being unable to pay for them, agreed with H. that, if the latter would pay the purchase price, together with the purchase price of four other mules which C. desired to buy, the title to the eight mules should be in H., and that C. would give H. a mortgage on them all to secure the payment of their purchase money, and such agreement was fully executed, H. became the vendor of C., within the purview of the act of August 17, 1903 (Acts 1903, p. 76), for the eight mules, and the mortgage given to him on them by C. would be such a purchase-money mortgage as contemplated by the act mentioned.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 237, 238; Dec. Dig. § 140.*]

3. CHATTEL MORTGAGES (§ 140*)—EXECUTION—PRIORITY OF LIEN.

A mortgage on ten described mules, which contained a recital, following the description, "This mortgage and note is given for the purchase money of the above last described mules," referred to all of the mules described in the mortgage, and, so construed, sufficiently complied with the provisions of the act of August 17, 1903 (Acts 1903, p. 76), requiring that a purchase-money mortgage on personality, in order to be superior to a year's support in such property, shall expressly state that the mortgage was executed and delivered for the purpose of securing the debt for such purchase money.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 140.*]

4. CHATTEL MORTGAGES (§ 157*)—WITNESSES (§ 150*)—TRANSACTION WITH PERSON SINCE DECEASED—CLAIMANT AGAINST ESTATE.

Where a bill to marshal assets was filed by the administrator of the mortgagor, and there were conflicting claims in regard to the mortgaged property, the widow claiming under a judgment for a year's support, the mortgagee claiming under the mortgage, and a third person claiming to be the owner of two of the mules covered by the mortgage, and one question in controversy was whether in fact the mortgage was given for the purchase money of the mules, as recited, it was competent for the mortgagee to introduce evidence to show that in fact the secured debt was for the purchase money of eight of the ten mules.

(a) In such a case the mortgage creditor was a competent witness, as against the widow, to testify in regard to transactions between himself and the intestate, touching things material to the issue on trial; it appearing from recitals in the bill of exceptions that all other issues had been adjusted and settled, except those between the widow, the mortgagee, and the claimant, and these being segregated by consent, the

estate not being interested in the result, and no objection to the competency of the witness being made on behalf of the administrator, but such objection being made only on behalf of the widow. *Gunn v. Pettygreaw*, 98 Ga. 327, 20 S. E. 328; Civ. Code 1910, § 5858.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 157;* *Witnesses*, Cent. Dig. §§ 653-657; Dec. Dig. § 150.*]

5. STATUTES (§ 115*)—TITLE GERMANE TO SUBJECT.

According to the decision rendered in the case of *Smith v. Bohler*, 72 Ga. 546, and followed in the case of *Morris v. State*, 117 Ga. 1, 43 S. E. 368, the act of 1903, referred to in the preceding notes, was not violative of the provisions of article 3, § 7, par. 8, of the Constitution of the state of Georgia, which provides that "no law or ordinance shall pass which . . . contains matter different from what is expressed in the title thereof."

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 150, 151; Dec. Dig. § 115.*]

6. DIRECTION OF VERDICT—PURCHASE-MONEY MORTGAGE—EVIDENCE.

The uncontradicted evidence demanded a verdict that the lien of Hall, the mortgagee, on the eight mules for their purchase money, was superior to the lien of the judgment in favor of the widow for a year's support, and the court did not err in directing such a verdict.

7. TRIAL (§ 143*)—ISSUES—SUBMISSION TO JURY.

On another issue between the widow and W. T. G. Cobb, who claimed title absolutely to the first two mules mentioned in the mortgage, based on the contention that they were never the property of the intestate, but were the property of the claimant, the evidence was conflicting, and it was erroneous to direct a verdict in favor of the claimant.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by Byron Collins, as administrator of the estate of J. E. Cobb, deceased, to marshal the assets of the estate, in which Mrs. M. C. Cobb, widow of the deceased, W. A. Hall, a mortgage creditor, and W. T. G. Cobb, a claimant to certain property alleged to belong to the deceased, intervened. A verdict was directed against Mrs. Cobb, in favor of the other claimants, and she brings error. Affirmed.

Byron Collins, as administrator of the estate of J. E. Cobb, deceased, instituted suit to marshal the assets of the estate, and to compel certain interested parties to interplead. Among those who interpleaded were Mrs. M. C. Cobb, the widow of deceased, W. A. Hall, a mortgage creditor of the deceased, and W. T. G. Cobb, a claimant to certain of the property of deceased. Before the trial the claims of all parties were adjusted, and issues relating thereto were eliminated from the case, except as to the parties above mentioned. The property in dispute between them consisted of ten mules, being the only property left in the hands of the administrator. A statutory year's support had been set apart to the widow, for \$650 in money, together with certain personal property

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

She asserted the priority of the lien of this judgment on all of the ten mules in question. W. A. Hall held a mortgage in his favor, executed by the intestate, which described all of the ten mules, and immediately following the description recited: "This mortgage and note is given for the purchase money of the above the last-described mules." He asserted this mortgage, contending that it was a purchase-money mortgage, as contemplated by the act of August 17, 1903 (Acts 1903, p. 76), as to the last eight mules described therein, and that its lien was entitled to priority over the lien of a judgment in favor of the widow for a year's support, but abandoned any claim of lien on the first two mules referred to in the mortgage. W. T. G. Cobb set up and contended that the two mules first described in the mortgage were purchased by himself from a dealer in live stock, and that they had never been the property of the intestate, and consequently were not subject either to the lien of the judgment for a year's support or to the lien of the mortgage above referred to.

All others having been eliminated, as before stated, these were the only issues dealt with on the trial. After the introduction of evidence, the judge directed a verdict against Mrs. Cobb, and in favor of each of the other parties, which, in effect, found that the mortgage of Hall was a purchase-money mortgage, as contemplated by the act of 1903, and that its lien was superior to the lien of Mrs. Cobb for a year's support as to the last eight mules described in the mortgage, and that W. T. G. Cobb, rather than the estate of J. T. Cobb, was the real owner of the two mules first mentioned in the mortgage. Mrs. Cobb filed a motion for a new trial, on general and special grounds, in the latter of which she complained that the court erred in rulings on the admissibility of evidence, and in misconstruing and misapplying the act of August 17, 1903 (Acts 1903, p. 76), thereby raising the questions ruled on in the second and third headnotes, and in holding that the act was not violative of article 3, § 7, par. 8, of the Constitution of Georgia, which provides that "no law or ordinance shall pass which * * * contains matter different from what is expressed in the title thereof," and in directing a verdict in favor of the other parties.

The motion for new trial was filed during the term at which the verdict was rendered, and contained a provision which, in effect, allowed the movant until the hearing, whenever it might be, to prepare and present for approval a brief of the evidence, and authorized the judge to enter his approval at any time, either in term or vacation, and if the hearing should be in vacation, and the brief of evidence had not been filed in the clerk's office before the date of the hearing, "said brief of evidence may be filed in the

clerk's office at any time within ten days after the motion is heard and determined." The hearing did not take place at the time stated in the original motion, but was postponed and had in vacation on the 21st day of January, 1910. The brief of evidence was approved at the hearing, which was held in a different county from that in which the suit was pending, but was not filed in the office of the clerk until February 3d, being more than ten days after the hearing of the motion, but before the certification of the bill of exceptions on February 4th. In the Supreme Court it was insisted by the defendants in error that there was no proper brief of evidence, because it was not filed in the clerk's office in terms of the order extending the time for such filing, and that no assignments of error should be considered which depended upon the evidence.

R. H. Sheffield and Pope & Bennet, for plaintiff in error. Glessner & Park and Patlie & Glessner, for defendants in error.

ATKINSON, J. Judgment in favor of W. A. Hall affirmed; in favor of W. T. G. Cobb reversed. All the Justices concur.

(136 Ga. 247)

GRIFFETH v. STATE.

(Supreme Court of Georgia. May 9, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The only assignment of error is that the court erred in overruling the motion of the plaintiff in error for a new trial, which motion contained only the general grounds that the verdict was contrary to law and to the evidence, and was without evidence to support it. The evidence was sufficient to authorize the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Oconee County; C. H. Brand, Judge.

Frank Griffeth was convicted of crime, and he brings error. Affirmed.

W. M. Smith and Geo. C. Thomas, for plaintiff in error. Clifford Walker, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 153)

MEADOWS et al. v. BOARD OF EDUCATION OF PAULDING COUNTY et al.

(Supreme Court of Georgia. April 12, 1911.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 68*)—COUNTY BOARD OF EDUCATION—JURISDICTION.

The policy of the Legislature, as declared in the several enactments relating to the establishment, maintenance, and control of the public schools of a county, is to devolve on the county board of education supervision of the schools and the duty of administering the school law. To

that end the county board of education is constituted a special tribunal for hearing and determining any matters of local controversy in the administration of the school law, with a right of appeal to the state school commissioner and the state board of education. Where a county is laid off into school districts under the act of 1906 (Acts 1906, p. 66), and a controversy arises as to the location of the school site in a particular district, this controversy is determinable by the special tribunal fixed by law, viz., the county board of education, and a court of equity will not usurp jurisdiction, but will remand the parties to their legal remedy.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 68.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 154*) —ATTENDANCE—COUNTY BOARD—DISCRETION.

Necessarily the county board of education is vested with some discretion in the administration of the school law, and, where neither district has adopted the provisions of the school law as to local taxation, they may allow pupils in one district to attend a school in an adjoining district, where it is more convenient and accessible to them, and appropriate the proportionate share of the public school fund to which such children are entitled to the support of the school which they actually attend. Their action is not illegal in this respect, and any complaint as to its propriety must be made to the county board of education.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 154.*]

3. INJUNCTION (§ 135*)—OFFICIAL ACTION—DISCRETION.

The court did not abuse its discretion in refusing a temporary injunction in this case.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135.*]

Error from Superior Court, Paulding County; Geo. L. Bell, Judge.

Suit by J. M. Meadows and others, as trustees of the Brownsville School District, against the Board of Education of Paulding County and others. From a judgment denying a temporary injunction, complainants bring error. Affirmed.

J. S. James, for plaintiffs in error. W. E. Spinks and J. J. Northcutt, for defendants in error.

EVANS, P. J. The county of Douglas was laid out into school districts, agreeably to the provisions of the act approved August 21, 1906 (Acts 1906, p. 66). The district in the extreme southeastern corner of the county was called "Brownsville District," and the district immediately north of it was known as the "Granger District." At the time the county was laid out into school districts there were two schools in operation in the territory embraced in the Brownsville district, known, respectively, as "Bethel" and "Brownsville" schools. These schoolhouses were about $1\frac{1}{4}$ miles apart. The county board of education adopted a resolution, proposing to the patrons of the Brownsville school, if they would make such repairs and additions to the schoolhouse as would favorably compare with the one at Bethel, that the school for the Brownsville

district would be located at the Brownsville schoolhouse. Certain repairs were made by the patrons of the Brownsville schoolhouse. The board of education appointed a committee to examine these improvements, which committee reported to the board that the repairs were not of a character as made it equal to the accommodations offered by the schoolhouse at Bethel; whereupon the board of education passed a resolution locating the school for the Brownsville district at the Bethel schoolhouse. Certain trustees were elected for the district, and recognized by the board of education as being elected pursuant to the provisions of the McMichael act. The school was opened in the Bethel school district, and some 15 pupils from the Granger district were allowed to attend this school, and the proportionate part of the school fund to which these children were entitled was allowed to go in support of the Bethel school. Whereupon certain persons, alleging themselves to be the trustees of the Brownsville and Granger districts, and certain patrons of each district, brought their petition against the board of education, the county school commissioner, and certain other patrons of the two districts, praying that the defendants be enjoined from locating the school at Bethel, and also from using any part of the fund derivable from the public school money in support of the school maintained at Bethel. The grounds urged against the location of the school of the Brownsville district at Bethel were that the Brownsville schoolhouse was nearer the geographical center of the district, and more accessible to all of the school children in that district, and that on account of the attendance of the pupils from the Granger district upon the Bethel school, and the diversion from the Granger school of the proportionate part of the school fund to which these children were entitled, consequent upon their attendance at the Bethel school, the Granger school was so reduced in numbers that the school could not be maintained all the year without supplemental support from the patrons of the Granger school. The defendants demurred to the petition, on the ground that the plaintiffs had an ample remedy at law, and also answered that they had duly located the Bethel school, with due reference to the geographical center of the district, and with reference to the accessibility of all of the children of that district. They also set up that the pupils of the Granger district were allowed to attend this school because of its convenience to the pupils of the Granger district living within close proximity to the Bethel school. The case came on to be heard on an interlocutory injunction, and the evidence before the judge respecting the main contentions of the parties was conflicting. The court dissolved the temporary restraining order

and refused an injunction, and exception is taken to this judgment.

[1] The adoption of the McMichael school law was a forward step in the movement for the development of the common schools of this state. The scheme comprehended two general features—one embracing the location and definition of the school districts, and the administration and government of the schools therein; and the other concerned the method of raising revenue by taxation for the support of the schools. *Dolvin v. Lewis*, 131 Ga. 29, 61 S. E. 913. It was not the intention of the act of 1906, known as the "McMichael Act," to repeal the existing laws respecting the administration of the school system, except when in direct conflict. Indeed, the act so expressly declares. *Hodges v. Talbert*, 135 Ga. 253, 69 S. E. 103. The legislative policy, as declared in these enactments respecting the administration of the school law, was to devolve the responsibility for the proper administration of the school law upon the county board of education, so as to give that board ample power to effectually administer the school laws within their jurisdiction. Pursuant to this policy it was enacted that: "The county board of education shall constitute a tribunal for hearing and determining any matters of local controversy in reference to the construction or administration of the school law, with power to summon witnesses and take testimony, if necessary; and when they have made a decision, said decision shall be binding upon the parties. Either of the parties shall have the right to appeal to the state school commissioner; said appeal shall be made through the county commissioner in writing," etc. Pol. Code 1910, § 1485. The tribunal thus provided for is a court of limited jurisdiction, and was designed to determine such controversies as are presented by this case. If the county board has improperly located the school site in the Brownsville district, the complaining parties are afforded a right to be heard before the board sitting as a court; and if that board, upon the testimony submitted, decides against the complainants, they are given the right of appeal to the state school commissioner and the state board of education, as provided in the act. It is a familiar rule that, where a plain and ample legal remedy is given, there is no occasion to resort to equity. If the special tribunal constituted by the Legislature for the determination of controversies arising out of the school law acts within its jurisdiction, and not oppressively or arbitrarily, its decision is binding upon the parties.

[2] There is no pretense in this case that the board of education, in the location of the school at Bethel, acted either arbitrarily or without the limits of their jurisdiction.

That being the case, especially with reference to the location of the school at Bethel, the plaintiffs must pursue the remedy pointed out in the statute. It will be borne in mind that neither the Granger nor the Brownsville district has adopted the provisions of the McMichael law with reference to the support of schools by local taxation. Therefore there can be no complaint that the money of any taxpayer is being diverted to pay for the support of the school. The specific complaint is that the board of education, by allowing the pupils in the Granger district to thus cross the line to attend the Bethel school, is giving to the Bethel school the proportionate part of the school fund to which these children from the Granger district are entitled, and as a result the attendance in the Granger district is reduced, and the amount derivable from the public school money is to that extent diminished, which requires an increased supplemental support to the common school fund to run the Granger school during the entire year, or for a greater period than would be authorized by the funds obtained solely from the public school money. There is nothing in the various provisions of the school laws which prohibits this course. *Clark v. Cline*, 123 Ga. 856, 51 S. E. 617. Necessarily the control and management of the public schools must be left largely to the discretion of the county board of education; and when this discretion is exercised within the limits of their jurisdiction, there is no ground for complaint.

[3] The denial of the temporary injunction was clearly within the discretion of the judge, and his judgment is affirmed. All the Justices concur.

(126 Ga. 226)

FIRST NAT. BANK OF ETOWAH, TENN.,
v. MESSER.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. **BILLS AND NOTES (§ 287*)**—"INDORSEMENT." Indorsing a note in its literal sense means writing one's name on the back of the note; but where the payee of a note, payable to his order, writes his name on the face of the note under the name of the maker, and delivers the note to a third person, such signing operates to transfer the title of the note to the transferee, so as to give the latter a right to maintain a suit in his own name against the maker.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 653; Dec. Dig. § 287.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3561-3566; vol. 8, p. 7686.]

2. **BILLS AND NOTES (§ 481*)**—ACTIONS—DEFENSES.

The holder of a negotiable note is presumed to be such bona fide and for value, and, unless the defendant negatives one or both of these facts, he is shut off from every defense which he might have against the payee. A plea to a suit by an indorsee against the maker, averring that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

such indorsee took the note with the express understanding with the payee, who indorsed it in blank, that if the maker failed to pay the same at maturity the indorser would pay it, and further averring that he has paid out a certain sum on a garnishment judgment, based on a judgment against the payee, who was the indorser, set out no defense, and should have been stricken on demurrer.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 481.*]

Error from Superior Court, Fannin County; N. A. Morris, Judge.

Action by the First National Bank of Etowah, Tenn., against J. W. Messer. Judgment of nonsuit, and plaintiff brings error. Reversed.

McCroskey, Peace & Kelso and Gober & Griffin, for plaintiff in error. O. R. Dupree and T. A. Brown, for defendant in error.

EVANS, P. J. The First National Bank of Etowah, Tenn., brought suit against J. W. Messer to recover an amount alleged to be due on a note, a copy of which was attached to the petition. From this copy the note appears to have been signed by J. W. Messer, and was payable to the order of J. H. Stafford. The payee's name appeared to have been signed on the face of the note, immediately beneath the signature of the maker. In the petition it was alleged that the payee had indorsed the note to the plaintiff. The defendant filed a plea averring that "he expressly denies that the plaintiff is the bona fide holder of said note without notice, and that it ever purchased said note bona fide and in good faith, but that the same was taken by said bank with the express understanding that, if said note was not paid by defendant, the said J. H. Stafford would take it up when due, without loss to the bank, the plaintiff." The plea then proceeded to aver that the defendant had been garnished by judgment creditors of the payee, and garnishment judgments had been rendered against the defendant, which he had paid; and he prayed that he have credit on the note for the amount paid on the garnishment judgments, offering to pay the balance due on the note into court. The plaintiff demurred to the sufficiency of the plea, which demurrer was overruled by the court, and on the conclusion of the plaintiff's evidence a nonsuit was awarded. The exceptions are to the grant of the nonsuit and to the overruling of the demurrer to the plea.

[1] 1. The ordinary and usual mode of indorsing a negotiable instrument is to write the name of the indorser upon the back of the paper. But where the payee writes his name on the face of the note under the maker's signature, the effect is to transfer the title of the note to the transferee, and the payee becomes liable as an indorser. *Perry v. Bray*, 68 Ga. 293.

[2] 2. An averment in a pleading is to be

construed according to the full allegation. Though the plea alleged that the plaintiff was not a bona fide holder, yet the same sentence containing such allegation qualifies its legal effect by assigning as a reason why the plaintiff is not a bona fide holder that the note was taken by the bank with the understanding that, if it was not paid by the maker, the indorser would pay it when due without loss to the bank. "In ordinary indorsements the contract of the indorser is to pay the money if the parties to the instrument primarily liable thereon fail to pay according to the terms thereof." Civil Code 1910, § 4279. So that the allegation in the plea is tantamount to saying that an indorsee is not a bona fide holder of a promissory note, when such indorsee acquires the note by indorsement from the payee of the note. The averment of fact is the contract of indorsement, and the statement of its effect is but the erroneous conclusion of the pleader. The plea is insufficient to charge that the plaintiff is not a bona fide holder of the note before maturity, so as to let in any defense (not excepted by Civil Code 1910, § 4286) which the maker may have against the payee, who indorsed the note to the plaintiff. "The holder of a note is presumed to be such bona fide and for value; if either fact is negated by proof, the defendants are let in to all their defenses; such presumption is negated by proof of any fraud in the procurement of the note." Civil Code 1910, § 4288. Under this rule the plea was insufficient as a defense to the note, and should have been stricken on demurrer.

Judgment reversed. All the Justices concur.

(126 Ga. 214)

LAWSON et al. v. LYON.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. INSURANCE (§ 797½*)—ASSIGNMENTS (§ 50*)—PARTIES (§ 84*)—SUBJECTS OF SALE—EQUITABLE ASSIGNMENT OF CLAIM—SUBJECT OF INJUNCTIVE RELIEF—NONJOINDER OF PARTIES.

A beneficiary certificate for \$1,350 was issued by the Grand Lodge of the Brotherhood of Railroad Trainmen to a member of a local lodge. Section 68 of the rules of the lodge provided that the Grand Lodge should pay to a member, upon named conditions, the amount of the certificate he held if he should "suffer the amputation or severance of an entire hand at or above the wrist joint." Section 70 of the rules provided: "All claims for disability not coming within the provision of section 68 shall be held to be addressed to the systematic benevolence of the Brotherhood, and shall in no case be made the basis of legal liability on the part of the Brotherhood. Every such claim shall be referred to the beneficiary board, composed of the President, Assistant President, and General Secretary and Treasurer, who shall prescribe the character and decide as to the sufficiency of the proofs to be furnished by

the claimant; and, if approved by said board, the claimant shall be paid an amount equal to the full amount of the certificate held by him, and such payment shall be considered a surrender and cancellation of such certificate, provided that the approval of said board shall be required as a condition precedent to the right of any such claimant to benefit thereunder, and it is agreed that this section may be pleaded in bar of any suit or action at law, or in equity, which may be commenced in any court to enforce the payment of any such claim. No appeal shall be allowed from the action of said board in any case; but the General Secretary and Treasurer shall report all disapproved claims made under this section to the board of insurance at the next annual meeting, for such disposition as such board of insurance shall deem just and proper." The hand of a member holding a certificate "was cut off below the knuckle in front of the thumb," and he applied to the Grand Lodge because of such injury for the payment. After the claim was approved by the beneficiary board, the holder of the certificate gave to one who purchased his claim to the extent of \$750 an order for that amount on the Secretary and Treasurer of the Grand Lodge. *Held:*

(a) This order was not invalid, on the ground that the claim of the holder of the certificate was a "bare contingency or possibility" and not a subject of sale.

(b) The order passed to the holder thereof at least an equitable assignment of the claim to the extent of \$750; and if the order did not divest the maker thereof of the legal title to his claim to the extent of \$750, the latter could not rightfully and justly collect the money paid on that part of the claim for which he had given the order.

(c) Where the holder of the certificate is insolvent, he may be enjoined from receiving, and the financier of the local lodge may be enjoined from paying him, any money that may be sent by the Grand Lodge in settlement of the claim for which the order was given.

(d) If there was a nonjoinder of necessary parties, this would furnish no ground for reversing the grant of a new trial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1973; Dec. Dig. § 797½; * Assignments, Cent. Dig. §§ 99-105; Dec. Dig. § 50; * Parties, Cent. Dig. §§ 134-142; Dec. Dig. § 84.*]

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—ABANDONMENT.

Where an assignment of error is not referred to in the brief of counsel for plaintiff in error, it will be deemed abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Alexis A. Lyon against Charles Lawson and another. There was a verdict for defendants, and a new trial granted, and defendants bring error. Affirmed.

Alexis A. Lyon brought the present action against Charles Lawson and George W. Lyon. The last named was made a party because he was the financier of a local lodge through whom it was expected payment would be made to the other defendant of a claim hereinafter explained, and no relief was sought against him, except to enjoin him from delivering to his codefendant any check

or other instrument in payment of the claim. As he was practically a nominal defendant, to whom but little further reference will be necessary, the plaintiff will be referred to as Lyon and the defendant as Lawson. In brief, the case made by the allegations of the petition was that Lawson held a certificate in the Brotherhood of Railroad Trainmen, and, on account of an injury received, had pending against its Grand Lodge a claim on account of total and permanent disability amounting to \$1,350. At the solicitation of Lawson, Lyon purchased \$750 of this claim, paying Lawson therefor the sum of \$250, and receiving from the latter an assignment of the claim to that extent. The details of the transaction will more fully appear from the agreed statement of facts, the evidence, and the contents of certain written documents herein below set out. It was alleged that Lawson was endeavoring to collect that portion of the claim assigned to the plaintiff, and that, should he succeed in doing so, being insolvent, the plaintiff would be defrauded of his right to collect the \$750, and would lose the \$250 paid to Lawson. It was averred that the Grand Lodge was located without the jurisdiction of the court, but that any remittance sent by it to the local lodge to be delivered to Lawson in payment of the claim would be sent to its financier for delivery. The plaintiff sought an injunction against Lawson to prevent him from collecting the claim and from undertaking to assign it, and also, as above stated, against the financier of the local lodge to prevent him from delivering to Lawson any instrument in payment of the claim. By amendment, one P. F. Brinkley, who had succeeded to the office of financier, was made a party defendant in lieu of G. W. Lyon, his predecessor. The plaintiff by a second amendment asked that the title to and the right to collect that part of the fund claimed by him be decreed to be in him, and for general relief. Upon the trial of the case, the court, at the conclusion of the evidence, directed a verdict in favor of the defendant, and upon the hearing of a motion for a new trial, made by the plaintiff, granted the motion, to which order the defendants excepted.

Upon the trial the plaintiff testified that after several conversations with Lawson, in which the latter tried to induce him to purchase the claim, he agreed to buy the balance of the claim, amounting to \$750 (plaintiff claiming that Lawson had previously assigned the other portion of the claim to another), and to pay Lawson \$250 therefor, which he did, paying him \$50 one day and taking receipt therefor, and the balance of \$200 the day following, when he took from Lawson an order authorizing the payment to him of the \$750. The receipt and order referred to were introduced in evidence, the

receipt being as follows: "Received of A. A. Lyon fifty dollars as part payment on the balance of \$750.00, seven hundred and fifty dollars, claim I have on insurance policy No. — in the B. R. T., of which H. E. King is Treasurer. The balance of two hundred dollars will be paid in three days. Should the deal now pending for the whole claim fail—the whole claim is for thirteen hundred and fifty and the price for the whole claim is six hundred and fifty—if this trade for the whole claim fails, then the above contract is to be carried out for the \$750.00, seven hundred and fifty dollars, as stipulated above. This 7th Oct., 1908. [Signed] Charles Lawson." The order was as follows: "Atlanta, Ga., Oct. 8th, 1908. State of Georgia, Fulton County. H. E. King, G. S. & T., Cleveland, O.: You are hereby authorized and you will please pay to Alexis A. Lyon seven hundred and fifty dollars (\$750.00) out of my claim for disability which is now pending before the insurance board of the Grand Lodge, for value received, and oblige, [Signed] Charles Lawson, Member of Altoona Lodge 302. Signed in presence of O. H. Puckett, J. P." A letter from King, G. S. & T., to Lyon, dated November 12, 1908, which was introduced in evidence, read as follows: "I am in receipt of your letter of the 10th instant from Chas. Lawson, a member of our organization, for the deduction of \$750 from his disability claim, which amount I understand was loaned to him by you. In such cases we have our regular form of order, and I return your order herewith and inclose our blank form. Please have Mr. Lawson sign the same, and his signature witnessed by the secretary and financier of the lodge of which he is a member, after which return to me promptly, and when the claim is ready for payment, which should be about December 12th, a draft for \$750.00 in your favor will be forwarded to our lodge in your city for delivery to you." The body of the form referred to in this letter was as follows: "You are hereby authorized to deduct from the amount due me on account of my total and permanent disability under beneficiary certificate No. 200640, held by me as a member of Altoona Lodge No. 302, Brotherhood of Railroad Trainmen, the sum of \$750.00, this being amount of money loaned me by Alexis A. Lyon on account of my said disability, and you are further authorized to pay the said sum of \$750.00 to said Alexis A. Lyon." This document, dated November 25, 1908, was signed by Lawson, but at his instance the secretary and financier of the local lodge refused to sign it as a witness.

The following agreed statement of facts appears in the record: "(1) The beneficiary certificate issued by the Grand Lodge of the Brotherhood of Railroad Trainmen for the defendant as a member of Altoona Lodge No. 302 provided that he should be entitled to all the rights, privileges, and benefits of

membership, and to participate in the beneficiary department, Class C, of said Brotherhood, to the amount set forth in the constitution thereof, which amount in the event of his total and permanent disability should be paid to him, which amount should become due only upon the presentment of proper proofs to be made in accordance with the constitution and by-laws of the Brotherhood; that the said Lawson should 'comply with the constitution, by-laws, rules, and regulations now in force or which may thereafter be adopted by the within named Brotherhood, which, as printed and published by the Grand Lodge of the said Brotherhood are made a part hereof.' Said certificate was issued on the — day of —, 190—. (2) It is further stipulated that the printed constitution and rules of said Brotherhood, as purporting to be printed by their authority, may be admitted in evidence without proof, in so far as relevant to the case. (3) It is further agreed that on the 8th day of October, 1908, the claim of Charles Lawson for disability was pending before the beneficiary board of said Brotherhood, but had not been approved by said board, and that said board approved said claim prior to November 12, 1908." There was also introduced in evidence the following rule of the Brotherhood: "Section 70. All claims for disability not coming within the provision of section 68 shall be held to be addressed to the systematic benevolence of the Brotherhood, and shall in no case be made the basis of any legal liability on the part of the Brotherhood. Every such claim shall be referred to the beneficiary board, composed of the President, Assistant President, and General Secretary and Treasurer, who shall prescribe the character and decide as to the sufficiency of the proofs to be furnished by the claimant, and, if approved by said board, the claimant shall be paid an amount equal to the full amount of the certificate held by him, and such payment shall be considered a surrender and cancellation of such certificate, provided that the approval of said board shall be required as a condition precedent to the right of any such claimant to benefit hereunder, and it is agreed that this section may be pleaded in bar of any suit or action at law or in equity, which may be commenced in any court to enforce the payment of any such claim. No appeal shall be allowed from the action of said board in any case; but the General Secretary and Treasurer shall report all disapproved claims made under this section to the board of insurance at its next annual meeting, for such disposition as such board of insurance shall deem just and proper." Section 68 of the rules provided that the Grand Lodge would pay to a member, upon named conditions, the amount of the certificate he held, if he should "suffer the amputation or severance of an entire hand at or above the wrist joint." The defendant Lawson, who held the

certificate, had his hand "cut off below the knuckle in front of the thumb." Other evidence was introduced, both by plaintiff and defendant, none of which we deem necessary to set out herein.

Anderson, Felder, Rountree & Wilson, for plaintiffs in error. A. H. Davis, for defendant in error.

HOLDEN, J. (after stating the facts as above). Counsel for the plaintiffs in error in their brief make the following contentions: "The verdict was proper, and the grant of a new trial error, as a matter of law. The fatal legal defects in plaintiff's case are: (1) Lawson's claim was not assignable; (2) the order on the Grand Secretary was not an assignment, legal or equitable; (3) if an equitable assignment, it could not be asserted in a proceeding to which neither the assignee of the other portion of the claim nor the Brotherhood was a party; and (4) there was no proof of Lawson's insolvency."

[1] If Lawson had suffered "the amputation or severance of an entire hand at or above the wrist joint," the lodge would have been absolutely liable for the full amount of the certificate, had its provisions been complied with. His "hand was cut off below the knuckle in front of the thumb." The injuries received by Lawson were not such as to create on the part of the lodge, under its rules, any absolute liability on its part to pay Lawson anything on account of such injuries. The injuries he received were such as made a claim on account thereof "addressed to the systematic benevolence of the Brotherhood." This provision of the rules was probably intended to meet instances where injuries were received not exactly coming within the class for which the lodge made itself absolutely liable, but so nearly so as to cause the lodge to have a systematic method of considering a claim for such injuries, and to pay the injured party therefor in its discretion, though under such provisions the lodge would have the right to pay the full amount of the certificate to the member holding the same on account of *any disability* he might suffer. The injury received by Lawson was not exactly, but almost, within the class for which the lodge made itself absolutely liable to pay. Under the rules of the Grand Lodge, Lawson had the right to present his claim for such injuries to the "systematic benevolence of the Brotherhood." The language of the rule hereinbefore referred to shows that not only was it the right of Lawson to present to the lodge his claim on account of the injuries he received, but that the lodge had a system for the consideration of such claims, and had the right to pay the same. Before Lawson, on October 8, 1908, gave to Lyon an order on the secretary and treasurer of the lodge for \$750, to be paid out of his claim, he had presented his claim to the lodge, and

they had had the question of its payment under consideration. The claim of Lawson was approved by the beneficiary board before November 12, 1908. On November 25, 1908, after the claim was thus approved, Lawson gave to Lyon another order on the secretary and treasurer of the lodge for the \$750, to be paid out of the claim.

This order given by Lawson after the claim was approved was not void under the provisions of Civil Code 1910, § 4117, that "a bare contingency or possibility cannot be the subject of sale, unless there exists a present right in the person selling, to a future benefit." After the claim was thus approved, it cannot be said that it had no potential existence, even if it could be said that prior to its approval it lacked sufficient potentiality to make it assignable. In *Dickey v. Waldo*, 97 Mich. 255, 261, 56 N. W. 608, 610 (23 L. R. A. 449) it was said: "In the legal sense, things are said to have a potential existence when they are the natural product or expected increase of something already belonging to the vendor." The last order on the secretary and treasurer of the Grand Lodge given by Lyon to Lawson was inclosed in a letter from that official to Lyon under date of November 12th, after which date it was presented to Lawson and signed by him. The receipt signed by Lawson and the orders given by him designate the fund out of which the \$750 was to be paid. The orders did not merely direct the secretary and treasurer to pay Lyon a certain amount, but specified the fund on which they were drawn; and certainly, after the approval of the claim, the order then given amounted to an equitable assignment thereof to the extent of \$750. Even if the orders given by Lawson did not divest him of the legal title to the fund to the extent of \$750, he should not be permitted to claim and collect that to which Lyon had the equitable title by reason of these orders. Lawson could not rightfully and justly claim that to which he had formally passed the equitable title to Lyon, even if he did not part with the legal title thereto. *Fidelity & Deposit Co. v. Exchange Bank*, 100 Ga. 619, 622-623, 28 S. E. 393. The Grand Lodge is not a party, and is not setting up any defense. It appears that the beneficiary board has approved the claim and the Grand Lodge is ready to pay it. The question, therefore, arises between the assignor and the assignee of such approved claim.

[2] There was evidence tending to show insolvency on the part of Lawson. Error was assigned on the order overruling a demurrer to the petition; but, as no reference to this assignment was made in the briefs of counsel for the plaintiff in error, it will be considered as abandoned. Whether or not the person to whom it was claimed Lawson had transferred the balance of the claim of \$1,350, or the Grand Lodge, either or both,

were necessary parties to the injunction proceedings, a verdict in favor of the defendants was not demanded, because they were not made parties; it not appearing that the question of nonjoinder of parties was raised in the court below or passed upon before the rendition of the verdict. *Hunt v. Doyal*, 128 Ga. 416, 57 S. E. 489 (2). The plaintiff testified that he purchased from Lawson his claim to the extent of \$750 for the sum of \$250, and that in pursuance of this contract of purchase he paid Lawson the \$250 and took from him the orders. We have treated the case on the theory that the contentions of the plaintiff in these respects were true, as counsel for Lawson in their briefs contend that the latter has no claim which was assignable, and that the orders given by Lawson were not valid, either as a legal or as an equitable assignment. The evidence did not demand the verdict, and the first grant of a new trial by the court below will not be disturbed.

Judgment affirmed. All the Justices concur.

(136 Ga. 281)

WORLEY v. STATE

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 762*)—INSTRUCTIONS—OPINION OF COURT.

Where, on the trial of an indictment for murder, only three questions were involved under the evidence, whether the accused was guilty of murder, whether he was guilty of voluntary manslaughter, or whether the homicide was justifiable, it did not constitute an expression of opinion, requiring a reversal, that the judge instructed the jury that they could render but one of three verdicts, and gave them appropriate forms to be used, as they might find upon such issues. *Sanders v. State*, 113 Ga. 267, 38 S. E. 841; *Dotson v. State*, 129 Ga. 727, 59 S. E. 774.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762; * Homicide, Cent. Dig. §§ 581, 586.]

2. HOMICIDE (§ 286*)—MURDER—TRIAL—INSTRUCTIONS.

A charge defining legal malice to be "an intent to kill a human being in a case where the law would neither justify nor in any degree excuse the intention, if the killing should take place as intended," did not require a new trial, although it would have been more apt to have used the word "mitigate" in lieu of the expression "in any degree excuse," as the word "excuse" was employed elsewhere in the charge in other senses than that of mitigation. *Mann v. State*, 124 Ga. 760, 53 S. E. 324 (2), 4 L. R. A. (N. S.) 934.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 586-591; Dec. Dig. § 286.*]

3. CRIMINAL LAW (§ 824*)—MURDER—TRIAL—INSTRUCTIONS—JUSTIFIABLE HOMICIDE.

It was not cause for a new trial that the court charged section 70 of the Penal Code of 1910 on the subject of justifiable homicide, omitting the concluding lines of that section, which had no application to the case, or that he failed to define the word "felony" as there-

in employed, at least in the absence of an appropriate written request made in due time. *Pressley v. State*, 132 Ga. 64, 63 S. E. 784 (3); *Pickens v. State*, 132 Ga. 46, 63 S. E. 783.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824; * Homicide, Cent. Dig. §§ 615, 651.]

4. CRIMINAL LAW (§ 829*)—MURDER—TRIAL—INSTRUCTIONS.

It furnished no ground for a new trial that the court did not give in charge section 70 of the Penal Code of 1910, which declares that, "the homicide appearing to be justifiable, the person indicted shall, upon trial, be fully acquitted and discharged," where the general charge informed the jury that the defendant could not be convicted unless proved guilty beyond a reasonable doubt, and instructed them fully as to the defense of justifiable homicide, and that the verdict might be for murder, voluntary manslaughter, or justifiable homicide, and in another place treated the verdict of not guilty as equivalent to that last mentioned. *Taylor v. State*, 121 Ga. 356, 49 S. E. 303 (10).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. CRIMINAL LAW (§ 823*)—MURDER—TRIAL—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

Where the judge, in defining voluntary manslaughter quoted Penal Code 1910, § 65, but did not employ the words "of which the jury in all cases shall be the judges" with reference to cooling time, which words were added to the section, as it stood in the Penal Code of 1895, by the act of 1899 (Acts 1899, p. 41), but charged fully upon the law of the case developed by the evidence, this will not require a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995; Dec. Dig. § 823; * Homicide, Cent. Dig. §§ 718, 719.]

6. REVIEW ON APPEAL.

Under the evidence, there was no error in charging as to when malice may be inferred from proof of a homicide, in accordance with the ruling in *Mann v. State*, 124 Ga. 760, 53 S. E. 324, 4 L. R. A. (N. S.) 934.

7. HOMICIDE (§ 297*)—MURDER—TRIAL—INSTRUCTIONS.

In a case where the evidence would have authorized a finding of voluntary manslaughter, under an indictment charging murder, it was error to give the following charge: "The facts and circumstances, as shown by the evidence, must have been sufficient to excite the fears of a reasonable man that * * * a serious bodily injury not amounting to a felony was about to be inflicted upon the defendant, to reduce the killing from murder to manslaughter." This mingled the law of justification with the law of voluntary manslaughter, and excluded other "equivalent circumstances" which might mitigate, under the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 611; Dec. Dig. § 297.*]

8. CRIMINAL LAW (§ 730*)—MURDER—TRIAL—ARGUMENT OF COUNSEL.

In his argument before the jury, the prosecuting attorney read to them Penal Code 1910, § 1015, and contended that it was applicable to the case. On objection, the court permitted the argument to proceed, but stated that counsel on each side must stay within the record, that each side might state its contentions, but the jury would look to the evidence for the facts and to the charge of the court for the law of the case. In his general charge he stated that the defendant entered on the trial with the presumption of innocence in his favor, that such presumption followed him throughout the entire trial, unless overcome in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a lawful manner, and that it was incumbent upon the state to prove the guilt of the accused beyond a reasonable doubt before the jury would be authorized to find him guilty. *Held*, that this furnished no ground for granting a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

9. MURDER—INSTRUCTIONS.

The court charged as follows: "In order to justify the homicide, there must be something more than a mere threat or menace; there must be an appearance of danger. The means for inflicting the threatening danger, if any, must be apparently at hand at the time, and there must be some manifestation of an intention to inflict a felonious injury presently." *Held*, that this generally followed the opinion in *Cumming v. State*, 99 Ga. 662, 27 S. E. 177, except in the use of the word "menace." If authorized by the evidence, and such a charge is given, it would be better to follow the expression in the case cited; but, as a reversal is granted on another ground, it need not be determined whether this would be cause for a new trial.

(Additional Syllabus by Editorial Staff.)

10. WORDS AND PHRASES—"MENACE."

"Menace" is defined as the show of an intent to inflict evil; a threat; indication of probable evil or catastrophe to come; that which menaces; an impending evil.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4474.]

Error from Superior Court, Hall County; J. B. Jones, Judge.

Leonard Worley was convicted of murder, and he brings error. Reversed.

Sam Kimzey and J. J. Kimzey, for plaintiff in error. Robert McMillan, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

LUMPKIN, J. Leonard Worley was indicted for the murder of E. S. (Emory) Worley. The state introduced a single witness, who testified in brief as follows: The accused and the person killed were brothers, and the witness was their brother-in-law. The accused came to the house of the witness about 1 o'clock at night, and said that Emory had beaten him with knucks, and that he was going to shoot his brother. The witness saw where the neck of the accused was scratched a little. The witness told him not to shoot his brother, but to return home. The accused went to the house of a named person, and the witness called him back. He brought his gun with him, and set it beside the door. "He got down on his knees and could hear a racket over at my mother's, and he grabbed his gun and shot, and they shot over at the other house." The witness said: "I see them leaving my mother's." The accused said: "He was going to shoot him, if he run up on him." The moon was shining brightly. Emory Worley left the house of the father-in-law of the witness, "and came running on him (Leonard), and Leonard shot him." Both the witness and his wife endeavored to prevent Emory coming to the place where Leonard was; but

he would pay no attention to them, and ran "right on him (Leonard)." This witness warned Emory twice to go back, and that if he went up there Leonard would kill him. The wife of the witness also tried to catch Emory and hold him; but he ran against her, shoved her back, and ran right on. He was within three feet of Leonard when the latter shot him. So far as the witness could see, Emory had no weapon or other thing in his hand; but a pair of metal knucks was found lying three or four inches from his hand. He had a pocket knife on him. The shot produced instant death. The accused was convicted, with a recommendation to mercy. He moved for a new trial, which was refused, and he excepted.

The evidence in this case is somewhat meager. The state introduced a single witness, who testified to what occurred at the time of the killing. It was inferable from his testimony that there had been a previous difficulty, or some previous transaction leading up to the homicide. Neither the state nor the accused introduced any evidence on that subject, though it might have cast light on the question of malice or the absence of it. The accused made no statement. The evidence of the state's witness did not show such a clear and unquestionable case of murder that certain inaccuracies or errors in the charge could be declared harmless. The charge on the subject of justifiable homicide, voluntary manslaughter, and reasonable doubt was not free from criticism.

[7] The statement quoted in the seventh headnote was not correct. By Penal Code 1910, § 70, it is declared that: "Justifiable homicide is the killing of a human being * * * in self-defense, or in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either," etc. By section 71 it is declared that: "A bare fear of any of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge." It will be seen that justifiable homicide is based on the idea of prevention of, or defense against, the commission of certain acts by the person killed. Under the section first quoted, the defense is against one who manifestly intends or endeavors to commit the acts mentioned. In the second of the two sections, circumstances sufficient to excite the fears of a reasonable man, and acting under the influence of such fears, and not in a spirit of revenge, take the place of proof of an actual endeavor on the part of the person slain to commit such acts.

Voluntary manslaughter differs from jus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tification. It does not rest on the same basis as the defense against the actual commission of a felony or acting under reasonable fears. It is a criminal homicide; but it is mitigated by the excitement of passion justified by some actual assault, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances. The killing must be the result of that sudden, violent impulse of passion, supposed to be irresistible, and excluding all idea of malice. The difference between justification arising from acting under the fears of a reasonable man, and mitigation arising from uncontrollable passion, justified by circumstances, is apparent.

We have considered whether the judge, in including the reduction of a homicide from murder to manslaughter in his charge on the subject of reasonable fears, did not rather err in favor of the accused than against him; but when the judge charged that the circumstances must be sufficient to excite the fears of a reasonable man that a serious bodily injury, not amounting to a felony, was about to be inflicted upon the accused, in order to reduce the killing from murder to manslaughter, thus excluding the consideration of other matters which might be sufficient, under the statute, to arouse uncontrollable passion and reduce the killing to manslaughter, it cannot be held that this was harmless error. In another part of his charge he again applied the doctrine of reasonable fears to the subject of voluntary manslaughter.

[8] In arguing a criminal case, counsel may read law to the jury, subject to the correction of the court in his charge, in order to apply the facts to the rules of law which they contend are applicable to the case. *McMath v. State*, 55 Ga. 303 (8); *Cribb v. State*, 118 Ga. 316, 45 S. E. 396 (10), and citations. The main reason for this is that, to be effective, where a general verdict is to be rendered, an argument must not only deal with what are the facts, but what result should follow from an application of the rules of law to such facts. In order to do this, the lawyer must be able to state to the jury what he believes to be the correct rule of law on the subject. He cannot always know in advance just what the judge will charge. That, in a criminal case, he reads what he thinks is the rule in the presence of the jury is not ordinarily objectionable. He does so subject to the correction of his positions of law by the judge in his charge. Here the judge stated that the jury should get the law from the charge, and his charge was to the effect that the accused was presumed to be innocent until proved guilty beyond a reasonable doubt. This court has held that no legal presumption of guilt arises under Penal Code 1910, § 1015 (Penal Code 1895, § 989), and that in a criminal case the court should not give that section in charge. *Long v. State*,

126 Ga. 109, 54 S. E. 906; *Mills v. State*, 133 Ga. 155, 65 S. E. 368 (5). The failure to introduce witnesses after swearing them might be a legitimate subject of comment by a prosecuting attorney, and authorize him to contend that the jury might draw inferences of fact therefrom prejudicial to the accused; and no *legal presumption of guilt* would arise from such action.

Of course, this broad right of argument may be abused, like any other right or privilege. But this court will not presume that conscientious counsel will intentionally use it as a means of misleading a jury.

[9] The presiding judge charged as set out in the ninth headnote. This charge was evidently taken from the opinion of Chief Justice Simmons in *Cumming v. State*, 99 Ga. 664, 27 S. E. 177. It seems to follow the statement of that opinion quite closely, except that the expression is there used that, "in order to justify a homicide, there must be something more than mere verbal threats," etc., while here the judge employed the expression that "there must be something more than a mere threat or menace," etc. [10] In Webster's Dictionary the word "menace" is defined as follows: "The show of an intention to inflict evil; a threat; indication of probable evil or catastrophe to come; that which menaces; an impending evil." The word, as thus defined, has a meaning synonymous with threats, and also one signifying something more than mere words. If the evidence authorized such a charge, it would be more apt to let it follow the expression contained in the *Cumming Case*, from which this charge was drawn, or to make it appear in what sense the term menace is used; but, inasmuch as the judgment is reversed on another ground, we need not determine whether this charge would furnish a cause for reversal.

[1-6] Except as herein stated, none of the rulings contained in the headnotes require further elaboration. If, during the former trial, any small inaccuracies not specially mentioned were committed, they were not such as to be likely to occur again.

Judgment reversed. All the Justices concur.

(126 Ga. 133)

MATTOX, Sheriff, v. BARRY.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. SHERIFFS AND CONSTABLES (§ 125*)—REMEDIES AGAINST OFFICERS.

In a money-rule proceeding against a sheriff to require him to pay over funds in his hands to a plaintiff in *fi. fa.*, issued upon a judgment rendered in an attachment case, he filed an answer admitting that he had a fund derived from a sale of property under the execution, but also set up that the holders of two other *fi. fas.* had placed them in his hands and demanded their satisfaction out of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fund, the amount of which was insufficient to discharge the *fi. fa.* first mentioned, and praying only for direction as to how he should apply the fund. The holders of the two *fi. fas.* last mentioned in the sheriff's answer appeared by counsel and participated in the trial; and by consent of all parties the case was tried by the judge upon an agreed statement of facts and resulted in a judgment which ordered the sheriff to apply the fund to the payment of the costs of court in the attachment case and the money-rule proceeding, and deliver the balance thereof to the attorneys for the plaintiff in the attachment case. *Held*, that the judgment was responsive to the prayer of the sheriff, and all of the contestants over the fund, being parties to the suit, were bound by the judgment, and the sheriff had no cause for complaint that the fund was awarded to one of the contestants, rather than to the others.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 125.*]

2. APPEAL AND ERROR (§ 336*)—RIGHT TO REVIEW.

The losing contestants for the fund in the court below having omitted to except to the judgment, they could not have their names added by amendment as plaintiffs in error in the Supreme Court to the bill of exceptions sued out by the sheriff, so as to proceed, not in the interest of the sheriff, but in the interest of themselves, to have the judgment of the lower court reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 336.*]

Error from Superior Court, Randolph County; W. C. Worrill, Judge.

Action by C. F. Barry against W. L. Mattox, Sheriff. Judgment for plaintiff, and defendant brings error. Affirmed.

On November 8, 1909, in the superior court of Randolph county, C. F. Barry recovered judgment in an attachment case against George L. Barry, and on the same day caused execution to issue and to be entered on the general execution docket. On November 9, 1909, the sheriff levied it upon certain property of the defendant, which was regularly sold on December 7, 1909. After the sale, on motion of the plaintiff in *fi. fa.*, a rule nisi was issued against the sheriff, requiring him to show cause why he should not pay the funds derived from the sale of the property to the plaintiff in *fi. fa.* In his answer the sheriff set up that a justice court *fi. fa.* issued on the 23d day of March, 1893, in favor of W. R. Curry against George L. Barry, and transferred to E. R. King on the 11th day of January, 1909, had been placed in his hands and levied upon the property, and that the money in his hands was produced by a sale of the property under both executions, and also that before the sale still another justice court *fi. fa.* in favor of Rawls, Perry & Webb against George L. Barry was placed in his hands, with instructions that the same constituted a lien upon the proceeds of the sale of the property, the last *fi. fa.* having been issued on November 20, 1892. Having thus answered, the sheriff prayed the court to be instructed "how to distribute said money arising from the sale

of said property, or to whom same shall be paid, whether to the plaintiffs in the said justice court executions or to the plaintiffs in this case." The rule against the sheriff was made returnable May 21, 1910. Service was acknowledged May 14, 1910, by the sheriff individually, and also by attorneys at law for E. R. King and for Rawls, Perry & Webb. On the same day an order was signed by the judge, reciting that by agreement "of all parties to this proceeding it is ordered that the questions presented therein be heard and passed upon by the judge of said court at chambers, on May 21, 1910, at Cuthbert, Ga." This order was consented to by the attorneys for C. F. Barry, the plaintiff in the attachment execution, who instituted the money rule against the sheriff, and also by the attorneys for E. R. King and attorneys for Rawls, Perry & Webb.

On the day set for the hearing the case was submitted on an agreed statement of facts, which was in conformity with all that is above stated, and showed the following additional facts: The amount realized from the sale was insufficient to discharge the attachment execution in favor of C. F. Barry. The justice court *fi. fa.*, issued March 23, 1893, in favor of W. R. Curry, was entered on the general execution docket on March 29, 1893, but never on the execution docket of the superior court, and contained an indorsement whereby, on January 11, 1909, the plaintiff assigned it to E. R. King. It also contained an entry of levy by the sheriff, dated November 2, 1909. The other justice court *fi. fa.*, which was issued November 24, 1892, in favor of Rawls, Perry & Webb, was entered on the general execution docket on December 9, 1892, but never on the execution docket of the superior court. The original was lost, and an alias was issued December 7, 1909. The defendant in *fi. fa.* left the state of Georgia in 1894 or 1895, and has not returned to this state to reside since that time. Upon this statement of facts the judge ordered that "all sums of costs accruing in said attachment case of C. F. Barry against Geo. L. Barry, as well as the costs of this rule proceeding, be first paid out of the funds admitted by the sheriff in his answer to be in his hands, and the balance paid over to 'the attorneys for the plaintiff in attachment, to be credited on his execution and judgment against Geo. L. Barry.'" The sheriff excepted to the order, on the ground that the court erred "in awarding said money to C. F. Barry, and in passing said order awarding said money to C. F. Barry, and in not awarding it to the plaintiffs in the justice court executions in the hands of the sheriff."

Glessner & Park and King & Castellow, for plaintiff in error. Smith & Miller, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ATKINSON, J. [1] 1. The assignments of error do not afford grounds for reversing the judgment at the instance of the sheriff, the only plaintiff in error who filed exceptions to the ruling of the court. The case was a money-rule proceeding against the sheriff, and by consent was tried by the judge upon the pleadings and upon an agreed statement of facts. According to his answer and only prayer, the sheriff had no interest further than to obtain a judgment protecting him in the matter of paying out the fund admitted to be in his hands, and invoked no judgment other than direction from the court on that subject. In money-rule cases, where a fund is in the hands of the sheriff and is contended for by different persons, ordinarily all persons having claims to the fund will be bound by the judgment, if they have notice of the proceedings and are afforded an opportunity to assert their claims. *Foster v. Rutherford*, 20 Ga. 668; *Berrie v. Smith*, 97 Ga. 782, 25 S. E. 757. The holders of the justice court *fi. fas.* put them in the hands of the sheriff, and in effect notified him to satisfy them out of the fund in controversy, thus in part bringing about the necessity for the sheriff to ask direction from the court. After the rule was issued against the sheriff, the attorneys at law for the holders of the justice court *fi. fas.* acknowledged service thereof, and entered into the consent for the trial by the judge and the agreement as to the facts, thereby participating in the trial of the case. Under these circumstances the holders of the justice court *fi. fas.*, as well as the plaintiff in attachment, would be bound by any judgment rendered in the case. With all of the parties at interest, so far as the record discloses, participating in the trial, a judgment was rendered which in effect gave the sheriff full directions as to the application of the fund, and afforded him complete protection in paying it out as ordered. The judgment was responsive to his only prayer, afforded him all that he sought, and he was no party to ask that it be set aside. In this connection, see *Western Union Telegraph Co. v. Griffith*, 111 Ga. 558, 36 S. E. 859; *Orr v. Webb*, 112 Ga. 810, 38 S. E. 98.

[2] 2. After the case was brought to the Supreme Court by the bill of exceptions filed by the sheriff, the holders of the justice court *fi. fas.* sought to have it amended by having their names inserted as parties plaintiff in error, and to have the judgment of the trial court reversed in their interest. As indicated in the first division, if the judgment should be reversed at all, it would not be in the interest of the sheriff, as he had no interest in having it reversed. It is not apparent why they should be thus allowed to proceed. If they were dissatisfied with the judgment of the trial court, they should have filed appropriate exceptions within the time

allowed by law. Several reasons exist why, after omitting to do so, they should not, after the expiration of the time for filing exceptions, be heard as to their separate interests in the Supreme Court merely by annexing themselves, under the law of amendments, to the bill of exceptions filed by the sheriff. This is not a case where they might have been added by amendment as necessary parties in order to afford relief to the sheriff, the only plaintiff in error in the original bill of exceptions. Ordinarily, in making parties plaintiff in error by amendment, the new parties proposed should have been on the same side of the controversy in the court below with the plaintiff in error. *Western Union Telegraph Co. v. Griffith*, 111 Ga. 551, 36 S. E. 859. But such was not the case now before us. The sheriff was a party all to himself, not on the side of the holders of the justice court *fi. fas.*, nor on that of the plaintiff in attachment, to whom the money was awarded. He did not purport to appear for either of them, nor was he allied with either. While, under certain conditions, bills of exceptions may be amended by adding parties plaintiff in error, this does not extend so far as to authorize a losing party on the trial of a controversy in the court below, who could have excepted, but did not, afterwards to have his name added by amendment to a bill of exceptions sued out by a different party, not on the same side of the controversy with him, in order that he might proceed in the Supreme Court in his own interest to have the judgment reversed.

Judgment affirmed. All the Justices concur.*

(136 Ga. 243)

SPENCER v. ROWE

(Supreme Court of Georgia. May 9, 1911.)

(Syllabus by the Court.)

NEW TRIAL (§ 78*)—GRANTING NEW TRIAL—DISCRETION—REVIEW.

A verdict was rendered for the plaintiff. The judgment of the trial court overruling the defendant's motion for a new trial was reversed by the Supreme Court on account of an erroneous instruction given to the jury. *Rowe v. Spencer*, 132 Ga. 426, 64 S. E. 468 (4). Upon a second trial a verdict was again rendered in favor of the plaintiff. The trial judge granted a new trial. This was the first exercise of his discretion in granting a new trial. As the verdict, under the evidence and the law applicable thereto, was not demanded, there was no abuse of discretion by the trial judge, and his judgment granting a new trial will be affirmed. *Kuhnen v. Postal Telegraph Cable Co.*, 135 Ga. —, 69 S. E. 554.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 78.*]

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action by E. A. Spencer against W. H. Rowe. From an order setting aside a ver-

dict for plaintiff, and granting defendant a new trial, defendant brings error. Affirmed.

E. O. Dobbs and I. L. Oakes, for plaintiff in error. J. V. Pool and J. A. Perry, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(136 Ga. 197)

SMITH v. SMITH.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

The court erred in failing to instruct the jury as pointed out in the first division of the opinion, and in giving the charge set out therein.

2. DIVORCE (§ 147*)—ACTIONS—JURY QUESTION—DOMICILE OF DEFENDANT.

Under the evidence in this case, the question as to whether or not, at the time the suit for divorce was instituted against the plaintiff in error, he was then a resident of Fulton county, was one for determination by the jury.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 147.*]

(Additional Syllabus by Editorial Staff.)

3. DIVORCE (§ 148*)—ACTIONS—INSTRUCTIONS—RESIDENCE OF DEFENDANT.

In a divorce action, where it was an issue whether defendant at the commencement of the action was a resident of the county of the jurisdiction, and it appeared that defendant before the action had separated from plaintiff, with whom the children of the marriage remained, his place of residence should be determined as if he were a person having no family, and it was error to fail to charge Civ. Code 1910, § 2181, providing that the domicile of a person of full age, laboring under no disability, if he has no family, is the place where he generally lodges.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 148.*]

4. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—ABANDONMENT.

A ground of motion for nonsuit, not referred to in the brief for plaintiff in error, will be deemed abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

5. EVIDENCE (§ 208*)—ADMISSIONS—ABANDONED PLEADING.

An abandoned paragraph of an answer is admissible in evidence, to show an admission of the pleader made therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 718, 719; Dec. Dig. § 208.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by M. L. Smith against J. H. Smith. Judgment for plaintiff, and defendant brings error. Reversed.

The plaintiff in error was sued for divorce and alimony, temporary and permanent. The petition was brought in the superior court of Fulton county, and alleged the defendant (plaintiff in error here) to be a resident of that county. At the second trial, for final

divorce and permanent alimony, the court allowed a plea of the defendant, striking the paragraph in his original answer wherein he had admitted himself to be a resident of Fulton county, and setting up that at the time the original petition was filed he did not reside in that county, and therefore that the trial court had no jurisdiction of the suit. The trial resulted in a verdict in favor of the wife for divorce and permanent alimony. The defendant moved for a new trial, which was denied, and he excepted. All the special assignments of error are based on the contention of the defendant that his legal residence was not in Fulton county. The evidence on the question of the defendant's residence was in substance as follows:

The plaintiff testified: "We separated September 8, 1907. At the time of the separation we were living at West End, in the city of Atlanta, in Fulton county, Ga. Since September 8, 1907, we have been living apart and in a state of separation. * * * On November 28, 1907, I saw J. Horace Smith [the defendant] in West End, where we had lived. Some of the property was there intact. I also called up Mr. Smith in West End, and he answered the phone. I called up a residence on the opposite side of the street over the phone, and Mr. Smith answered. * * * Mr. Smith's father lived at Clarkston, in De Kalb county. I am certain of the date of the separation. At that time we were living in West End. From the time of the separation till the trial of the temporary alimony matter here, I saw Mr. Smith in passing. He stayed at his father's, and passed my door twice a day. I don't know whether I saw him every day during that time; probably some days I happened to be where I could not see him. I would see him pass my house every day. He was working in Atlanta. After the separation, he went to his father's, and stayed there at night. He was down there at the time this suit was filed, and he was there at the time of the hearing of the temporary alimony."

J. L. Smith testified: "I am the father of the defendant in this case, J. Horace Smith, and live in De Kalb county—Clarkston, Ga. I have been living there seven years. I remember the time the suit was filed for divorce and alimony by Mittle L. Smith against J. Horace Smith. At that time my son was staying at my house in Clarkston, De Kalb county, Ga. He went back and forwards every day to his work. He stayed at my house. He had a contract with me for board during that time. When this suit was filed, he had been staying at my house for about a month. Prior to that time he and his wife resided in Atlanta. They lived in West End a month or such a matter. * * * Prior to that time they lived in Decatur. Prior to that time they lived at

Edgewood, and also Kirkwood, in De Kalb county. The time I have mentioned as my son's having lived in West End is the only time my son ever stayed or lived in Fulton county. All the rest of the time he lived in De Kalb county. The separation was about the 1st of September. After the separation, Mr. Smith's household furniture and goods was most of it in De Kalb county, at a friend of his house, a man named Floyd, just across the line in De Kalb county. Some of the other part of his property was stored somewhere. I don't know where. Probably some of it was where they lived in West End. * * * When my son was living at my house, his wife and family was living right there at Clarkston. She was staying with her father. She was living there at the time my son came to stay with me. My son and his wife were living at West End when they separated. After the separation his wife lived at Clarkston. I think a month is about all the time they lived at West End." The witness further testified that his son came to his house the 1st of September, and stayed two or three months. The witness was present at the hearing for temporary alimony after the 8th of October. His son "did not leave the state right straight." He worked at Rhodes-Haverty the whole month of October, and worked there in November, 1907, and until he left Atlanta.

Another witness testified that he lived in De Kalb county; that from about the 1st of September until the latter part of October he saw the defendant passing his house; that he saw him about every morning going to the train, and saw him in the afternoon coming back, until it got dark. On cross-examination he testified: "I am not positive of the particular month in 1907. It was along in September, October, or November. * * * The last time I saw him was in November, as he went past."

Another witness testified that he lived in Clarkston, and saw the defendant, while he was staying there with his father, going backward and forward to town to work. This was in September, as well as the witness could recollect. He saw him, after September, about the 1st of October. "It was in the latter part of October and November. I can't indicate the particular time in September. * * * I don't remember whether it was the first or the last."

The plaintiff, recalled, testified that she and the defendant moved to West End February 22, 1907, and were living there on the date of the separation. The suit was filed September 25, 1907.

Mark Bolding, for plaintiff in error. Alonso Field, for defendant in error.

HOLDEN, J. (after stating the facts as above). [1, §] 1. Error is assigned on the failure of the court to charge the provisions of section 2181 of the Civil Code of 1910,

and especially on the failure of the court to charge the second and last sentence thereof. The provisions of that section are as follows: "The domicile of every person of full age, and laboring under no disability, is the place where the family of such person shall permanently reside, if in this state. If he has no family, or they do not reside in this state, then the place where such person shall generally lodge shall be considered his domicile." There was evidence to the effect that the plaintiff and the defendant separated as husband and wife on the 8th day of September, 1907, while residing in Fulton county, and that after the separation the defendant continued to work in Atlanta, but boarded with his father in De Kalb county until several weeks after the suit for divorce was filed on September 25, 1907. After the defendant separated from his wife, with whom the children of the marriage remained, his place of residence would have to be determined as if he was "a person having no family." *Gilmer v. Gilmer*, 32 Ga. 685. We think, therefore, the last sentence in the Code section above quoted, that, "if he has no family, * * * then the place where such person shall generally lodge shall be considered his domicile," should have been given in charge to the jury. The court nowhere gave this principle in charge, and we think it was error for the court to fail to charge the jury as above stated.

Error is assigned on the following charge of the court: "The court further instructs you that, if a person shall reside indifferently at two or more places in this state, such person shall have the privilege of electing which shall be his domicile; and if such election shall be made notorious, the place of his choice shall be his domicile. If no such election be made, or, if made, is not generally known among those with whom he transacts business in this state, third persons may treat each one of such places as his domicile, and it shall be so held; and in all such cases a person who habitually resides a portion of the year in one county, and another portion in another, shall be deemed a resident of both, so far as to subject him to suits in either for contracts made or torts committed in such county. Transient persons, whose business or pleasure causes a frequent change of residence, and having no family permanently residing at one place in this state, shall be deemed and held, as to third persons, to be domiciled at such place as they at the time temporarily occupy." Complaint is made that this charge is not applicable to any phase of the case under the evidence introduced.

We think it was error to give this charge, as no portion of it was applicable. After the separation on September 8, 1907, while the husband continued to work in Atlanta, he boarded with his father in De Kalb county, and was boarding there at the time the suit was filed on September 25, 1907. There

was evidence that he came to Atlanta to work during the day, and returned to his father's every night, and that that was the place where he generally lodged. The place of his residence after the separation, as above stated, is to be determined as if he was "a person having no family," and there is no evidence that he resided "indifferently at two or more places in this state." Nor is there any evidence that "he habitually resided a portion of the year in one county, and another portion in another" county. Nor is there any evidence bringing him within that class of persons described as "transient persons, whose business or pleasure causes a frequent change of residence," and have no family residing permanently in this state. See, in this connection, *Knight v. Bond*, 112 Ga. 828, 38 S. E. 206. The above-quoted charge was inapplicable, and constituted error requiring a new trial, inasmuch as one of the main defenses set up by the defendant to the suit was that the court had no jurisdiction to entertain the suit for divorce, because the defendant at the time of its institution was not a resident of Fulton county. There was no error in the other charge complained of.

[4] 2. Plaintiff in error excepted to a remark made by the court at the conclusion of the plaintiff's evidence, when the defendant made a motion for a nonsuit. This ground of the motion is not referred to in the brief of counsel for the plaintiff in error, and will be considered as abandoned. The court committed no error in refusing to nonsuit the case, nor in refusing to direct a verdict in favor of the defendant.

[5] The question of the place of residence of a party is a mixed question of law and fact. There was evidence to show that, when the plaintiff in error and his wife separated, their residence was in Fulton county, and after the separation he continued to work in Atlanta, but boarded with his father in De Kalb county. There was also evidence tending to show that part of the household goods of the plaintiff in error had not been removed from Fulton county. The plaintiff in error did not testify upon the trial of the case. If his domicile at the time of the separation was in Fulton county, and he intended to change it from Fulton to De Kalb, this intention would have to be gathered from the facts and circumstances proved in the case. The plaintiff in error in his original answer admitted that at the time of the institution of the divorce proceedings he was a resident of Fulton county. By an amendment to his answer, allowed by the court, he struck the paragraph of his answer making this admission, and averred in lieu there-

of that he was not at the time the suit was commenced a resident of Fulton county, but was at that time a resident of De Kalb county. The original answer was introduced in evidence, and the jury had a right to consider the admission made therein in determining the question as to where the plaintiff in error was domiciled when the suit was commenced. *Mims v. Jones*, 135 Ga. 541, 69 S. E. 824.

[2] In view of all the evidence in the case, the question as to whether or not the domicile of the plaintiff in error was in Fulton county at the time of the institution of the suit for divorce against him was one for the jury to determine.

Judgment reversed. All the Justices concur.

(126 Ga. 501)

SIBLEY et al. v. LEE.

(Supreme Court of Georgia. May 10, 1911.)

(Syllabus by the Court.)

VERDICT—EVIDENCE—SUFFICIENCY.

No errors of law are complained of, and the evidence was sufficient to support the finding of the jury.

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action between William C. Sibley and others, as executors, etc., and W. J. Lee. From a judgment for the latter, the former bring error. Affirmed.

Wilson, Bennett & Lambdin, for plaintiffs in error. R. J. Dickerson and J. L. Sweat, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(126 Ga. 264)

ANDERSON et al. v. NELSON.

(Supreme Court of Georgia. May 10, 1911.)

(Syllabus by the Court.)

VERDICT—EVIDENCE—NEW TRIAL.

The verdict was authorized by the evidence, and there was no error in refusing to grant a new trial.

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Action between U. Anderson and others and W. J. Nelson. Judgment for the latter, and the former bring error. Affirmed.

D. M. Roberts & Son and W. M. Clements, for plaintiffs in error. J. A. Neese and W. M. Morrison, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 251)

BRIDGES v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO. et al

(Supreme Court of Georgia. April 12, 1911.)

(Syllabus by the Court.)

CORPORATIONS (§ 388*) — POWERS — ESTOPPEL OF STOCKHOLDER—LACHES.

A minority stockholder, who co-operated in the consummation of the sale of the physical properties of a telephone company, and, with a knowledge that the sale had been made and the purchase price paid, stood by and saw the purchaser expend large sums in the improvement of the property without objection, and inexcusably waited an unreasonable time before making objection, will be estopped by his laches and conduct from attacking the validity of the sale as ultra vires, or as having been irregularly made. Under the facts of this case, the judge did not abuse his discretion in denying an injunction and the appointment of a receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by R. L. Z. Bridges against the Southern Bell Telephone & Telegraph Company and another. Judgment for defendants, and plaintiff brings error. Affirmed.

The Bainbridge Telephone Company was incorporated by the superior court of Early county on December 23, 1904. It constructed and operated a telephone system in the city of Bainbridge and in the towns of Brinson and Climax, all located in Decatur county. The physical properties of the company were incumbered by two mortgages. On January 13, 1910, the Bainbridge Telephone Company sold and transferred by deed its physical properties to the Southern Bell Telephone & Telegraph Company, which immediately took possession of the same and expended large sums of money in the improvement of the telephone system. On July 13, 1910, R. L. Z. Bridges, a minority stockholder of the Bainbridge Telephone Company, filed a petition against the Bainbridge Telephone Company and the Southern Bell Telephone & Telegraph Company, alleging that the sale of the physical properties of the former company to the latter was without authority of law, and without any resolution of its stockholders, and without any notice to petitioner, and that the same was made collusively and in fraud of petitioner. The prayers were to declare the sale void, to cancel the deed, to restrain the Southern Bell Telephone & Telegraph Company from further interfering with the property of the Bainbridge Telephone Company, and that a receiver be appointed to take charge of all the property of the Bainbridge Telephone Company.

Both corporations answered. The Bainbridge Telephone Company alleged that the petitioner, prior to the sale of its physical properties to the Southern Bell Telephone & Telegraph Company, had sold his stock to T. E. Gurr, and in furtherance of the

sale had executed a power of attorney to transfer the same on the books of the company, and had agreed to take a certain sum of money as the purchase price, which sum was duly tendered to and refused by the petitioner; that the municipalities where the telephone company operated had assented to the transfer by ordinances, in which rates of toll were fixed, and the sale had also been approved by the Railroad Commission; that the company had been legally dissolved, and notice thereof was published in a newspaper in Bainbridge, having a general circulation in the county; that the petitioner knew of the pending sale to the Southern Bell Telephone & Telegraph Company, and actively participated in consummating it; that he was instrumental in obtaining the assent of the municipality of Brinson to the sale; that the Bainbridge Company was in bad financial condition, and was being operated at a loss, and the sale was to the advantage of its stockholders; and that the Southern Bell Telephone & Telegraph Company had expended large sums of money in the improvement of the telephone system after its purchase by them, and the petitioner was aware that such improvements were being made at the time the money was being expended therefor. In its answer the Southern Bell Telephone & Telegraph Company made substantially the same allegations contained in the answer of the Bainbridge Telephone Company, averring that the petitioner was not a stockholder; that its purchase of the property was legal and authorized by law; that the petitioner was estopped from contesting the sale, because he participated in bringing about the same, and knowingly permitted, without objection, large sums of money to be expended in the improvement of the telephone system after its purchase; and that the respondent was solvent, and it purchased the property of the Bainbridge Telephone Company in good faith, and paid its full value for the same. Both corporations denied all charges of collusion or fraud in the matter of the sale of the property. On the interlocutory hearing the court refused a temporary injunction, and the petitioner excepted.

Russell, Fleming & Custer, for plaintiff in error. H. E. W. Palmer, Brutus J. Clay, and Hawes & Pottle, for defendants in error.

EVANS, P. J. (after stating the facts as above). Two reasons are advanced for denying the plaintiff the relief which he seeks. One is that he was not a stockholder, and the other that he is estopped by his conduct from attacking the sale. We will pretermitt any discussion of the evidence relied on to show a sale of his stock, because the plaintiff never parted with his stock certificate and declined to receive the purchase price.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Whether he violated his contract to sell his stock, or whether the purchaser failed to comply with the terms of sale, may be passed by, as the stock certificate, with its transfer, was never delivered to the purchaser. Nevertheless we think the evidence was sufficient to show an estoppel against the plaintiff from having the relief which he seeks. In his affidavit, submitted at the interlocutory hearing, the plaintiff deposed that the sale was not authorized by any resolution of the stockholders, nor was the corporate seal impressed upon the deed. There was no evidence to the contrary. But the deed was actually made in the corporation's name; the corporate name purporting to have been signed by its president, and attested by its secretary.

Treating the deed as being informally executed, and the sale as being without proper corporate action, we think, for the purposes of this case, the minority stockholder is estopped from attacking the validity of the purchaser's title. The Bainbridge Telephone Company admits the execution of the deed and the receipt of the money, and expressly ratifies the sale. It further appears that the purchaser paid full value for the property, and that the Bainbridge Company was unsuccessfully operating the business at the time of the sale. It also appears, that the petitioner knew of the pending negotiations for the sale of the telephone system to the Southern Bell Telephone & Telegraph Company; that he co-operated with the officials of the Bainbridge Telephone Company in bringing about the sale, agreeing with its president that it was to the best interest of the corporation to make the sale; that he was instrumental in obtaining the assent of the authorities of the town of Brinson to the sale; that he knew that the sale was consummated; and that after the Southern Bell Telephone & Telegraph Company had been put in possession of the property it expended large sums of money in improving it, without any dissent or objection on the part of petitioner. There was no evidence of any fraud or collusion between the Bainbridge Telephone Company and the Southern Bell Telephone & Telegraph Company in making the sale, or of any intention to defraud the plaintiff. Notwithstanding the plaintiff participated in bringing about the sale, and observed the purchaser making valuable improvements on the faith of its legality, it was not until after such improvements were made, and six months after the sale, that he protested against its validity or propriety.

Before a minority stockholder may proceed for acts ultra vires against the corporation, its officers, and those participating therein, he must show, not only that the act is ultra vires, and that the majority of stockholders are illegally pursuing in the name of the corporation a course in violation of the

rights of shareholders, but also that he acted promptly. Civ. Code 1910, § 2224. If a minority stockholder postpones his complaint that the corporate act is ultra vires or irregular for an unreasonable time, or, after full knowledge of the facts, stands by and allows large operations to be completed, or money expended, before he brings suit, his laches and acquiescence bar him of any right to equitable relief with respect thereto. *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337. After a careful review of the evidence, we do not think that the judge abused his discretion in refusing the extraordinary relief sought by the plaintiff.

The plaintiff in error complains of certain rulings on evidence; but, in view of the foregoing discussion of the grounds upon which we place our decision, it becomes unnecessary to discuss them.

Judgment affirmed. All the Justices concur.

(136 Ga. 246)

HUTCHINS v. STATE.

(Supreme Court of Georgia. May 9, 1911.)

(Syllabus by the Court.)

1. NAMES (§ 16*)—IDEM SONANS.

"Crooms" and "Grooms" are idem sonans, and the court did not err in instructing the jury that they are such as a matter of law. *Woody v. State*, 113 Ga. 927, 39 S. E. 297.

[Ed. Note.—For other cases, see *Names*, Cent. Dig. §§ 12-14; Dec. Dig. § 16.*]

2. HOMICIDE (§ 309*)—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

From the evidence for the state, none being introduced by the defendant, it appears that the defendant struck the decedent on the head with an ax, inflicting a mortal wound; and it appears that there was no provocation for the homicide, except certain insulting and opprobrious words used by the decedent to the defendant. *Held*, that the omission of a charge on the subject of voluntary manslaughter was not error.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 650; Dec. Dig. § 309.*]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Will Hutchins was convicted of homicide, and he brings error. Affirmed.

Hines & Vinson, for plaintiff in error. J. E. Pottle, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur.

(136 Ga. 341)

SINGLETERY v. WATSON.

(Supreme Court of Georgia. May 9, 1911.)

(Syllabus by the Court.)

1. AFFIDAVITS (§ 5*)—AUTHORITY TO ADMINISTER OATH—CLAIMANT OF PROPERTY LEVIED ON.

Under Civil Code 1910, § 621, subd. 4, a commercial notary public is authorized to ad-

minister the oath, provided for in section 5157 of such Code, to one claiming property as not subject to an execution levied thereon.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 18-27; Dec. Dig. § 5.*]

2. AFFIDAVITS (§ 15*)—EXECUTION IN FOREIGN STATE—AUTHENTICATION.

An affidavit made out of this state before a notary public of another state, with his seal attached thereto, is receivable in the courts of this state, without further authentication. *Simpson v. Wicker*, 120 Ga. 418, 47 S. E. 965; *Ballew v. Broach*, 121 Ga. 421, 49 S. E. 297.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 61-64; Dec. Dig. § 15.*]

Error from Superior Court, Grady County; Frank Park, Judge.

Action between John R. Singletary, as guardian, etc., and Y. L. Watson. From a judgment in favor of the latter, the former brings error. Reversed.

R. C. Bell and M. L. Ledford, for plaintiff in error. Theo. Titus, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(136 Ga. 264)

BARNES v. PETERSON.

(Supreme Court of Georgia. May 10, 1911.)

(Syllabus by the Court.)

1. REFORMATION OF INSTRUMENTS (§ 1*)—DEEDS—MISTAKE—DESCRIPTION.

The proper inquiry in all applications for relief against mistake is: Does the instrument contain the true agreement of the parties? Is it what the parties intended it should be?

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE.

There being no evidence that the plaintiff was lacking in proper diligence in connection with the mistake in the execution of the deed, it was not erroneous for the court to omit an instruction respecting his negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

(Additional Syllabus by Editorial Staff.)

3. REFORMATION OF INSTRUMENTS (§ 13*)—DEEDS—MISTAKE.

Where a landowner agrees to sell land, and a purchaser agrees to buy it, and the deed, by mistake of the draftsman, fails to correctly describe the land, equity will correct the description, so as to conform the deed to the actual agreement of the parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 42-60; Dec. Dig. § 13.*]

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Suit by B. Peterson against Elmira Barnes to reform a deed for mistakes. Judgment for complainant, and defendant brings error. Affirmed.

Lankford & Dickerson and Levi O'Steen, for plaintiff in error. J. W. Quincey and F. Willis Dart, for defendant in error.

EVANS, P. J. B. Peterson brought suit against Elmira Barnes, alleging that on December 28, 1908, he purchased a certain described tract of land, containing 60 acres, more or less, known as the "Georgia Ann Levans land," and in pursuance of his purchase the defendant undertook to convey to him the land by warranty deed. The scrivener selected to draw the deed inadvertently and erroneously described the northern boundary, the effect of which was to limit the land conveyed to about one-half of the tract purchased. A few days after the execution of the deed the plaintiff discovered the mistake in the description of the land, and requested the defendant to correct the same. This the defendant refused to do. The prayer of the petition was to reform the deed, so that the land actually purchased may be properly described and for other relief. The defendant denied that any mistake was made in the execution of the deed, and alleged that the land described in her deed was the land purchased by the plaintiff. On the trial of the case, it appeared from the evidence submitted by the plaintiff that the defendant and her mother were indebted to him in a large sum; the mother's debt being secured by deed to a certain tract of land owned by her, and the defendant's indebtedness was secured by deed or mortgage on personalty and on 60 acres of land upon which the defendant resided, and known as the "Georgia Ann Levans land," the northern boundary of which was stated to be the "old red oak line." Upon the death of the defendant's mother she became entitled to her mother's land as heir at law, and entered into an agreement with the plaintiff that she would sell him the land upon which she lived, containing 60 acres, more or less, and also a mule, if the plaintiff would convey to her the land hypothecated to him by her mother and cancel the debts against her mother, herself, and her brother. The plaintiff canceled the debts and executed a deed to the defendant, conveying the land formerly owned by her mother, and the defendant executed to him a deed purporting to convey 60 acres, more or less; the call for the northern boundary being the "old red oak line." The plaintiff was under the impression at the time that the mortgage from the defendant to himself correctly described the land which he agreed to accept in satisfaction of the debts he agreed to settle; and in drafting the deed the scrivener was also under that impression, and obtained his information as to the boundaries from that mortgage. The defendant, immediately after the execution of her deed, expressed herself to several as having conveyed her entire tract of 60 acres to the plaintiff. In a few days, however, the plaintiff discovered the mistake and called upon the defendant to rectify it. She re-

fused, and contended that the deed covered the land which she sold. The defendant on the trial testified that the land which she conveyed was the only land which she sold, that the entire tract contained about 60 acres, and that the northern boundary as stated in the deed left her 26 acres. The jury found in favor of the plaintiff, and the court refused a new trial.

[3] The petition is by a purchaser of land to reform the deed by correcting an erroneous description of the land made by the draftsman. If an owner agrees to sell land, and the purchaser agrees to buy it, and the deed, by mistake of the draftsman, fails to correctly describe the land, a court of equity will correct the erroneous description, so as to make it conform to the actual agreement of the parties. *Collier v. Lanier*, 1 Ga. 238; *Ward v. Allen*, 28 Ga. 74.

[1] In such a case the proper inquiry is: Does the instrument contain the true agreement of the parties? Is it what the parties intended it should be? And the court may so instruct the jury. *Wyche v. Greene*, 11 Ga. 159. There was no conflict of evidence surrounding the execution of the deed. The scrivener obtained his information as to the boundaries from the old mortgage, and the purchaser erroneously supposed the boundaries as delineated in the old mortgage included the entire tract. Nor is there any dispute that the purchaser promptly filed his petition to correct the alleged mistake. The point of pressure was whether the defendant intended to sell the whole tract to the plaintiff, or only a part; in other words, whether the land actually sold was the entire tract or only such part thereof as was described in the deed.

[2] Under such circumstances instructions to the effect that if the defendant actually agreed to sell to the plaintiff the whole tract, and the intent of the parties was that the deed should include the whole tract, but one of the boundaries was misdescribed because of a mistake of the scrivener, the plaintiff would have the right to have the deed reformed so that it would speak the contract, are not erroneous, because such instructions exclude consideration of any negligence on the part of the plaintiff at the time of the execution of the deed, which would prevent a reformation of the deed. If the plaintiff actually bought all the land, and paid for it, he would be entitled to a deed to it. This is not a case where a purchaser accepted his deed with a knowledge that it only purported to convey a part of the land. In that kind of a case there would have been no mistake. The charges complained of were authorized by the evidence, which amply supports the verdict.

Judgment affirmed. All the Justices concur.

DOTSON v. STATE.

(Supreme Court of Georgia. May 9, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1180*)—APPEAL—DECISION ON FORMER APPEAL—LAW OF CASE.

The evidence in the present record is substantially the same as that contained in the record when the case was formerly before this court (129 Ga. 727, 59 S. E. 774), and it was there adjudged that the evidence did not involve manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3002-3004; Dec. Dig. § 1180.*]

2. WITNESSES (§ 274*)—CROSS-EXAMINATION—CHARACTER.

Where the defendant puts his character in issue, it is allowable on cross-examination to ask a witness, called to establish his good character, if the witness on a certain occasion came upon the scene immediately after the defendant had made a serious attack with a weapon upon another person, who charged the defendant in his presence with an attempt to kill him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 965, 966; Dec. Dig. § 274.*]

3. CRIMINAL LAW (§ 833*)—INSTRUCTIONS—GIVING REQUESTS—NEW TRIAL—GROUNDS.

In giving requested instructions, the court should do so in such a manner as to impress the jury that such are emanations from the court, and are to be considered as part of the court's instructions on the law of the case. This is best accomplished by incorporating such requests at some appropriate place in the charge, without stating that the requests were made by a party to the case. While the practice is not commended, a new trial will not be granted solely because the court, near the conclusion of his charge, picked up certain written requests and read them to the jury, with the preface: "The defendant has requested the court to charge you the following, which I will read to you."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2015; Dec. Dig. § 833.*]

4. CRIMINAL LAW (§ 823*)—TRIAL—INSTRUCTIONS—CURING ERROR.

Where the court erroneously instructs the jury, and subsequently specifically calls their attention to such erroneous instruction, and corrects the error, the original error is cured.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995; Dec. Dig. § 823.*]

5. CRIMINAL LAW (§§ 763, 764*)—CONFESSIONS—CORROBORATION—INSTRUCTIONS.

The charge relating to the sufficiency of evidence as corroborative of a confession was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1768; Dec. Dig. §§ 763, 764.*]

Error from Superior Court, Applying County; C. B. Conyers, Judge.

Randolph Dotson was convicted of murder, and he brings error. Affirmed.

W. W. Bennett and A. V. Sellers, for plaintiff in error. J. H. Thomas, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

EVANS, P. J. Randolph Dotson was convicted of the murder of John Willbanks, and the court refused him a new trial.

[1] 1. The failure of the court to instruct

the jury on the law of voluntary manslaughter was not erroneous. The evidence on this trial was substantially the same as it was on the first trial, and on a review of the first trial it was held that the evidence on behalf of neither side involved manslaughter. 129 Ga. 727, 59 S. E. 774.

[2] 2. The defendant put his character in issue. On the cross-examination of one of the witnesses offered by the defendant to prove his good character, the court allowed the witness to testify, in response to questions propounded by the solicitor general, that the witness was the jailer of the county, having in custody the defendant and another prisoner; that on one occasion he heard considerable noise in the jail, and ran to discover the cause; when he reached the jail he saw the defendant's fellow prisoner run across the room and fall bleeding from wounds on his arm and head, and that the defendant had a knife with a broken blade; and the defendant's fellow prisoner immediately remarked in the presence of the defendant that the defendant hit him with the knife, and he thought he was going to kill him. There was no error in this ruling. Where a defendant calls a witness to establish his good character, and such witness testifies that the character of the defendant is good, he may be interrogated on cross-examination as to his having seen the defendant engage in a broil or a fight. *Ozburn v. State*, 87 Ga. 173 (4), 13 S. E. 247.

[3] 3. Where proper and pertinent instructions are requested, it is the duty of the court to give the same to the jury. *Ga. R. Co. v. Flowers*, 108 Ga. 795, 33 S. E. 874. Though the judge may substitute his own phraseology for that of the request, and such substitution will not be ground for new trial, where the instruction given is as comprehensive as that requested, yet it is the duty of the court to distinctly charge the jury on the matter requested, if the same is apposite to the case and sound in law. It is always best for the judge to incorporate a proper request at an appropriate place in his charge, without reference to the same as having come from counsel for either party in the case. The jury are not concerned about the sources from which the judge gets the material with which he builds the legal structure of his charge. The purpose of making a request is that the jury may be informed as to the law; and, if the request correctly embodies a proper principle of law, the court should submit the same in such a manner as best to inform the jury of the legal principle embraced in the request, and also that such legal principle is to be accepted for their guidance in passing on the particular point to which it applies. It is sufficient to read

the requested instruction to the jury, and tell them that the court gives it in charge, or that it is the law. *Feagan v. Cureton*, 19 Ga. 404; *Long v. State*, 12 Ga. 293; *Dillon v. McRea*, 40 Ga. 107.

In the case at bar the court had practically completed his charge when he picked up the two requests to charge and read them to the jury, prefacing the reading with the remark: "Gentlemen, the defendant has requested the court to charge you the following, which I will read." Complaint is made of the manner in which the requests were submitted. Counsel argues, inasmuch as the court did not tell the jury distinctly that such requests contained the law pertinent to the case, that in effect the defendant was deprived of his right to have a pertinent and correct legal principle given in charge. While we do not commend the practice observed on this occasion as being the correct way of submitting a request still we do not think that the manner in which the court submitted the request sufficient ground to require a new trial. It is the duty of juries to take the law from the court under our system of procedure. Judges are forbidden to express an opinion upon the facts, and the jury always look to emanations from the bench in the final charge as the last word upon the law of the case. We do not doubt that the jury understood that the requests which the court read to them was a part of his charge, and were so considered in arriving at their verdict.

[4] 4. Complaint is made of an instruction which the court later on modified in his charge. The complaint is not as to the correctness of the charge as modified, but of the original charge before its modification. Inasmuch as the court corrected his first instruction by specific reference to its vice, a new trial will not be granted on this ground.

[5] 5. In charging on the law applicable to confession, among other things, the court said: "Proof beyond a reasonable doubt of the corpus delicti—that is, that the crime charged has been committed—may be, but is not necessarily, sufficient corroboration of a confession. The law does not fix the amount of corroboration necessary. The jury are judges whether other evidence sufficiently corroborates a confession to justify a conviction, if you find that a proper confession was made." The objection to the charge is that it is expressive of an opinion on the weight of the evidence. The charge was not erroneous. *Holsenbake v. State*, 43 Ga. 43 (5).

The evidence supports the verdict, and we find no error of law requiring the grant of a new trial.

Judgment affirmed. All the Justices concur.

(126 Ga. 338)

LOVELESS v. BRIDGES.

(Supreme Court of Georgia. April 13, 1911.)

*(Syllabus by the Court.)***1. EVIDENCE (§ 445*)—CORPORATIONS (§ 123*)—PAROL EVIDENCE—CONSIDERATION.**

Bridges brought an action of trover against Loveless to recover a certain "certificate of fifteen (15) shares of the capital stock of the Alkahest Lyceum System, a corporation," of which Bridges was president and Loveless was secretary and treasurer. The plaintiff testified in part substantially as follows: He sold the 15 shares to L. O. Jones by virtue of a written contract, signed by them, reciting that the former "agrees to sell" to the latter the shares for \$2,000, "to be paid as follows: Three hundred (\$300) dollars cash when stock is transferred, and the balance to be paid from the monthly dividends and at any other intervals that special dividends may be declared on said stock, it being understood that all the earnings of said stock are to go to the first party until the remaining seventeen hundred (\$1,700) dollars is settled. It is agreed that notes for this stock shall be interest-bearing at the rate of 6% after two years from their date. It is further agreed that the second party agrees to give first party option on buying his stock back, in case he should decide at any time to sever his connection with the company." A certificate for the shares was issued and delivered to Jones, who subsequently to the signing of the contract agreed to deliver and did deliver to Bridges the certificate to hold as security for the notes given Bridges by Jones in pursuance of the written contract. Bridges subsequently delivered the certificate and notes to Loveless, to be kept by him for Bridges. Loveless returned to Bridges the notes, but refused to return the certificate. Loveless testified, in part, that the certificate was delivered to him by Jones to keep for the latter, and, when Bridges asked him why he did not return the certificate, "I said, 'By nature of his written instrument, that belongs to Mr. Jones.' He said, 'No, it belongs to me.' I said, 'How comes that?' He said, 'It is mine until it is paid for.' I said, 'You ought to have had it transferred, then, out of Mr. Jones.' He said, 'Mr. Jones gave it to me.'" *Held*, an oral agreement between Jones and Bridges that the latter should hold the certificate to secure the debt due him by the former, made subsequently to the execution of the written contract, could be proved without violating the rule that parol evidence is inadmissible to add to, take from, or vary a written contract. Civil Code 1910, § 5794.

(a) Nor was such oral agreement invalid for the want of a consideration to support the same.

[*Ed. Note.*—For other cases, see Evidence, Dec. Dig. § 445; Corporations, Dec. Dig. § 123.*]

2. EVIDENCE (§ 445*)—PAROL EVIDENCE—VARYING WRITTEN CONTRACT.

Bridges testified: "When I took those notes, I turned them over to Mr. Loveless. I put the stock with the notes at that time. I held the stock certificate, because Jones had absolutely nothing. I knew that at the time. * * * I certainly would not have turned the stock over to him without some collateral, and he had nothing else to give. * * * This agreement that I was to keep as collateral the stock and notes was made after the stock was issued. We were closing up the day's work. We had been working on that business most of the day. I think it early in the afternoon when we finished. Finally the contract was signed. Then we took the matter up about the notes, and we agreed that I should hold the stock with the notes. * * * Mr. Jones delivered the

stock back to me when he gave me the notes. I put the stock and notes together, and turned them over to Mr. Loveless, to put in the safe. * * * I know this: The contract had been made after talking to Mr. Jones. I noticed these terms had been fixed in there, and that he had nothing, and I had to hold the stock, as the only way I could get anything out of him." *Held*, that this testimony was not subject to the objection that it was irrelevant and incompetent, nor on the ground that, "there being a written contract of sale for the stock in question, such testimony was an attempt to vary by parol the terms thereof, and to qualify or make additions to the same."

[*Ed. Note.*—For other cases, see Evidence, Dec. Dig. § 445.*]

3. CORPORATIONS (§ 123*)—PLEDGE OF STOCK—EVIDENCE.

The following testimony of Bridges: "No part of the purchase money of the stock has ever been paid, except the \$300 credit which I allowed"—was not inadmissible on the ground that it "was irrelevant, because the fact that the stock had not been paid for in full would not affect the title thereto, nor prevent same from passing into Jones." Bridges contended, and offered testimony to show, that the certificate was delivered by Jones to him to secure the balance of the purchase money of \$1,700, and that it was delivered by Bridges to Loveless for safe-keeping. It was therefore competent for Bridges to show that the debt to secure which the certificate was pledged had not been paid.

[*Ed. Note.*—For other cases, see Corporations, Dec. Dig. § 123.*]

4. PRINCIPAL AND AGENT (§ 76*)—ESTOPPEL OF AGENT TO DENY TITLE OF PRINCIPAL.

If there was an agreement between Jones and Bridges that the latter should hold the certificate to secure a debt due him by the former, and if Jones, for the purpose of securing such debt, delivered the certificate to Bridges, and the latter delivered it to Loveless for safe-keeping, Loveless could not defeat a recovery of the certificate by Bridges on the ground that there was no written assignment of the certificate by Jones to Bridges. Civil Code 1910, § 3584.

[*Ed. Note.*—For other cases, see Principal and Agent, Dec. Dig. § 76.*]

5. REVIEW ON APPEAL.

No error requiring a new trial appears in the record, and the evidence was sufficient to authorize the verdict rendered.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by S. R. Bridges against F. M. Loveless. Judgment for plaintiff, and defendant brings error. Affirmed.

Hines & Jordan, for plaintiff in error. Napier, Wright & Cox and J. M. Wood, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(126 Ga. 240)

CENTRAL OF GEORGIA RY. CO. v. GILL.
(Supreme Court of Georgia. May 9, 1911.)

*(Syllabus by the Court.)***1. EVIDENCE (§ 591*)—WEIGHT AND CONCLUSIVENESS—ACTION AGAINST RAILROAD—PRESUMPTIONS—INSTRUCTIONS—CERTAINTY—STATUTES.**

This being a suit against a railroad company for damages arising from personal inju-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ries caused by the running of the locomotives, cars, and other machinery of the company, the charge on the subject of the presumption arising from the proof of the injury, and on the subject of the various defenses which were open to the company after a prima facie case had been made against it, was in substantial accord with the rulings announced in the cases of Georgia Railroad Co. v. Neely, 56 Ga. 540 (2), Central Railroad Co. v. Brinson, 64 Ga. 475 (3), and Georgia Railroad Co. v. Thomas, 68 Ga. 744.

(a) The evidence to defeat the plaintiff's cause of action may come from the plaintiff's side, as well as that of the defendant.

(b) The charge was not subject to the criticism that it confused the rules of law contained in sections 2321, 2322, and 3830 of the Civil Code of 1895.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 591.*]

2. NEGLIGENCE (§ 141*)—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Where the judge charged the law of contributory negligence and diminution of damages substantially as set out in section 2322 of the Civil Code of 1895, it furnished no ground for a new trial that the court failed, in connection with such charge, to also instruct the jury that if the parties were equally negligent there could be no recovery.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 141.*]

3. VERDICT—EVIDENCE—NEW TRIAL.

The evidence authorized the verdict, and there was no error requiring the grant of a new trial.

Error from Superior Court, Taylor County; S. P. Gilbert, Judge.

Action by L. M. Gill against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. E. Battle and Howell Hollis, for plaintiff in error. Robt. L. Berner and C. W. Foy, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(69 W. Va. 57)

SMITH et al. v. LINDEN OIL CO. et al.
(Supreme Court of Appeals of West Virginia.
March 14, 1911. Rehearing Denied May
17, 1911.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 79*)—CONFLICTING CLAIMS TO ROYALTY OIL—JURISDICTION.

Equity has jurisdiction to pass on conflicting claims to royalty oil, though under the same lease.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 79.*]

2. APPEAL AND ERROR (§ 1036*)—HARMLESS ERROR—OVERRULING DEMURRER.

Though a demurrer to a bill for want of parties be erroneously overruled, yet, if they be later made parties by amended bill, the error is cured.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4069-4074; Dec. Dig. § 1036.*]

3. CARRIERS (§ 70*)—CARRIAGE OF GOODS—DUTY TO YIELD POSSESSION TO PERSON HAVING TITLE.

A common carrier of goods must yield possession or recognize the right of a third party having the true title, or such party may enforce his right by suit.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 70.*]

4. CARRIERS (§ 70*)—CARRIAGE OF OIL—LIABILITY OF PIPE LINE COMPANY FOR ROYALTY OIL.

A lease for oil provides that the lessee shall pay the landowner a royalty of a fraction of the oil produced under the lease; such royalty oil to be delivered into the pipe line of a common carrier of oil. Such common carrier, having notice of the assignment by the landowner to another of a given fraction of such royalty oil, must account to such an assignee for his undivided fraction of such oil.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 70.*]

5. EQUITY (§ 427*)—CONCLUSIVENESS—MATTERS CONCLUDED.

In a suit by an assignee of a fraction of the one-eighth for royalty reserved in a lease of land for oil to vindicate his right among conflicting claimants to a portion of such royalty oil, no decree can be made in favor of a claimant to another fraction of such royalty oil; he not asking it. It is foreign to the suit.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 427.*]

6. CARRIERS (§ 70*)—PIPE LINE COMPANIES—DUTY OF COMPANY TO ACCOUNT FOR UNDIVIDED FRACTION OF OIL.

Where a lease for oil provides for the delivery to the lessor of a fraction of the oil in the pipe line of a common carrier of oil, there need be no actual physical separation of the lessor's share from the whole of the oil to vest title in him, but the carrier must account to him for his undivided fraction.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 70.*]

Appeal from Circuit Court, Tyler County.

Suit by G. D. Smith and others against the Linden Oil Company, the Eureka Pipe Line Company, and others. From the decree, the Eureka Pipe Line Company appeals. Affirmed in part and reversed in part.

A. B. Fleming, Charles Powell, and Kemble White, for appellant. J. V. Blair, G. D. Smith, and I. M. Underwood, for appellees.

BRANNON, J. On 24 December, 1898, T. K. Harter and wife made a lease for development of oil and gas to W. S. Miller, trustee, of a tract of 51 acres of land, which lease Miller assigned to the Linden Oil Company. The lease bound the lessee to pay to the lessor, Harter, a royalty of one-eighth of oil produced, and "to deliver the same, free of expense, into tanks or pipe lines to the credit of the party of the first part." On 12 October, 1900, by deed recorded 13 October, 1900, Harter and wife conveyed to G. M. Smith and I. M. Underwood the undivided thirty-second of the oil that should be produced from the "two first" wells that should be drilled on the land under said

lease, for a consideration of \$100, and for deferred consideration specified. This conveyance was recorded, and of it the Linden Oil Company and the Eureka Pipe Line Company had notice. When this conveyance of part of Harter's one-eighth royalty oil was made, no well had been drilled. Later the Linden Oil Company drilled wells producing much oil; two of those wells being known in this suit as Harter Well No. 1 and Harter Well No. 2. These are the wells in whose oil Smith and Underwood claim a thirty-second interest. This oil was run into the pipe line of the Eureka Pipe Line Company, a common carrier. By deed 13 October, 1900, T. K. Harter and wife conveyed to Foster Mitchell one-half the oil in said tract subject to said Miller lease, this deed declaring its intent to be to convey to Mitchell one-sixteenth of the oil; that is, half the one-eighth royalty oil reserved by lease to Harter. This conveyance was recorded 18 October, 1900. Mitchell conveyed various interests in the oil conveyed to him by Harter to D. Dally, C. Melick, and H. E. Wilson. Harter and wife conveyed to W. R. Fitch $\frac{1}{64}$ of the oil in said tract. It was discovered that, though Harter and wife leased to Miller the entire tract, Harter owned only three undivided fifths, the remaining two-fifths being owned by George V. Harter and Rebecca J. Harter; and Harter, conceding want of title to two-fifths, made an agreement with the Linden Oil Company modifying the lease from Harter to Miller, so that the royalty, instead of the usual one-eighth as therein provided, should be $\frac{3}{40}$, that is, three-fifths of one-eighth. The Linden Oil Company took a lease from George and Rebecca Harter for their two-fifths. It seems not necessary to make this statement as to the modification of the Miller lease, as Harter's $\frac{3}{40}$ of the oil is more than the $\frac{1}{32}$ of oil assigned by him to Smith and Underwood.

The conveyance by T. K. Harter of the $\frac{1}{32}$ of the oil is prior in date and prior in recordation to the conveyance of interests in the oil made by Harter to Mitchell and Fitch. The conveyances of fractions of the oil by Harter to Smith and Underwood and to Mitchell and to Fitch exceed the three-fifths of the one-eighth royalty oil going to Harter as lessor under his lease to Miller. Smith and Underwood notified the Eureka Pipe Line Company of their right to the $\frac{1}{32}$ of the oil in the two wells first to be drilled, and requested that no oil be sold from said farm until proper division orders should be made; and a second time notified the company not to sell oil until their interest or share be set apart, and required the company to render monthly statements of oil coming from those two wells.

When oil came the Linden Company gave no direction to the Pipe Line Company to account to Smith and Underwood for any share in the oil, and the Pipe Line Company

would not recognize their right, but refused, alleging conflicting claim, and Smith and Underwood brought this chancery suit praying that the Linden Oil Company be compelled to turn over and deliver to them their share of the oil from those two wells, and make division orders recognizing their right to $\frac{1}{32}$ of the oil so that it might be sold, and that the Pipe Line Company render a true account of the oil run into its pipes from those wells; that a full account be had of such oil as against both companies; that the Pipe Line Company be required to show what disposition had been made of such oil, whether sold or not, and what the proceeds; that a decree be made declaring the $\frac{1}{32}$ of the oil produced from those wells, or to be produced, to be the property of Smith and Underwood; and that the companies be required to deliver to the plaintiffs their share of the oil. A decree was made declaring Smith and Underwood owners of $\frac{1}{32}$ of all oil produced from said two wells, and that it had not been accounted for, and that it had been run into the pipes of the Pipe Line Company as a common carrier of oil, that $\frac{3}{40}$ of the oil from the two wells was going to Harter, and that, out of such $\frac{3}{40}$, $\frac{1}{32}$ of all the oil should be set apart and delivered to Smith and Underwood. This decree also declared that the oil produced should be divided by the Eureka Pipe Line Company, as follows: To Smith and Underwood $\frac{2}{160}$ royalty oil; to T. K. Harter $\frac{1}{160}$ royalty oil; to George V. Harter $\frac{2}{160}$ royalty oil; and to Linden Oil Company $\frac{1}{8}$ working interest. The decree referred the case to a commissioner to report the oil from the two wells, and the daily production. The commissioner made a report, which was confirmed without exception by a later decree, holding that the total production was 15,365.68 barrels, and that $\frac{1}{8}$ of it, known as the working interest, 13,444.97 barrels, was the property of the Linden Oil Company; 480.17 barrels to Smith and Underwood; 672.25 barrels to T. K. Harter; 768.29 barrels to George V. Harter. It held that the oil of Smith and Underwood had been unlawfully detained from them, and required the Eureka Pipe Line Company to forthwith deliver to them said 480.17 barrels of oil, and place the same to their credit subject to sale by them, free of storage charges. And the decree required delivery to T. K. Harter of $\frac{1}{160}$ of the oil. The Eureka Pipe Line Company alone appeals.

The question of equity jurisdiction is raised. There can be no question here. The case is one presenting conflicting claims to royalty oil, and we have held for equity jurisdiction in such case. *Peterson v. Hall*, 57 W. Va. 535, 50 S. E. 603; *Swearingen v. Steers*, 49 W. Va. 312, 38 S. E. 510.

It seems not worthy of mention that the court overruled a demurrer to the first bill based on the absence of T. K. Harter and wife as parties, since they were made par-

ties by an amended bill, thus curing this error, if error.

A complaint is made that the decree required the Pipe Line Company to make discovery of the oil run into its line when no officer of it was made a party capable of making discovery. This is answered by the fact that the company filed a statement of such oil, which formed the basis of the decree. The law does require that some officer be made a defendant when discovery is required, as a corporation discovers by an officer; it is a means of discovery for the plaintiff's benefit; but when the corporation does make the discovery, and it is accepted, where is the error?

It is pressed upon us strenuously that the Eureka Pipe Line Company is a common carrier; that it knows not Smith and Underwood or their rights, having no contract with them; that it contracted only with the Linden Company to receive its oil; and that Smith and Underwood must look to Harter and the Linden Company. This is a claim of nonaccountability by the Pipe Line Company to the true owner of the oil; a claim that a common carrier knows only the consignor and consignee, and cannot be called on by a third party, having true title to the goods, to recognize this right. But the authorities do not bear out this position. The carrier is bound to respond to the demand of the real owner for possession of his goods, and in so doing does not render himself liable to one who, having wrongfully obtained possession, has delivered them to the carrier for transportation. "The real owner may maintain an action against the carrier for refusal to deliver goods to which he is entitled." 6 Cyc. 471. So say Moore on Carriers, 155, and 2 Hutchinson on Carriers, § 749. The lessee in this lease stipulated to deliver the royalty oil into the pipe line to the credit of Harter. When that oil got into the pipe line it was the property of Smith and Underwood. It was by extraction made personal property, and belonged to them. It cannot be that, simply because it was in the pipes, it was beyond the reach of the true owners. Generally the true owner can get his goods. I do not see that their presence in the line took away the efficacy of the superior title, or had any peculiar virtue to absolve the carrier from accountability. The fact the premises were in the possession of the Linden Oil Company is urged as being the sole test to show that the Pipe Line Company was not bound to look further, but only to receive from it, without liability to the true owner. For this we are cited to *Giffin v. South West Pipe Lines*, 172 Pa. 580, 33 Atl. 578. That case will not support the possession. There the producing land was in adverse possession of one, and the Pipe Line Company received oil from him, and another claimant of the land sued the company for the value of the oil, and it was held that trover and conversion or assumpsit will not

lie for a third party for oil coming from land in adverse possession. Land title cannot be so tried. The adversary title was the point denying the action.

Counsel tell us that an oil lease providing for royalty is like an agricultural lease; that the royalty is like a share of a grain crop to be paid the landlord; and that title remains in the landlord until he divides the grain and separates the landlord's part, and Harter and those under him have no title to sustain suit until the oil is separated. Now, all the oil is run into the pipe line. The lease in terms says that the royalty shall be delivered into the pipe "to the credit of the party of the first part." It provides no separate delivery, but for running the oil as a whole into the pipes. This peculiar provision distinguishes it from an agricultural lease. Delivery to the pipe line was a separation, going to the credit of the lessor gave him title.

Counsel make the point that the lease provides royalty, and the lessee had a right to pay to one hand, and cannot be called upon to split it into parts, and assign to each his part. We do not see that this is so. Why cannot the company give each credit for his share?

It is said that the carrier cannot tell just what oil comes from each well; that other wells might deposit in the tank. Oil companies have a means of telling this, and it seems that no other wells poured into these tanks. Anyhow, the Pipe Line Company did file a statement of the production from each well, which was accepted and acted on as the basis of the commissioner's report. There was no exception to it. It does not, under these circumstances, lie with the appellant to find fault in this, when the fact that it kept a record from which it filed this statement shows, not only that it was in its power to ascertain what the output of each well was, but that it did so ascertain. Fault is found by counsel in the fact that the commissioner made his report of output of oil from the statement filed by the company. The company filed it as a discovery; it was its own evidence. Besides, there was no exception to the report on this score.

Complaint is made that no storage charge was made. Its amount does not appear. But could the defendant unlawfully hold against Smith and Underwood, the true owners, deny their right, and charge storage?

It is assigned for error that the decree gives oil to T. K. Harter. We think this assignment valid. Harter, after conveying $\frac{1}{16}$ of the oil to Smith and Underwood, conveyed interests in the oil to Mitchell and Fitch, and, these conveyances having been canceled by decree in another suit, the court in this suit held that those interests reverted to Harter, and hence decreed him 672.75 barrels in oil produced and declared that he retained a certain fractional interest in the two wells. This suit cannot be held to be

a partition or lien suit to settle the rights of defendants inter sese. It is a suit brought to vindicate the rights of Smith and Underwood against the Oil Company, the Pipe Line Company, and adverse claimants to oil. The relief given Harter does not grow out of relief administered the plaintiffs. Harter filed no answer, asked for nothing. This decree would prejudice the right of the Pipe Line Company as between it and Harter about a matter not cognizable in this suit.

The decree gave a money recovery to T. K. Harter against Smith and Underwood for \$295 for the deferred purchase money for the assignment by Harter to Smith and Underwood of $\frac{1}{32}$ of the oil. That is not involved in this suit. Harter did not by answer claim it, if he could have done so. This money is recoverable at law. Smith and Underwood cross-assign this as error. This decree for money does not grow out of relief administered the plaintiffs and the corporations.

We reverse the two decrees so far as they decree oil to T. K. Harter, and so far as the decree of 12 November, 1908, decrees \$295 to Harter against Smith and Underwood, without prejudice to Harter touching those matters, and in other respects we affirm the decrees.

(99 W. Va. 219)

LEACH v. MARTIN.

(Supreme Court of Appeals of West Virginia.
April 25, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 196*)—"FELLOW-SERVANTS."

All who serve the same master, working under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though in different grades or departments thereof, are "fellow-servants," each taking the risk of the others' negligence, except when one of them stands as the representative of the master in relation to a duty incumbent on the master toward the others.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 486; Dec. Dig. § 196.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

2. MASTER AND SERVANT (§ 196*)—"FELLOW-SERVANTS."

A servant employed by a wholesale merchant in building a platform from the business house to an adjoining railway track, for the convenience of the business in transporting goods, is a fellow-servant to another of the merchant's servants who is engaged in transporting goods, to a railway car, across the space where the platform is being constructed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 486; Dec. Dig. § 196.*]

3. MASTER AND SERVANT (§ 173*)—INJURIES TO SERVANT—FELLOW-SERVANT—INCOMPETENCY—MASTER'S KNOWLEDGE.

The master is liable for injury to the servant by the incompetency of a fellow-servant, if the master had notice of the incompetency before the injury and the injured party himself

did not know of the incompetency of his fellow-servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 343-346; Dec. Dig. § 173.*]

4. MASTER AND SERVANT (§ 260*)—NEGLIGENCE OF FELLOW-SERVANT—PLEADING.

In a declaration basing a cause of action against the master on the ground that he knowingly employed an incompetent servant to the injury of the plaintiff, a fellow-servant, it is not essential to aver that the plaintiff had no knowledge of the incompetency of his offending fellow-servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 844-848; Dec. Dig. § 260.*]

Error to Circuit Court, Wood County.

Action by W. T. Leach against C. C. Martin, trading as C. C. Martin & Co. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

F. P. Moats, for plaintiff in error. Van Winkle & Ambler, for defendant in error.

ROBINSON, J. In this action for damages arising from a personal injury, the plaintiff's declaration was dismissed on demurrer. The writ of error brings up the question: Does the declaration state a good cause of action?

Defendant was carrying on a wholesale grocery business. Plaintiff, in the service of defendant, was engaged in constructing a platform to extend from defendant's business house to a railway track a few feet from the building. This platform was needed in the transaction of defendant's business, so that articles of merchandise could be conveniently received and discharged. While plaintiff was engaged on the ground in preparing a foundation for the platform, a temporary bridge was made of boards, extending from the door of the building to the door of the freight car on the railway track, and goods were being handled over this bridge by means of a truck. The work of trucking these goods was being done by another servant of defendant. He allowed some of the packages or boxes to fall from the truck and to strike plaintiff who was working below the temporary bridge in constructing the platform. Plaintiff was thereby injured, and for the injury so received he claims damages by this action.

The declaration founded on the injury stated cannot be sustained as one showing a failure on the part of the master to provide the servant a reasonably safe place in which to work. It does not sufficiently aver facts to show that there was such failure. It does not directly set forth that the temporary bridge was a defective appliance, or that the method by which goods were trucked over it made plaintiff's working place a hazardous one. For all that the declaration says, the bridge was perfectly safe and a proper handling of goods over it in no way endangered

plaintiff. The real gist of the declaration is that the servant handling the goods on the bridge was an incompetent one and that his incompetency led to a negligent act on his part whereby plaintiff was injured. The declaration specifically avers the incompetency of this servant for the work in which he was employed. It also plainly avers that his incompetency caused the plaintiff's injury. It presents only a case of injury to plaintiff by a fellow-servant.

[1] Plaintiff and the servant who injured him were fellow-servants, notwithstanding the allegation that they were engaged in different departments of the master's business. The so-called department rule does not prevail in this jurisdiction. *Kniceley v. Railroad Co.*, 64 W. Va. 278, 61 S. E. 811, 17 L. R. A. (N. S.) 370; *Jackson v. N. & W. R. Co.*, 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337. "The decided weight of authority is to the effect that all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, although it may be in different grades or departments of it, are fellow servants, each taking the risk of the other's negligence." 28 Cyc. 1282. [2] Though plaintiff was only engaged in making repairs or improvements so that the business of the master in which the other servant was engaged might be promoted, yet they were in a common employment, servants in the same general business. Plaintiff, we may say, was employed in the repair or improvement department of the master's mercantile business, while the other servant was engaged in the sales department. But the grades or departments in which they were employed have nothing to do with a proper test as to whether they were fellow-servants. "It has been said that the most approved test of a common employment is whether the injured servant can be said to have apprehended the possibility of injury from another servant while engaged in the service for which he hires. It is not necessary that both be engaged in the same or even similar acts, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which have to be considered in his wages." *McKinney on Fellow-Servants*, § 13. Is the negligence of the one likely to inflict injury on the other, when both are engaged by the same master in the promotion of the same general business? If so, they are fellow-servants and the master is not liable for injury of the one by the other, unless the offending one clearly stands as the representative of the master and is acting in relation to some duty incumbent on the master toward the injured servant. When plaintiff undertook employment to build a platform for the promotion of the master's business, did he not reasonably know that

other servants would be engaged near him in also promoting that business by acts and duties different from his? Did he not assume the risk of injury from the servants working in and about the store? He could not reasonably suppose that all sales and shipments would be stopped for his safety until he could complete the work he was employed to do. Risk of injury from other servants in handling goods was a necessary consequence of the employment which plaintiff accepted when he undertook to build the platform. That natural and necessary consequence defines plaintiff's employment as one of fellow-servancy with those working directly at the mercantile business, when taken in connection with the fact of a common master and the promotion of the same general business. If employees operating trains are fellow-servants of track and bridge repairers or builders, and it is well settled that they are, surely this platform builder is a fellow-servant of the employees operating the defendant's wholesale store.

[3] The declaration, however, alleges that the servant that injured plaintiff was an incompetent one and that the master had notice of the incompetency. It is distinctly averred that this incompetency caused the servant to be so negligent and careless that he injured plaintiff. The master is liable for injury to one servant by the incompetency of another, if the injury occurs after the master has had notice of the incompetency and has still retained the incompetent servant in his employment. This rule is elementary. But the point is made that the declaration fails to state that plaintiff did not know of the incompetency of the fellow-servant who injured him. [4] It is argued that the declaration does not state a cause of action because it omits to charge that plaintiff was ignorant of the incompetency while working with the fellow-servant. This argument is not tenable. That plaintiff knew of the incompetency and continued at the risk of it may be a good defense on a trial, but a negative statement in this particular is not necessary in the declaration. *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; 2 *Labatt on Master and Servant*, § 857. The averments of the declaration relative to the incompetency of the offending servant and the injury to plaintiff which that servant inflicted by reason of his incompetency are entirely sufficient. A cause of action against the master on this score is sufficiently stated.

A further objection made to the sufficiency of the declaration is that the pleading shows that the injury came to plaintiff by his own contributory negligence. It does not appear from the averments that plaintiff was negligent in working below the bridge. Neither that structure, nor the method by which goods were taken across it, is shown to be of a character that gave notice to plaintiff that he would be injured in the handling of goods over it. It does not plainly appear

that plaintiff did that which a prudent man would not do. The declaration in this particular is not bad.

The judgment of the circuit court will be reversed, the demurrer overruled, and the case remanded.

(68 W. Va. 562)

HENDERSON v. HENRIE.

(Supreme Court of Appeals of West Virginia.
Jan. 31, 1911. Rehearing Denied
May 17, 1911.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 39*) — CONTRACTS ENFORCEABLE—VERBAL CONTRACT FOR SALE OF REALTY.

A court of equity will not decree specific performance of a verbal contract for the sale of real estate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 114-119; Dec. Dig. § 89.*]

2. FRAUDS, STATUTE OF (§ 63*) — CONTRACT FOR SALE OF EQUITABLE ESTATE.

A contract for the sale of an equitable estate is within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 97-104; Dec. Dig. § 63.*]

3. FRAUDS, STATUTE OF (§ 142*) — VERBAL CONTRACT.

To enable a court of equity to exclude a verbal contract of sale of land from the operation of said statute, there must be a collateral circumstance, constituting an independent equity, imposing an obligation in conscience.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 343; Dec. Dig. § 142.*]

4. FRAUDS, STATUTE OF (§ 142*) — VERBAL CONTRACT FOR SALE OF LAND.

Mere breach of an oral agreement does not constitute such an equity.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 343; Dec. Dig. § 142.*]

5. FRAUDS, STATUTE OF (§ 74*) — VERBAL AGREEMENT FOR SALE OF LAND.

A verbal agreement between two bidders for land at a judicial sale, each desiring a portion thereof, to the effect that the successful bidder will allow the other to take and pay for the portion he desires, is, in substance and effect, a contract for the sale of land, and unenforceable; the successful bidder having paid for all of the land, and the unsuccessful bidder not having paid for the portion it was agreed he should have, though prevented from doing so by breach of the agreement on the part of the other.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 74.*]

(Additional Syllabus by Editorial Staff.)

6. FRAUDS, STATUTE OF (§ 63*)—ASSIGNMENTS OF TRUSTS AND CONFIDENCES.

The ninth section of the English statute of frauds, requiring assignments of trusts and confidences to be in writing, is not in force in West Virginia.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 63.*]

Appeal from Circuit Court, Wood County.

Action by Jock B. Henderson against James M. Henrie and others. Judgment for plaintiff, and the mentioned defendant appeals. Reversed and dismissed.

McCluer & McCluer, for appellant. V. B. Archer and Wm. H. Wolfe, Jr., for appellee.

POFFENBARGER, J. The general nature of the contract involved in this cause is set forth in the report of a former decision here, on another appeal, found in 61 W. Va. 183, 56 S. E. 369. This appeal is from a final decree, requiring Henrie to convey to Henderson a portion of the land purchased by him at the judicial sale, by way of specific performance of the verbal agreement constituting the basis of the suit.

The former decision disposes of the charge of illegality or invalidity of the contract, as alleged, on the ground of fraud or inhibition by public policy; and the remaining argument against the sufficiency of the bill, namely, that it does not allege irreparable injury, is wholly inapplicable; the legal remedy for breach of a contract to convey land being obviously inadequate, and the law affording no remedy at all for enforcement of a trust. Hence the demurrer was properly overruled.

The vital inquiry is the character of the contract, viewed in the light of the statute of frauds, relied upon in a plea to the bill—a question neither raised nor considered on the former appeal, involving only the ruling on a motion to dissolve an injunction, made in vacation. At that time no demurrer, plea, or answer had been filed. The contract is verbal, and prior in date to the purchase by the defendant. The plaintiff, though willing to pay, or, to be strictly accurate, repay, a portion of the purchase money, and claiming the right to do so, has in fact paid nothing at all, and title has vested in the defendant. At the date of the making of the agreement, neither party had any interest whatever in the land, either legal or equitable, and there was no copartnership relation. Each was to take and hold a portion of the land. In bidding, each acted for himself and as agent of the other at the same time; the action in one capacity relating to one portion of the land, and in the other to the residue thereof.

The basis of the cause of action, as disclosed by this inquiry and analysis, seems to be the oral agreement, and nothing more. We perceive nothing of a collateral nature, constituting an independent equity, such as payment of purchase money; a prior interest in the land, not released; lack of consideration moving from the grantee, accompanied by an agreement to take mere legal title as a necessary step in the execution of some plan or purpose previously agreed upon; or a copartnership, covering the subject-matter of the conveyance. Such an equity seems to be essential to the establishment of a trust or immunity of a contract of sale of land from the inhibition of the statute of frauds. In *Floyd v. Duffy*, 69 S. E. 993, we said, speaking of certain provisions of that statute: "These provisions absolutely prevent the ac-

quisition of any estate in land for more than five years by means of a mere verbal contract. There must be something more—an equity outside and independent of, or in addition to, the contract. * * * By the great weight of authority, if not, indeed, by all courts, an agreement on the part of one purchasing land with his own money, and taking the conveyance in his own name, to hold it in trust for another person, or to convey it to the grantor, is within the statute of frauds." In resulting trusts, the basis of the equity is the payment of money. In those instances in which deeds, absolute on their faces, are construed and enforced as mortgages, the antecedent interest in the land lies at the bottom of the equity. In cases of voluntary conveyances for specific purposes, the fraud of the grantee is the circumstance imposing an obligation in conscience. To apply the statute under such circumstances would allow the grantee to obtain the land for nothing, defeat the meritorious purpose of the conveyance, and make the statute an instrument of fraud, contrary to legislative design. As copartnership is a confidential relation, and there is a joint interest in firm assets, a conveyance to one member, under a purchase with partnership funds, creates a constructive or resulting trust; the confidential relation constituting the ground of equity. In cases of exception, on the ground of part performance, the altered situation of the vendee, in reliance upon the contract, working irreparable injury, constitutes the independent equity. In parol gifts of land, enforceable, the equitable foundation is the same.

No precedent or declaration of principle by this court is broad enough to except this agreement from the operation of the statute. The decisions making the nearest approach to it are *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329, and *Hamilton v. McKinney*, 52 W. Va. 317, 43 S. E. 82, but the cestui que trust in the former had an antecedent interest in the land, being an unfortunate debtor, for whose benefit another had purchased it at judicial sale; and, in the latter, the plaintiff had paid a portion of the purchase money. Some of the language in the opinions in both cases may be broader than the view here expressed, and unnecessarily so, since the facts established in each brought it within the limits here fixed. However that may be, the broad terms there used must be read and considered in the light of the facts, since the court cannot be deemed to have intended to assert anything beyond the equities and requirements of the particular cases. Ordinarily anything additional would be regarded as obiter dicta, having only persuasive influence, and rejected for unsoundness, if unable to stand the test of logic and the application of general legal principles, and particularly so, if in conflict with express decisions and the general current of authority, applicable to the precise question. Taken as

a whole, the opinion in *Currence v. Ward* asserts and applies sound propositions of law. One part must not be taken to the exclusion of others. By the terms of the contract, *Currence* retained his equity of redemption. Between him and the *Wards*, the relation of debtor and creditor was established and continued. He paid money under that contract. His real status was that of mortgagor. Judge *Brannon* is not to be regarded as having attempted to state all the law of the case in any single sentence.

The assertions in *Floyd v. Duffy* that an agreement, valid in law, is valid in equity, and one, not valid in law, will not be enforced in equity, and that equitable title to land must rest upon something more than a mere verbal contract, are in perfect accord with almost uniform authority everywhere, and not in conflict with any actual decision of this court. Our decisions, properly analyzed and understood, will verify this statement. In every instance of exclusion from the statute, an independent equity has been found. *Floyd v. Duffy*, supra; *Bond v. Taylor*, 69 S. E. 1000; *Johnson v. Ludwick*, 58 W. Va. 464, 52 S. E. 459; *Ratliff v. Sommers*, 55 W. Va. 30, 46 S. E. 712; *Moore v. Mustoe*, 47 W. Va. 549, 35 S. E. 871, 81 Am. St. Rep. 812; *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907; *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868; *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176; *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329; *Marshall v. Hall*, 42 W. Va. 641, 26 S. E. 300; *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644; *Deck v. Tabler*, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837; *Seller v. Mohn*, 37 W. Va. 507, 16 S. E. 496; *Frame v. Frame*, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 323; *McClintock v. Loiseau*, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816; *Shaffer v. Petty*, 30 W. Va. 248, 4 S. E. 278; *Kimmins v. Oldham*, 27 W. Va. 258; *Tichenell v. Jackson*, 26 W. Va. 460; *Hefskell v. Powell*, 23 W. Va. 717; *Murry v. Sell*, 23 W. Va. 475; *Hamilton v. Steele*, 22 W. Va. 349; *Renick v. Ludington*, 20 W. Va. 511; *Campbell v. Fetterman*, 20 W. Va. 398; *Middleton v. Selby*, 19 W. Va. 167; *Pack v. Hansbarger*, 17 W. Va. 313; *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670; *Troll v. Carter*, 15 W. Va. 567; *W. Va.*, etc., *Co. v. Vinal*, 14 W. Va. 687; *Tracy v. Tracy*, 14 W. Va. 243; *Smith v. Patton*, 12 W. Va. 541; *Vickers v. Slason's Adm'r*, 10 W. Va. 12; *Lowry v. Buffington*, 6 W. Va. 249; *Capehart v. Hale*, 6 W. Va. 547; *Pumphry v. Brown*, 5 W. Va. 107; *Hardman v. Orr*, 5 W. Va. 71; *Hedrick v. Hern*, 4 W. Va. 620.

Seeking the limitation, as indicated by decisions denying exception or exclusion, we find it in perfect harmony with these propositions. *Henderson v. Hudson*, 1 Munf. (Va.) 510; *Jarrett v. Johnson*, 11 Grat. (Va.) 327; *Nash v. Jones*, 41 W. Va. 769, 24 S. E. 592. In all these cases claims for relief in equity, resting upon mere verbal contracts, and nothing more, have been denied, without ref-

erence to the forms of such contracts or the relations of the parties; the contracts relied upon being substantially for the sale of real estate. In the first two claims of joint purchase were rejected, and in the other a claim of purchase by an agent; the alleged principal having paid none of the purchase money. Sugden on Vendors, vol. 2, top page. Section 15, c. 21, saying: "Where a man merely employs another person by parol, as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds"—is sustained by a vast array of authority. We observe the same as to the text in 29 A. & E. Enc. Law, 899, saying: "It is equally well settled that agreements for joint purchases of land, not for the purpose of speculation, whether the title is taken in the name of one for the benefit of all or in the individual names of the parties, are within the statute, and are required to be in writing."

Joint purchases of land are sometimes upheld as having been made in pursuance of an existing partnership or an agreement for one; the relation of copartnership constituting the essential equitable circumstance attending the verbal contract (Floyd v. Duffy, supra; Bond v. Taylor, supra; 20 Cyc. 237); but we have here not a particle of evidence of such a relation or agreement.

The suggestion of immunity from the statute, on the ground that the contract was made before the defendant acquired the legal title and was recognized by him, while holding the equitable title only, founded upon expressions in Currence v. Ward and Hamilton v. McKinney, is wholly untenable, in view of the application of the statute of frauds to equitable estates. See 20 Cyc. 230, and 29 A. & E. Enc. Law, 888, citing numerous decisions holding it to be applicable to such interests. I have found no Virginia or West Virginia decisions to the same effect, and the ninth section of the English statute, requiring assignments of trusts and confidences to be in writing, is not in force here; but equitable estates are regarded in these states as having about all the incidents of legal ones. 2 Min. Inst. 195, 196; 1 Lomax, Dig. 277. They are regarded and dealt with as real estate. In some of the states said section may be, and no doubt is, in force. In view of this, our holding as to that question would not necessarily have to harmonize with those of such other states. However, as equitable titles are here regarded as land and estates of inheritance, they fall within both the terms and policy of section 1, c. 71, and subsection 6 of section 1, c. 98, of the Code. That these statutes are broad enough

to reach them is suggested in 1 Lomax, Dig. 278.

Under these principles and conclusions, we reverse the decree, dismiss the bill, and decree to the appellant his costs in the court below, as well as in this court.

WILLIAMS, P., absent.

(69 W. Va. 18)

RIEDEL v. WHEELING TRACTION CO.

(Supreme Court of Appeals of West Virginia.
March 7, 1911. Rehearing Denied
May 17, 1911.)

(Syllabus by the Court.)

1. STREET RAILROADS (§ 85*)—OPERATION—CARE REQUIRED.

Street railways and pedestrians have equal right to the use of the public street crossings, and the law enjoins upon both the exercise of reasonable care and caution.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.*]

2. STREET RAILROADS (§ 81*)—OPERATION—SPEED OF CARS.

Unless a street railway company is expressly permitted by law to run its cars over the streets of a city at a high rate of speed, the speed should not be greater than is reasonable and consistent with the safe use of the streets by the public.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81.*]

3. STREET RAILROADS (§ 114*)—OPERATION—ACTION FOR INJURIES—EVIDENCE.

If a street railway is not expressly permitted by law to run its cars over the streets of a city at a high rate of speed, it is evidence of negligence, if it operates its cars at so great a speed as not to be able to stop them readily, and within reasonable distance, when approaching a public street crossing.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

4. STREET RAILROADS (§ 117*)—OPERATION—INJURIES AT CROSSING—QUESTION FOR JURY.

A traveler on the streets of a city has a right to assume that street cars will not be run at an excessive rate of speed; and if a car running at a high rate of speed collide with a traveler at a public crossing, whereby the traveler is injured, it is for the jury to say, under all the facts in the case, whether or not the street railway company is negligent.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

5. STREET RAILROADS (§ 103*)—OPERATION—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE.

If plaintiff is guilty of negligence which might have produced his injury, but before the injury actually results the defendant is guilty of negligence which is the immediate cause of the injury, the negligence of defendant becomes, in law, the sole proximate cause of the injury, even though no injury could have resulted to plaintiff, if he had not been originally negligent. The negligence of defendant, supervening between the original negligence of plaintiff and the happening of the injury, destroys the legal force of plaintiff's negligence as a contributing cause to the injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. § 103.*]

Error to Circuit Court, Marshall County.

Action by Louisa Riedel against the Wheeling Traction Company. From a judgment for defendant, plaintiff brings error. Reversed and remanded for new trial.

See, also, 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. (N. S.) 1123.

J. Howard Holt and Martin Brown, for plaintiff in error. W. A. Duggan, C. C. Newman, and Wm. Erskine, for defendant in error.

WILLIAMS, P. Defendant operates an electric car line between the cities of Wheeling and Benwood, and through Benwood. Plaintiff attempted to cross defendant's tracks at a public street crossing in Benwood, and was run over by defendant's car, and was maimed. She brought an action against the defendant for negligently causing her injury. Defendant offered no evidence, and on its motion the court struck out plaintiff's evidence, and directed a verdict for the defendant, and entered final judgment in its favor. Plaintiff has brought the case here on writ of error. Defendant insists that plaintiff's evidence proves such contributory negligence as precludes a recovery.

The proof is that plaintiff was about 41 years of age, strong, and in good health, at the time of the accident; that about 4 or 5 o'clock on the 11th of April, 1906, she left her home to go to Dolan's store on the southeast corner of McMechen and Sixth streets; that she came to McMechen street by way of an alley which intersects it some distance north of Sixth street crossing, and followed down McMechen street, on the west side thereof, to Sixth street crossing, and left the sidewalk at the intersection of the streets and started diagonally across the street; that when she was almost across defendant's track she was struck by a south-bound electric car, running at the rate of 15 or 20 miles an hour, and was thrown forward upon the track a distance of some 12 or 15 feet, and the wheels of the car passed over her leg, and cut it off; that from the time she came upon McMechen street, until she reached the point where she left the sidewalk to cross diagonally over the intersection of McMechen and Sixth streets, she was going southward, with her back toward the car which was coming in the same direction; that after leaving the sidewalk, and when at a point about midway between the curb and the car tracks, she glanced back over her shoulder, to see if there was an approaching car, and saw none. But it appears from other facts proven that the car must then have been visible to her, and not far away, and that if she had looked straight up the tracks, instead of diagonally across, she could have seen it. She also testifies that she heard no car. Benwood is a manufacturing town, in which are located a number of iron mills, which produce a great deal of noise when in operation. The tracks of the Baltimore &

Ohio Railway are not far away from McMechen street, and when its trains are moving makes a good deal of noise. Two or three eyewitnesses to the accident testify that the motorman could easily have seen plaintiff in her perilous situation, if he had been looking out for pedestrians at the crossing.

Witness McCabe, who was standing on the southwest corner of the street crossing, says he saw the car coming when it was about 15 yards from the crossing; that at the same time he saw it he also saw the motorman, and that he was looking in the direction of witness; that plaintiff was then out in the street, going in the direction of the tracks. According to this testimony, plaintiff must have been almost in a direct line of the motorman's vision, walking diagonally towards the track, with her back rather toward the motorman, and it is difficult to understand how he could have failed to see her. The proof is that he sounded no alarm, and made no effort to stop or check the speed of the car, until after he had struck plaintiff. It does not appear that there is any municipal ordinance regulating the speed of defendant's cars in passing over the streets of Benwood. It is also proven that the car, running at the rate of 15 miles an hour could have been stopped within the distance of 45 feet.

Upon this state of facts, can it be said, as matter of law, that plaintiff was guilty of contributory negligence? If it can, then the judgment of the lower court is right, and it should be affirmed; but, if not, then the question should have been submitted to the jury, and the judgment is erroneous.

There was a former trial of this case, which was reviewed on writ of error to this court, and will be found reported in 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. (N. S.) 1123. It was first tried upon conflicting testimony; but the case is now before us upon different evidence, which presents facts which, according to the report of the former decision, did not then appear. The case is now to be reviewed upon the uncontradicted testimony of plaintiff and her witnesses, which the lower court held not sufficient to warrant a recovery in her favor. We cannot look to the testimony of witnesses on the former trial for any purpose.

Granting that plaintiff was negligent in the first instance in not taking reasonable precaution to ascertain whether a car was approaching, before she attempted to cross the tracks, still it does not follow that such negligence was the proximate cause of her injury. If the defendant was guilty of a subsequent act of negligence, either in the omission of a duty or in the commission of a wrongful act, such supervening negligence becomes, in law, the proximate cause of the injury, and plaintiff's prior negligence will not defeat her recovery. "It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's neg-

ligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him." 1 Shear. & Red. on Negligence, § 99.

The rights of the traction company to the use of the street at the crossing is not superior to the rights of pedestrians. Their rights at that point are equal; and the law requires that both shall exercise reasonable care. The law does not apply the same rule in determining the relative rights between a street car company and other persons in the use of a public street crossing that it applies in case of a steam railroad crossing a public highway. The rights of the former are more analogous to the rights of ordinary vehicles. 2 Shear. & Red. on Negligence, § 485a, and numerous cases cited in the notes; *Richmond, etc., Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839; *Bass' Adm'r v. Norfolk, etc., Co.*, 100 Va. 1, 40 S. E. 100; *Richmond Traction Co. v. Clarke*, 101 Va. 382, 43 S. E. 618.

Plaintiff's negligence in failing to observe the approaching car would not excuse defendant from the duty of exercising reasonable care to avoid doing her injury. If the motorman saw plaintiff in her perilous situation, or if he could have seen her by the exercise of reasonable caution, and could thereafter have avoided the accident by sounding the alarm, or by checking the speed of the car, and failed to do so, then his failure to do so was a supervening, independent act, or acts, of negligence which were the proximate cause of plaintiff's injury. The defendant's negligence is therefore a mixed question of law and fact, properly to be determined by the jury, upon proper instructions. If the case had been submitted to them, they would certainly have been warranted in finding, from the testimony of the witnesses, that defendant's motorman was guilty of negligence after he saw, or should have seen, plaintiff's danger. This fact established, the law is that it, and not the plaintiff's original negligence, was the proximate cause of the injury. Plaintiff was struck just as she was passing beyond the farthest rail of the track, and if the motorman had checked his car ever so little, if he had delayed it even the fractional part of a second, it is highly probable that plaintiff's body would have cleared the track, and she would not have been hurt; or, if he had sounded the alarm and given her warning, she might have quickened her pace, and thus have avoided the collision.

But it is insisted that plaintiff's negligence, if not the sole proximate cause of her injury, at least combined with defendant's negligence to produce it, and that therefore she cannot recover. Such is the law, if such were the fact. 1 Shear. & Red. on Negli-

gence, § 93; *Eastburn v. Railway Co.*, 34 W. Va. 681, 12 S. E. 819; *Carrico v. Railway Co.*, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50; *Humphrey's Adm'r v. Railway Co.*, 100 Va. 749, 42 S. E. 882. But such is not the fact, as it appears from the only evidence before us—the undisputed testimony of plaintiff and her witnesses. The negligence of plaintiff and that of defendant's motorman were separate and independent of each other; and the motorman's negligence was later in time, and the last to occur before the accident. It was therefore necessarily the proximate cause of the injury, unless it had been shown that, after discovering plaintiff's danger, he used reasonable care to avoid the collision, and was, nevertheless, unable to avoid it. In view of the respective rights of the parties to the use of the street crossing, it was the duty of the motorman to have approached the crossing with reasonable precaution, and to have kept a lookout for pedestrians at that point. His negligence in not sounding an alarm, and in not making an effort to stop the car, is not in any way related to plaintiff's negligence in attempting to cross the street ahead of the car; and the legal effect of it, as constituting the proximate cause of the injury, depends upon whether he exercised reasonable diligence to avoid a collision with plaintiff, after he should have seen her danger. Its relation to the cause of the accident depends upon his duties and his opportunities, one a question of law and the other a fact for the jury. After plaintiff had failed in her duty to use reasonable precaution the motorman later, according to the testimony, failed in his duty which, if it had been performed, might have prevented the injury.

The law applicable to actions involving both negligence and contributory negligence is clearly stated in point 6 of the syllabus in *Washington v. Railroad Co.*, 17 W. Va. 190, as follows, viz.: "It is therefore not contributory negligence for the plaintiff to be guilty of a negligent act, which might have produced the injury, if, before it actually results, the defendant is guilty of some negligent act which was the immediate cause of the injury, even though no damage could have resulted to the plaintiff, had he not been originally negligent." See, also, *Richmond Traction Co. v. Clarke*, 101 Va. 382, 43 S. E. 618; *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Inland, etc., Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270. This principle seems to have been first announced by the English Court of Exchequer, in the case of *Davies v. Mann*, decided in 1842, 10 M. & Wel., side page 546. That was an action brought for the negligent killing of an ass, which the owner suffered to be in the public highway, with his front feet hobbled together, and which a driver carelessly ran into with his wagon and horses. The court there held that the plaintiff's negligence in-

suffering the animal to be in the public highway, thus hobbled, did not preclude him from recovery, if the defendant carelessly caused the death of the animal. That case has been almost universally followed by the courts of this country as the law. 1 Shear. & Red. on Negligence, § 99.

In view of the uncontradicted testimony of witnesses, proving negligence of defendant's motorman, it cannot be said, as matter of law, that plaintiff's negligence was the proximate cause of her injury, or that it combined with defendant's negligence as the proximate cause. The trial court erred in excluding plaintiff's evidence and directing a verdict for the defendant.

The judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

BRANNON, J., absent.

(69 W. Va. 260)

STATE v. POE.

(Supreme Court of Appeals of West Virginia.
April 25, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 940*)—NEW TRIAL—GROUNDS—CONFESSION OF OTHER THAN ACCUSED.

Evidence that a person made a statement that he, and not the accused, committed the crime, would not be admissible on a trial of the accused, and therefore is not ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327; Dec. Dig. § 940.*]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW (§ 958*)—NEW TRIAL—PROCEEDINGS TO PROCURE—SUFFICIENCY OF MOVING PAPERS.

On motion for a new trial for newly discovered evidence, the affidavit of the new witness showing to what he will testify must be produced, or good excuse shown for its absence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2401; Dec. Dig. § 958.*]

Error to Circuit Court, Taylor County.

Burt Poe was convicted of stabbing another, and he brings error. Affirmed.

Sommerville & Sommerville, for plaintiff in error. Wm. G. Conley, Atty. Gen., and G. W. Ford, Pros. Atty., for the State.

BRANNON, J. Burt Poe was indicted for stabbing William A. Rogers and was convicted by a jury, and was sentenced to the penitentiary for two years.

Poe made a motion for a new trial on the ground that the verdict was contrary to the evidence; but he does not rely upon that in this court. There is a large volume of conflicting evidence, and it is useless to say anything more as to this.

The only point relied upon here is the refusal of the court to grant a new trial on

newly discovered evidence. This motion was based on two affidavits. Poe's affidavit says that he has learned from a good, reliable, and creditable source that Joseph Shackelford will testify upon retrial that he was present during the difficulty between W. A. Rogers and Poe, and saw Luther Rogers cut and stab W. A. Rogers. Poe does not name the good, reliable, and creditable source of such information, unless it be Benjamin F. Bailey. Poe's affidavit says that he had tried to get an eyewitness to the trouble, and that his first information that an eyewitness to the crime could be produced was given him by Benjamin F. Bailey, his attorney. Is Bailey the person who gave him this information? If he is not, then the affidavit is fatally defective in not naming the person who gave him information that Shackelford would so testify. It is a prime necessity that the person should be named, and should have talked with the proposed witness.

[2] Is a court to turn down a verdict upon the mere statement of a prisoner that he has received information that a witness would say so and so, when he does not state who so informed him? He does not state that he ever talked with Shackelford, and he does not give the name of the person who informed him that Shackelford would give such evidence. Where is Shackelford? He must be in that country, because Poe's affidavit says on another trial he can prove certain things by Shackelford. Why is Shackelford's affidavit not produced? Our case of *Jacobs v. Williams*, 67 W. Va. 377, 67 S. E. 1113, demands that the affidavit of the new witness showing what he will testify must be produced, or good excuse shown for its absence. So *State v. Stowers*, 66 W. Va. 198, 66 S. E. 323. He must produce the affidavit of the witnesses, or, if that be impracticable, the affidavit of some one who has conversed with them showing what facts they would state. *Brown v. Speyers*, 20 Grat. (Va.) 290; *Nuckolls v. Jones*, 8 Grat. (Va.) 267. Poe does not say he talked with Shackelford, nor does any one else. Benjamin F. Bailey made an affidavit stating that he was standing in front of the post office, "and a thoroughly reliable citizen, who is acquainted with all the parties concerned in the above prosecution, approached affiant, and inquired about the status of the above case. Affiant fully advised him of the exact status, and he proceeded to advise affiant in regard to evidence that can be secured that affiant never heard of before the trial. And affiant further says that the substance of information given him is as follows: That Joseph Shackelford will testify that he saw Luther Rogers cut and stab W. A. Rogers; that affiant's informant advised him that Ford went home with said Rogers, and fully advised him that Luther Rogers was the party who committed the crime—cut and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
71 S.E.—12

stabbed him." Who is that thoroughly reliable citizen? The affidavit does not tell us. But the law says that Shackelford's affidavit must be produced, or the affidavit, not merely an unsworn statement, of somebody who talked with him stating that Shackelford would give such evidence. If Bailey is the one who gave Poe information, Bailey's affidavit is in itself insufficient, and neither he nor Bailey tells us who it was that talked with Shackelford. Under these and many other authorities, these affidavits are wholly inadequate to overturn the verdict. It is an established rule to grant new trials very rarely on after-discovered evidence, and never but under very special circumstances.

[1] Another ground is presented to us for a new trial. On the hearing of the motion Mary A. Rogers, mother of Luther Rogers, gave oral evidence that her son Luther confessed to her that he cut W. A. Rogers, and that Poe did not do so. That is mere hearsay. Is the confession of an outside party that he committed a murder charged to another admissible? Surely not. Can such a hearsay statement acquit a prisoner on trial? We find it stated in 6 Ency. of Evidence, 752, that, "neither the extrajudicial admissions or confessions of third persons, though made as dying declarations, nor their acts and conduct in the nature of admission, are admissible to show that they and not the defendant are guilty of the homicide charged." Many cases from other states are there cited and support the text. We find in the case of Greenfield v. People, 85 N. Y. 75, 39 Am. Rep. 636, that a letter written by another to a third person containing admissions that the writer committed the murder is incompetent evidence for the prisoner, and so of like conversation overheard between other persons. The Supreme Court of Georgia in a note found in said American Report ridiculed such propositions. Luther Rogers was present when his mother gave this testimony on the motion for a new trial, and said nothing. He did not corroborate his mother. He was not called to state that he could, or would, give such evidence. He did not so state under oath or even make an unsworn statement that he could or would give such evidence. The cutting was at a gathering at a schoolhouse on the occasion of a Christmas tree, and numerous persons present, yet none of the many witnesses hint that Luther Rogers did the act. Luther Rogers was arrested, and on legal examination on the charge was discharged. Can it be expected that he would on a retrial give evidence to send himself to the penitentiary? He could not be forced to do so. That confession would not be evidence, and we have no assurance that he would give evidence to send himself to the penitentiary. Shall we set aside a verdict on a such a ground? This application for a

new trial does not bear the hue of candor and sincerity, but seems to rest on fabrication. It does not appeal to a court of justice. Solemn verdicts in criminal cases cannot be overturned thus. For a court to do this would seem to be a travesty on criminal justice. Luther Rogers is a mere boy. His mother's evidence bears on its face plain evidence of her zeal for Poe, and is suspicious on its face. Wonderful that a mother would make such a statement. Her evidence shows her to be ignorant and uncultivated.

Judgment affirmed.

(69 W. Va. 228)

HARVEY COAL & COKE CO. v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia. April 25, 1911.)

(Syllabus by the Court.)

RAILROADS (§ 443*)—INJURY TO ANIMALS ON TRACK—EVIDENCE.

Judgment below reversed, verdict set aside, and a new trial awarded for want of sufficient evidence showing actionable negligence of defendant in killing plaintiff's mules. Applying *Toudy v. Norfolk & W. R. Co.*, 38 W. Va. 694, 18 S. E. 896; and *Lovejoy v. C. & O. Ry. Co.*, 41 W. Va. 693, 24 S. E. 599.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1606-1620; Dec. Dig. § 443.*]

Error to Circuit Court, Fayette County.

Action by the Harvey Coal & Coke Company against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Simms, Enslow, Fitzpatrick & Baker, for plaintiff in error. Dillon & Nuckolls, for defendant in error.

MILLER, J. The verdict and judgment below, on appeal, by defendant, from the judgment of a justice, was for three hundred dollars, interest and costs, damages alleged to have been sustained by plaintiff, by the killing by defendant of a pair of mules astray on its railway tracks.

All questions of error presented are covered by defendant's motion, denied by the court below, to set aside the verdict and grant it a new trial.

The sole question is, was the law properly applied, and the verdict warranted by the facts proven? The complaint was that defendant negligently ran over and killed the mules, in the early morning of January 18, 1909. The facts proven are, that plaintiff owned and operated a coal mine on the Loop Creek branch of defendant's railway, in Fayette County. It employed mules and kept them in its stable, located on the side of the railway opposite the mine, and from seventy to ninety feet distant therefrom, and about three hundred feet west of a public road crossing the track, and about four hundred

feet west of a curve in the track going up the creek. The stable and any object on the track opposite it could be seen in the day time by trainmen, after rounding the curve going west. The mine was usually reached from the stable by following a road way along the defendant's right of way leading to the public road, and then crossing over the track on the public road. Sometimes, however, drivers crossed the track directly opposite the stable. On this morning, Roach had gone to the stable, a little after seven o'clock, gotten the mules, and had started to the mine in the usual way, but was called back by the stable boss to take along another team of mules for another driver, who was late. Roach left his mules, unguarded and unhitched, standing in front of the stable, while he went around on the side of the stable to get his dinner bucket and lamp. Left alone as they were, the mules went directly to the track, got on it and started up the track in the direction of the public road and the approaching engine, when they were almost instantly hit and killed by the locomotive, in charge of an engineer and fireman, running at the rate of about eight miles an hour. Roach says, the mules started right across in front of the train, had just got on and started up the track, about fifteen feet, when the engine struck them; and they were almost instantly killed. This witness did not see the engine hit the mules; he was watching the engine, he says, and waving his light to make them stop. He swears that when he came around in front of the stable the engine was on the crossing where he could see it, and that he waved his light at them; that if the engineer had been looking down the track when he waved his light, he could have seen the mules. But he does not say the mules were then on the track. Cumbo, another driver, and a witness for plaintiff, says: The mules went straight across from the stable, and that about fifty feet up from where they got on the track they were struck by the engine. He was standing just opposite the point on the track where the engine hit the mules. He says, he could plainly see the engine from the point where he was standing, that it was light enough to see. He thinks the engineer could and should have seen the mules; but he admits that, standing right opposite, and within fifty feet of the place where the engine hit the mules, and saw them start across the track, he did not watch them on the track, as he thought the driver was with them. If in such close proximity, he did not see, or thought the mules were in charge of the driver, should not the engineer and fireman be excused, for not observing the mules on the track without driver? Dixon, superintendent of plaintiff's mines, who measured the distance, says that it was from two hundred to two hundred and fifty feet west of the public crossing to the point where the mules were killed, seven rail lengths from the frog.

And he would think, he says, that an engineer ought to be able to see from two to two hundred and fifty feet before reaching that point. This witness was asked by plaintiff's counsel, whether he knew within what distance an engineer could stop a single engine, without cars, going at the rate of six or eight miles an hour, and he answered that he did; but for some reason he was not asked to state the distance. It plainly appears from all the evidence, though the witnesses do not exactly agree as to the distance from the public road, that the mules were struck by the engine at from fifteen to fifty feet from the point where they went on defendant's track.

The only evidence offered by defendant, was that of Neil, the engineer, and R. L. Dixon, the brakeman or fireman, in charge of the engine. Neil says, referring to the mules, "They were right in front of the stable." "We were coming in that morning just about 6:45, about that time, and the brakeman called my attention that way. I had struck something, and I blew the whistle for the station, and just as I blew the whistle, the brakeman caught me by the arm and said I had struck something." He also says, that he was in his proper place, looking out ahead, and that he did not see the mules, and as a reason for not seeing them, further says: "Well, there were a good many miners down there with bank lamps on, between the railroad and the stable and it seems to me from where the first mule was laying, they come right up behind this trestle that they use to haul feed down to the stable on and they were struck just as they were crossing the track." He states, moreover, that the morning was dark and smoky from the coke ovens, that it was just before day; that the cut east of the crossing was about three hundred and fifty feet from where the mules were killed; that the curve was to the left, and he on the right side of the engine going west, and his vision thereby obstructed. His head light was not a very good one, but he says he does not think that a good one would have enabled him to see much better on account of the miners' lights, as they blinded him. He could see, he thinks, about one hundred feet ahead of his engine, and the fireman about the same distance. Dixon, the fireman, says: "I was looking out for obstructions. * * * I saw the mules just before we hit them. * * * I could not tell you whether they were standing still or coming ahead, or what they were doing. It was dark, and the light from the coke ovens was shining over there right in my face." Asked how far away the mules were when he first saw them, he says: "They were ten or fifteen feet to the best of my knowledge." Considerable reliance is placed by plaintiff on the testimony of this witness on cross-examination, which implies that the mules had gone up the track to within fifty feet of the crossing, when they were struck by the en-

gine, that is that they had traveled from the point where they went on the track, opposite the stable, up the track about two hundred and fifty feet; thereby disagreeing with all the plaintiff's witnesses, and the testimony of the engineer, who says the mules were struck just as they were crossing the track. The witness had been asked: "How far from the stable up toward the crossing were the mules hit?" He evidently meant to say about fifty feet; but whatever the fact may be, he does say that he is not sure about this statement. But if the fact was, that the mules were struck within so short a distance from the railroad crossing, we do not see that this fact would make a better case for plaintiff. It would destroy very much the force of the testimony of its witnesses, to the effect that the mules could have been seen for a distance of three hundred feet from the crossing, before they were hit by the engine.

In our view of this evidence it wholly fails to make out a case of negligence, and liability on the part of the defendant company. In what particular does it show defendant negligent? The testimony of the plaintiff's own witnesses is that the mules went directly from the stable onto the track, and in front of the engine, and were struck within fifteen to fifty feet from the place where they got on the track. Even if the trainmen could have seen, or did see the mules in front of the stable, or going in the direction of the track, they may have thought, as did witness Cumbo, who was within fifty feet of them, that they were in charge of the driver, and would be taken care of; and that plaintiff's own servants, standing at the stable, in plain sight of the approaching engine, would not allow them to go upon the track and be killed. We judicially know that it is still dark at 6:45 or 7:00 o'clock a. m. in the month of January. We are persuaded also that the light and smoke from the coke ovens, and the miners' lights, were well calculated to confuse and obscure the vision of the trainmen at that early hour. It would be carrying the doctrine of negligence very far, we think, to hold the defendant liable on this evidence. We think the case one of inevitable accident, and that it is controlled in its facts, and the legal principles applicable, by *Toudy v. Norfolk & W. R. Co.*, 38 W. Va. 694, 18 S. E. 896; *Lovejoy v. C. & O. Ry. Co.*, 41 W. Va. 693, 24 S. E. 599, and other cases. The rules and principles of these cases require a reversal of the judgment below, and the awarding of a new trial to defendant.

It is urged by the defendant that, as the court below denied its motion to exclude plaintiff's evidence, and rejected its instruction number one to the jury to find for the defendant, which was error, we should enter judgment here for the defendant, notwith-

standing the verdict. But we can not clearly see that a different case may not be made on a new trial. In such cases our practice, declared in recent decisions, is to simply reverse the judgment below, and award a new trial. Accordingly, the judgment below will be reversed and a new trial awarded.

(60 W. Va. 223)

SNEDEKER v. RULONG.

(Supreme Court of Appeals of West Virginia.
April 25, 1911.)

(Syllabus by the Court.)

1. WILLS (§ 360*)—CONTEST—IRREGULARITY—WAIVER OF OBJECTIONS.

It is irregular for a contestant to institute contest proceedings before a will is offered for probate by some one desiring its probate; but if a proponent, after objecting, appears thereto, and offers evidence to establish the due execution of the will, and on appeal by the contestant, from the order or sentence of the county court, to the circuit court, again appears, and without objection there takes the affirmative of the issue, *devisavit vel non*, and there again offers the will for probate, he will in this court be treated as having waived his objection to the regularity of the proceedings begun in the county court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 825; Dec. Dig. § 360.*]

2. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE TO SUPPORT.

If there be evidence tending in some appreciable degree to support the theory of proposed instructions, it is not error to give such instructions to the jury, though the evidence be slight, or even insufficient to support a verdict based entirely on such theory.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596-612; Dec. Dig. § 252.*]

3. WILLS (§ 166*)—VALIDITY—UNDUE INFLUENCE—EVIDENCE.

Undue influence sufficient to overthrow a will will not be inferred from opportunity, suspicion, physical or even mental weakness, or from attachment or love for, or a desire to gratify the wishes of a beneficiary. It is necessary to show in addition that the free agency of the testator, at the time of the execution of the will, was overcome thereby.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

4. WILLS (§ 386*)—VALIDITY—CONFLICTING EVIDENCE—REVIEW.

Where a will is offered for probate, as a holographic, and on an issue *devisavit vel non*, the evidence is conflicting on the question whether the will was wholly written by the testator, and signed by him, the verdict of the jury will not be set aside, unless shown to have been influenced by fraud, bias, prejudice or corruption, or some other undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 359; Dec. Dig. § 386.*]

Error to Circuit Court, Marshall County.

Proceeding by J. M. Snedeker to contest probate of a writing offered by J. M. Rulong as the last will and testament of Lula L. Conner, deceased. From an order of the county court admitting same to probate, Snedeker appealed to the circuit court, where judgment denying probate was pro-

nounced, and Rulong brings error. Affirmed.

C. A. Showacre and D. B. Evans, for plaintiff in error. Martin Brown, for defendant in error.

MILLER, J. On appeal by Snedeker, contestant, to the circuit court, from so much of the order or sentence of the county court, as admitted to probate, as the last will and testament of Lula L. Conner, deceased, a paper writing, dated January 23, 1909, the jury upon the issue of *devisavit vel non*, found, that neither the writing, dated December 9, 1908, also involved therein, nor said writing of January 23, 1909, offered for probate, taken separately or together, constituted the true last will and testament of said decedent.

On this verdict the court below denied the motion of Rulong, proponent, and devisee, to enter judgment, *non obstante veredicto*, that said paper writing, dated January 23, 1909, was the true and last will and testament of said decedent; and also his motion to set aside the verdict of the jury and grant him a new trial. And on November 6, 1909, the court pronounced the judgment complained of, that neither the said writing of December 9, 1908, nor the said writing of January 23, 1909, separately or together, constituted the true last will and testament of said Lula L. Conner.

To this judgment, on the petition of Rulong, a writ of error was awarded, bringing the case here for review, for the errors assigned.

[1] A preliminary point presented in the briefs, is that as no one who desired it had offered the alleged wills for probate in the county court, and as the proceedings there had been initiated by Snedeker, contestant, that court should not have proceeded, over the objections of Rulong, to try the contest begun by Snedeker. Section 26, chapter 77, Code 1906, does not authorize the institution of such a contest, before the will has been offered for probate by some one desiring the probate thereof. But Rulong did not stand on his objection, either in the county court, or on appeal, in the circuit court. After his objection had been overruled by the county court, he took the affirmative, and offered evidence to prove the due execution of said paper writings, resulting in the order and sentence of that court, denying the probate of the paper of December 9, 1908, but admitting to probate the paper of January 23, 1909, as the true last will and testament of said testatrix.

In the circuit court, on appeal, no question was presented by proponent as to the regularity of the proceedings in the county court. In the circuit court the proceedings were altogether regular, resulting in the judgment now under review. There the proponent, without again questioning the regularity of the proceedings in the county court,

again took the affirmative of establishing the due and proper executions of the testamentary papers, and there, after the verdict, moved the court, notwithstanding the verdict, to pronounce judgment that the said paper writing of January 23, 1909, is the true and last will and testament of said Lula L. Conner. We are of opinion, therefore, that Rulong must be regarded as having waived all objections to the irregularity of the proceedings in the county court.

But three other points of error are presented: First, the giving of contestant's instructions to the jury, numbers one, six, seven, eight and nine; second, overruling proponent's motion for judgment *non obstante veredicto*; third, overruling proponent's motion to set aside the verdict and award him a new trial.

First, as to the instructions. It is not claimed that these instructions do not state correct legal propositions. The contention is that there was no evidence justifying them, and that for this reason they were misleading and ought not to have been given. Without quoting, all of them, except the eighth, were intended to cover contestant's theory of undue influence, controlling the mind of the testatrix. Numbers one, seven and nine seem to have been approved, as correct legal propositions, in *McMechen v. McMechen*, 17 W. Va. 711, 41 Am. Rep. 682; and number four, in *Forney v. Ferrell*, 4 W. Va. 737. Number eight related to the theory of incompetency, and simply told the jury that they might consider in connection with all the other evidence on that question, the unnatural disposition of her property by the testatrix to others than her next of kin, her living father, mother and sisters. The other instructions of contestant given, and not excepted to, were intended to cover his theory that said testamentary papers were not written, or wholly written and signed by the testatrix, and that not being witnessed, as required by section 3, chapter 77, Code 1906, could not be probated as her will, the burden of proving which and to establish the due execution of which was devolved, by the statute, on the proponent thereof. The proponent's theories on these and other questions, were fully covered by the eight several instructions given the jury at his instance. The case seems to have been fully and fairly tried and submitted to the jury, on all questions presented by the evidence.

[2] But did the evidence warrant contestant's several instructions given on the theory of incompetency and undue influence? We think it did. By so saying we must not be understood as indicating the opinion that the evidence justified the verdict of the jury on these theories. What we mean to say is, that the evidence tended in an appreciable degree to establish these theories of the case, justifying the giving of the instructions, and that no error was committed in doing so. As was said by Judge Poffenbarg-

er, in *State v. Clifford*, 59 W. Va. 1, 18, 52 S. E. 981, 988: "A court need not withhold an instruction for paucity of evidence, if there be any, tending, in an appreciable degree to establish the hypothesis embodied in the instruction." Citing and quoting from Judge Lee in *Hopkins v. Richardson*, 9 Grat. (Va.) 485, and criticising the expressions of some of our previous decisions, and relying on *Carrico v. Railroad Co.*, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50, as justifying his conclusion. The later case of *Diddle v. Casualty Co.*, 65 W. Va. 170, 63 S. E. 962, 22 L. R. A. (N. S.) 779, point eight of the syllabus is also applicable.

[3] We have carefully examined the evidence on the questions of incompetency, and undue influence, and while we find evidence of an appreciable degree justifying the giving of the instructions on these theories, it is very doubtful whether the verdict could be justified on these theories. Indeed our doubt, based on numerous prior decisions, amounts to substantial conviction that the verdict and judgment, if they stood alone on these theories, and the evidence thereon, would have to be reversed. It is not only proven, but admitted, that the testatrix was sick and weak physically, at the dates of the alleged execution of these papers; that Rulong, who practiced the profession of "Masseur,"—treatment of the body, as described by him, by the process of manipulation, concussion, kneading and rubbing, and who had been employed, professionally, by Mrs. Conner's husband, before his death, and afterwards by her; had visited her nearly every day, sometimes remaining with her for long periods, and in this way, and by befriending her in other ways, had gained great favor with, and influence over her, and had many opportunities to unduly influence Mrs. Conner; and had gone to the extent of advising her to make a will. Other facts proven arouse grave suspicions of improper and undue influence, by Rulong; but our decisions say that, opportunity, suspicion, physical and even mental weakness, attachment or love for, and desire to gratify the wishes of a beneficiary, are not enough to overthrow a will, if the free agency of the testator, at the time of the execution of his will, be not overcome by undue influence; and that such undue influence must have amounted to such force or coercion as to overcome such free agency. *Woodville v. Woodville*, 63 W. Va. 286, 60 S. E. 140; *Stewart v. Lyons*, 54 W. Va. 665, 47 S. E. 442, and the numerous prior decisions cited therein. We find little in the evidence justifying the conclusion that the testatrix did not, at the date of these papers, have sufficient mind to execute a will; or that her free agency was then overcome by Rulong.

[4] But may the verdict and judgment stand on the other theory of the case, name-

ly, that the papers were not wholly written and signed by the testatrix? We think it can. The county court found against the paper of December 9, 1908. The motion of the proponent in the circuit court, for judgment *non obstante veredicto*, did not include a motion for a judgment of probate of that paper; that motion was limited to the paper of January 23, 1909. Does this not show lack of faith on his part in the validity of that paper? The evidence relating to handwriting was practically the same as to both papers. The opinion of the witnesses as to handwriting and signatures of the testatrix, and their comparisons of these papers with her letters and checks introduced was conflicting. The jury and the court below heard the witnesses, had all the original papers before them; and had better opportunities than we have of getting at the truth. The sufficiency of the evidence was challenged in the court below, and was deliberately considered, weighed and passed upon by an able, painstaking and learned judge; and it is of such a conflicting character as to preclude us from overthrowing the verdict and the judgment, for want of sufficient evidence to support them. To do so would be violative of rules and principles too familiar to require repetition. Our plain duty, therefore, is to affirm the judgment.

(69 W. Va. 216)

DAWKINS v. ELLIS.

(Supreme Court of Appeals of West Virginia.
April 25, 1911. Rehearing Denied
May 19, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 86*)—ATTACHMENT—PLEADING.

In an attachment before a justice, when the ground of attachment justifies the issuance of the writ before maturity of the debt, it is not absolutely essential to set out that the debt is due or when it will become due, if the debt is otherwise sufficiently described.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 282, 284; Dec. Dig. § 86.*]

2. APPEAL AND ERROR (§ 502*)—REVIEW—EXCEPTIONS TO RULINGS—MOTION FOR NEW TRIAL—NECESSITY.

Exceptions taken to rulings of the court in the progress of a trial are not available in the appellate court, though made part of the record by bill of exceptions or otherwise, unless the record shows a motion for a new trial made and overruled below and also shows an exception to the action of the court in refusing a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2305-2309; Dec. Dig. § 502.*]

Error to Circuit Court, Kanawha County.
Action by J. W. Dawkins against E. S. Ellis. Judgment for plaintiff before a justice, and on appeal to the intermediate court judgment was again rendered for plaintiff, and defendant brings error. Affirmed.

E. E. Robertson and Linn, Byrne & Linn, for plaintiff in error. M. M. Robertson, D. W. Taylor, and J. A. Seaman, for defendant in error.

ROBINSON, J. Dawkins sued Ellis before a justice of the peace and took out an attachment with the action on the ground of fraud in the procurement of the debt. The justice gave judgment for plaintiff, and also sustained the attachment. On appeal to the intermediate court, a motion to quash the attachment was overruled, and a trial was had before a jury, which resulted in judgment for plaintiff and an order sustaining the attachment. Defendant was denied a writ of error by the circuit court. Thereafter, he obtained a writ of error from one of the judges of this court.

[1] The action of the court in overruling the motion to quash the attachment was duly excepted to; and it is relied on as error. The writ of attachment and the affidavit supporting the same are in compliance with the statute for such proceedings before justices. The debt is sufficiently described, and good ground for attachment is sufficiently set forth. It was not absolutely essential to show that the debt was due or to state when it would become due, since the ground of attachment was one which justified the issuance of the writ even before the maturity of the debt. The claim was definitely described by other particulars.

[2] There are two other assignments of error. One relates to the refusal at the trial to exclude alleged improper testimony; the other to the refusal to set aside the verdict and to grant a new trial. Neither of these can be considered, for no exception was taken to the action of the court in refusing to set aside the verdict and grant a new trial. Defendant, as far as the record shows, willingly submitted to the action of the court in this behalf. While there is an exception to the refusal to exclude the alleged improper testimony, yet that can avail nothing without an exception to the court's action in refusing a new trial. The exception in relation to improper testimony was saved as a reason for securing a new trial if the verdict should be against defendant. But defendant did not pursue this line far enough. He did not pursue it at all after there was refusal to set aside the verdict against him. It was still necessary to ask that the verdict be set aside and a new trial awarded, and also to save an exception to the denial of that request. Were we to pass on the exception to the admission of testimony and find that some testimony was improperly admitted, we could not disturb the verdict, since no objection was made to the refusal to disturb it below. The acquiescence in the refusal to grant the major motion so covers the objection to the refusal to grant the minor one

that the latter is waived. This rule is established by a pronounced line of authorities in the Virginias. In 5 Enc. Dig. Va. & W. Va. 372, the cases are cited, and the matter is summed up thus: "Where exceptions are taken to rulings of the court in the progress of a trial before a jury, such exceptions are not available in the appellate court, though made part of the record by bill of exceptions or otherwise, unless the record shows that a motion for a new trial was made in the court below and the action of the court in refusing a new trial was excepted to. In the absence of such motion the error will be considered to have been waived."

An order will be entered affirming the judgment.

(39 W. Va. 85)

BANK OF GASSAWAY v. STALNAKER
et al.

(Supreme Court of Appeals of West Virginia.
April 4, 1911. Rehearing Denied
May 17, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 52*)—CIVIL JURISDICTION.

The civil jurisdiction of a justice cannot be extended, even by legislative enactment, beyond the limits of the justice's county.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 146; Dec. Dig. § 52.*]

2. JUSTICES OF THE PEACE (§ 52*)—JURISDICTION—TERRITORIAL EXTENT—GARNISHMENT.

A justice has no jurisdiction over one as garnishee if he resides in another county and is not served with summons in the justice's own county.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 52.*]

3. JUSTICES OF THE PEACE (§ 53*)—JURISDICTION—GARNISHMENT.

A justice cannot summon one as garnishee from another county, and, on his default to appear and answer, render a valid judgment against him in favor of the judgment creditor.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 147; Dec. Dig. § 53.*]

Error to Circuit Court, Clay County.

Action by the Bank of Gassaway against Mary Stalnakar and others. Judgment for defendants, and plaintiff brings error. Reversed.

Haymond & Fox, for plaintiff in error. James Coberly and Jared L. Wamsley, for defendants in error.

ROBINSON, J. Can a justice summon one as garnishee from another county than that of the justice, and, upon his default to appear and answer, render a valid judgment against him in favor of the judgment creditor? This question alone is presented by the writ of error.

[1] We answer the question in the negative. Such a judgment is totally void for want of jurisdiction. A justice has no civil jurisdiction beyond the limits of his county.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

To that territory his powers are confined by the Constitution itself. Article 8, § 28. It says that "the jurisdiction of justices of the peace shall extend throughout their county." It grants no power that will enable a justice of the peace to render such a judgment as the one under consideration; but, after defining some powers, it further says that "the Legislature may give to justices such additional civil jurisdiction and powers within their respective counties as may be deemed expedient." Mark the two phrases in these constitutional provisions, "throughout their county," and "within their respective counties." Here by constitutional law we have territorial limits fixed for the exercise of a justice's powers. The first phrase allows the jurisdiction to extend to the confines of the county; the second binds the lawmakers to restrain their further grant of powers within such limits. Pretty plain and specific is all this. Nowhere does the Constitution justify civil action on the part of a justice beyond the county lines. Quite plainly does it forbid the extension of power in civil matters beyond those limits, even though that extension be by the sanction of the Legislature itself.

[2] True it is that some statutes impliedly indicate that a garnishee may be summoned from another county and a judgment be rendered against him on such process. Code 1906, ch. 50, §§ 120-124. But none of these sections expressly provide that a garnishee may be served with summons beyond the county line. The first section cited simply says in effect that process of garnishment against one residing in another county may be issued. It does not assert that it may be served in another county. Certainly service on a garnishee in the county of the justice, though the garnishee live elsewhere, would be good. It may be that procedure only to that extent was contemplated by this enactment. If the Legislature intended more, it ignored the constitutional inhibition upon itself in regard to granting powers to justices. "If a court is invested with jurisdiction by the constitution, such jurisdiction cannot be taken away, changed, or modified by statute." Works on Courts and their Jurisdiction (2d Ed.) 146.

The same chapter in relation to procedure before justices, when it comes to the subject of the service of process on a garnishee in an attachment, expressly confines the service within the county. Code 1906, ch. 50, §§ 193 and 197. But, for these attachment cases, there is a similar provision as that one for suggestions on judgments, providing the manner in which a garnishee residing out of the county may answer. Code 1906, ch. 50, § 206. This may be said to indicate that while a garnishee out of the county may be summoned, and while he may answer from out of the county, yet it was intended that he should be reached and caused so to answer

only by service with process in the county. At any rate, that procedure is all that the constitutional powers of a justice will warrant.

Then again, it may be that these references to a garnishee that resides in another county have been inadvertently left in our statutes. They were there long before the adoption of our present Constitution. They are found first in the Acts of 1865. The Constitution then in force contained no such terms in relation to the territorial limit of powers of justices as we find in the present one.

There is a direct way to reach by garnishment a debt in the hands of a creditor of a judgment debtor when that creditor resides out of the county of the justice's court that rendered the judgment, and cannot be served with process therein. A transcript of the judgment may be filed in the office of the clerk of the circuit court of the county wherein the judgment is rendered, execution therefrom may be issued to the county wherein the garnishee resides, and upon that execution suggestion proceedings may be had in the circuit court of the last-named county. Code 1906, ch. 50, § 118; ch. 141, § 10.

[3] In the case before us, the record of the justice plainly shows that the judgment against the garnishee is void. It appears that the justice had no jurisdiction over the garnishee, because the summons was served beyond the justice's county. "A justice cannot act outside of his own county in any case." Hogg's Treatise and Forms, § 80. The motion to quash the execution issued on this judgment against the garnishee should have been sustained. The order overruling that motion will be reversed, and the execution will now be quashed.

BRANNON, J., absent.

(69 W. Va. 255)

HEAVNER et al. v. CITY OF ELKINS et al.
(Supreme Court of Appeals of West Virginia.
April 25, 1911.)

(Syllabus by the Court.)

CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—ASSESSMENT.

An assessment by a city upon lot owners for cost of paving a street is not contrary to amendment 14 of the national Constitution, or section 10 of article 3 of the state Constitution (Code 1906, p. li), either because the assessment is by the number of front feet of lots abutting on the street, or because there was no notice of such assessment to the lot owners.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

Appeal from Circuit Court, Randolph County.

Bill by John M. Heavenner and others against the City of Elkins and others. Decree for defendants, and plaintiffs appeal. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

James A. Bent, for appellants. Samuel T. Spears, for appellees.

BRANNON, J. Under power given it by Acts 1906, c. 6, amending section 28 of its charter act, the city of Elkins caused certain of its streets to be paved, and assessed two-thirds of the cost upon owners of lots fronting on those streets. Such taxes or assessments were placed in the hands of its collector for enforcement of payment, and certain chancery suits to enforce such assessments as liens upon the lots charged therewith were instituted in the circuit court of Randolph county against certain lot owners, and other suits were about to be brought for the same purpose against other lot owners. John E. Heavner, George W. Adamson, and Seymour Harper, residents and taxpayers of the city, suing on behalf of themselves and all other citizens, property owners, and taxpayers of the city whose property was so assessed, sued out an injunction to restrain the city and its tax collector from levying the said assessments upon their property, and also to restrain the further prosecution of suits then pending, and to restrain the city from instituting such other suits. The decree in the case was one dissolving the injunction and dismissing the bill, from which decree Heavner and Adamson appeal.

This case is an important one in principle. It involves the right of municipal corporations to improve their streets by paving and otherwise and charge the cost thereof to abutting lot owners. This is an important function of cities and towns, essential, not merely to their beautification, but also to convenience in the use of the streets and the public health. In these days of large population and large business the power is indispensable. That power has been frequently sustained as constitutional and valid. *City of Parkersburg v. Tavenner*, 42 W. Va. 486, 26 S. E. 179; *Hager v. Melton*, 66 W. Va. 62, 66 S. E. 13; *Chadwick v. Kelly*, 187 U. S. 540, 23 Sup. Ct. 175, 47 L. Ed. 293. However, this power is not contested in this case. This case is also important in the respect that it is the first case in this state directly involving the power of a city to fix the amount of such assessment by the front foot, and also whether there must be notice at some stage of the proceeding to the lot owner. Counsel tells us that the assessments involved in this case are void as depriving persons of property without due process of law, and consequently violative of the fifth and fourteenth amendments of the Constitution of the United States and of the state Constitution in their prohibition against depriving persons of property without due process of law. I may remark that the fifth amendment has nothing to do with this case, as that is only a restraint upon the federal and not state government. However, this is immaterial, as the fourteenth amendment

and the state Constitution contain the same provision.

The plaintiffs strongly urge that these assessments are void and contrary to such constitutional law, because the assessments were not made according to the benefits conferred upon each lot by the paving improvement, but by the frontage of the lots on the streets; that is, by the front foot. At one time it was a great question whether the assessment could be so made. Some state courts held that it could not be, but that the assessment must be measured by the benefits conferred on each lot. *Violett v. Alexandria*, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. Rep. 825. Such was the holding, as commonly construed, of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. But in *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, that construction of the *Norwood Case* was repudiated. The common construction was that the *Norwood Case* condemned such assessment; but, if it did, it has been overruled or ignored by the Supreme Court. The well-considered case of *French v. Barber Co.*, just cited, holds as follows: "The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to the benefits, may be authorized by the Legislature, and this will not constitute a taking of property without due process of law." This case has been followed in *Tonawanda v. Lyon*, 181 U. S. 389, 21 Sup. Ct. 609, 45 L. Ed. 908; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 21 Sup. Ct. 644, 45 L. Ed. 914; *Webster v. Fargo*, 181 U. S. 394, 21 Sup. Ct. 623, 45 L. Ed. 912; *Chadwick v. Kelly*, 187 U. S. 540, 23 Sup. Ct. 175, 47 L. Ed. 293; *Davis v. City of Lynchburg*, 84 Va. 861, 6 S. E. 230. The Supreme Court has said: "A system of delusive exactness should not be extracted from the very general language of the fourteenth amendment in order to destroy methods of taxation which were well known when the amendment was adopted, and which no one then supposed would be disturbed." *L. & N. Ry. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819. Thus we hold the assessment by the front foot is not an unconstitutional mode of assessment. What fairer mode of assessment?

This assessment is assaulted also on the ground that no notice was given the lot owners of the assessment. It is contended that, where any proceeding deprivative of property takes place, the first requirement is that there shall be notice, and that, where there is none, is not due process of law, and the state and federal Constitutions are violated. That depends. That depends on the nature of the case and many other considerations. Since the coming of the fourteenth amendment, the powers of the states by their constituted authorities and of counties and mu-

municipalities is almost daily challenged. If that amendment means what it is often claimed to mean, then the states have very narrow powers. As was said in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, and repeated in *French v. Barber Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, there exists some strange misconception of the scope of the provision in the fourteenth amendment in the thought that almost every act of state authority can be arraigned as void at the bar of the Supreme Court, or branded in the state courts as repugnant to the fourteenth amendment. The Supreme Court, the final arbiter on the question, has expressed its strong condemnation of such a construction of that amendment. Now as to the necessity of notice. This power of local assessment for improvements rests under the taxing power. So the courts everywhere say. It is well-known, an axiom in the law, that ordinary annual taxation does not require notice and judicial process. If it did, the heels of government would halt. If it were material here, I would admit that such is not the rule with special assessments like those in this case. They are not annual, but occasional and special. *Judson on Taxation*, § 327, says: "There is a distinction to be observed between assessments for the regularly recurring general taxation and those specially made for local improvements. The former are reviewed by a board of equalization which sits regularly at stated intervals, and of these sessions the taxpayer is bound to take notice, so that no special notice is required. Special assessments, on the other hand, are not made at regular intervals, but whenever the public necessity or convenience requires. The taxpayer therefore cannot be charged with constructive notice of such proceedings, and he must have some specific notice of the proposed charge against his property. This notice need not be personal, but may be sufficiently made by publication." And I would not deny that, where the assessment is to be tested in amount by law or ordinance by benefits conferred on the property, a notice to the lot owner at some stage of the proceeding before the assessment becomes final must be given. *Judson on Taxation*, § 312; *Page & Jones on Taxation*, § 119; *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270. As this charter act contains no requirement of notice, it is said to be for that reason unconstitutional. We cannot accede to this proposition. If the nature of the case is such as to require notice, we think that the requirement would be implied, and that there must be such notice, but that it would not render the act void for that reason. *B. & O. R. Co. v. P. W. & Ky. Co.*, 17 W. Va. 812. I have said that if the process of charge were according to the benefits accruing to the lots that notice would be essential; but in this case it was by the

front foot. In 25 Am. & Eng. Ency. L. 1215, it is stated that, where the assessment is dependent on special benefits to the property, it is essential that notice be given; but it is further stated that, "Where, however, the only act necessary to ascertain the amount of an assessment upon property is a plain mathematical calculation, as where the apportionment is made by the front foot rule or according to area, and no discretion is left to the officers, a notice seems not to be essential to the validity of the assessment and levy," unless the statute require a notice. For this proposition are cited the cases of *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, and *Shumate v. Heman*, 181 U. S. 402, 21 Sup. Ct. 645, 45 L. Ed. 922, and other cases. Our Code in chapter 47, § 34, authorizes such paving, and fixes the front foot rule as the one to be observed in the assessment, and we see such rule is not repugnant to the federal Constitution. The assessment conforms to this rule. Thus we hold that this assessment is not void under either of the Constitutions for want of notice.

As said above, this injunction went to restrain the prosecution of regular suits in the circuit court to enforce these assessments. Of course, the injunction would be untenable in that feature, even if the assessment were unconstitutional, because the circuit court would have jurisdiction to pass on the question, and the party would have his day in court, and could not say that he had no hearing, and that the proceeding was without due process. The plaintiffs could not thus deprive the court of general jurisdiction the benefit of that jurisdiction.

Our conclusion is to affirm the decree.

(69 W. Va. 263)

STATE v. BAKER et al.

(Supreme Court of Appeals of West Virginia.
April 25, 1911.)

(Syllabus by the Court.)

1. GAMING (§ 75*)—KEEPING GAMING HOUSE—MISDEMEANOR.

The keeping of a common gaming house is a misdemeanor at common law, and consequently a violation of the law of this state.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 199-201; Dec. Dig. § 75.*]

2. GAMING (§ 75*)—KEEPING GAMBLING HOUSE.

That only those who gamble are admitted to the room where the gambling is carried on, and the rest of the public are excluded therefrom, does not affect the crime.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 199-201; Dec. Dig. § 75.*]

3. GAMING (§ 75*)—KEEPING GAMBLING HOUSE.

The keeping of a common gaming house is unlawful, whether the gambling therein be lawful or unlawful.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 199-201; Dec. Dig. § 75.*]

4. GAMING (§ 75*)—KEEPING GAMBLING HOUSE.

It is not material that a common gaming house should be kept for lucre or profit.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 199-201; Dec. Dig. § 75.*]

5. GAMING (§ 75*)—KEEPING GAMBLING HOUSE.

It is not essential to constitute the offense of keeping a common gaming house that the gambling therein should be in view of the public, or that the public should be disturbed by noise therein.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 199-201; Dec. Dig. § 75.*]

Error to Circuit Court, Cabell County.

Wiley Baker and Dick Rader were convicted of keeping a gaming house, and bring error. Affirmed.

Marcum & Shepherd, for plaintiffs in error. Wm. G. Conley, Atty. Gen., and Jean F. Smith, Pros. Atty., for the States

WILLIAMS, P. Wiley Baker and Dick Rader were indicted, tried, and convicted, and adjudged by the circuit court of Cabell county to pay a fine of \$50 each, and the costs of their prosecution, for keeping a common gaming house; and they have brought the case here by writ of error.

[1] Is the keeping of a common gaming house a violation of the law of this state? We think it is. It was certainly an offense at the common law. "Common gaming houses are a public nuisance at common law, being detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness and avaricious ways of gaining property persons whose time might otherwise be employed for the good of the community." 2 Russell's Law of Crimes (7th Eng. Ed.) 1897; 1 Bishop's New Crim. Law, § 504. In section 1135, Bishop says: "A common gaming house is a species of disorderly house; the disorder consisting of its allurements tending to evil." Its unlawfulness does not depend upon the unlawfulness of the games which may be therein played. The keeping of a common gaming house is forbidden because it is a public nuisance, tending to evil consequences. All the text-writers say that it is an indictable offense at the common law. Joyce's Law of Nuisance, § 395; 1 Wood on Nuisance, § 45; Bacon's Abridgment, p. 223; 14 A. & E. E. L. 668; 20 Cyc. 893; Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275, 65 L. R. A. 616, 104 Am. St. Rep. 1004; State v. Ehrlick, 65 W. Va. 700, 64 S. E. 933, 23 L. R. A. (N. S.) 691; Commonwealth v. Warren, 161 Mass. 281, 37 N. E. 172; Thrower v. State, 117 Ga. 753, 45 S. E. 126.

The common law of England was made a part of the law of Virginia; and later, the law of this state. In May, 1776, Virginia passed an ordinance providing that "the common law of England, all statutes or acts

of Parliament made in aid of the common law prior to the fourth year of the reign of King James the First, and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony."

9 Henning's Statutes at Large, 127. The General Assembly by act passed December 27, 1792, repealed so much of the above ordinance as relates to the English statutes made in aid of the common law; but that part of the ordinance making the common law a part of the law of Virginia was not repealed, and the common law of England continued to be the law of Virginia. 1 Min. 51. The first Constitution (1861-63) of West Virginia which became the law of the state upon its admission into the Union (section 8, art. 11) declares: "Such parts of the common law and of the laws of the state of Virginia as are in force within the boundaries of the state of West Virginia, when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this state until altered or repealed by the Legislature." And section 21 of article 8 of the present Constitution (Code 1906, lxxviii) also declares the common law to be the law of this state until altered or repealed by the Legislature. There is no statute in this state which repealed the common law in relation to the offense of keeping a common gaming house; and the common law relating thereto is the law of this state. The statutes against gaming do not repeal by implication the common-law offense of keeping a common gaming house.

The demurrer to the indictment was properly overruled. The offense of keeping a common gaming house is sufficiently alleged. The fact that the indictment alleges that the games which were played in the house kept by defendants were unlawful games is immaterial. Such allegation may be treated as surplusage. It is not necessary that the games which were played should have been unlawful in order to constitute the offense with which defendants are charged.

The state produced a number of witnesses who testified that they had gambled in the room kept by defendants, and that they sometimes lost money, and sometimes won money, at a game played with cards called "stud poker." It does not appear that any greater amount of money than \$1 or \$2 was ever won or lost by one person at any one game or sitting. But the amount won or lost is immaterial, as the amount of money or value of the thing gambled for consti-

tutes no part of the offense of keeping a common gaming house.

It appears that the gambling room was over Rau's barber shop in the city of Huntington, and had to be reached by way of an alley. A stairway led from the alley up to a door opening into a hall or anteroom; and, in order to obtain admission, the visitor had to knock on this outer door, and, if the guard or keeper of the door was satisfied that he was a gambler, he was then admitted. From this hall, or anteroom, another door led into another and still more private room where the gambling was carried on. There was a hole in the door leading into this room, through which the keeper inside could look out in order to determine whether the visitor was a proper person to be admitted. If he was known to the gambling fraternity as a gambler, he was admitted, if not too drunk. Only those who wished to gamble were admitted. The room was kept closed, and the gambling could not be seen except by those in the room. Some of the witnesses were advised of the location of this gambling room by persons on the street who knew of its location, and who would tell them when a game was going on. It appears that this room was only kept and used for the purpose of gambling. It does not appear that the room was used for any other purpose than as a gambling place. Neither does it appear that the defendants kept this gaming house for gain or lucre. It is testified to by at least one witness, who says he used to run the place himself, that the defendants kept this gaming house in the year 1909 prior to October. The indictment was found on the 28th of October, 1909. Defendants offered no testimony, and there is no conflict in the evidence. Defendants rested upon their motion to strike out the state's evidence. This motion was overruled by the court, and the case allowed to go to the jury, and defendants excepted.

[4] The fact that it is not proven that defendants kept the room for lucre is not material. True, some authorities hold that to constitute the offense of keeping a common gaming house it must be alleged and proven that it was kept for gain or lucre; but the better opinion, as well as the weight of authority, is to the contrary. The offense consists in the keeping of a gaming house. The keeping of such house is, in law, a public nuisance. Its character as a nuisance in no wise depends upon the matter of profit to those who maintain it. 1 Bishop's Crim. Law, §§ 1086, 1137; 14 A. & E. E. L. 715.

[5] That the game was not carried on in view of the outside public, or that the public was not disturbed by noise from within, does not affect the case. These are not necessary elements of the offense. 14 A. & E. E. L. 697, and cases cited in notes 3 and 4.

[2] It is none the less a common gaming house because only those who desired to gamble were admitted within its walls. Says Hawkins, J., in Jenks v. Turpin, 13 L. R., Q. B. D., 515: "To no gambling house is the public at large invited to go without restriction of some sort or other. The keeper of such a house has always the right to admit or refuse admission to any one he pleases, or to make such rules as he may think fit for the regulation of such admission." Again, on the same page, the learned judge further says: "It is true that no annoying interference in the public street can be pointed to, so that in that sense a public nuisance can be said to have been created; but that is not necessary"—citing Reg. v. Rice et al., 2 L. R., 1 C. C. R. 21, which we do not find in the library. Commonwealth v. Blankinship, 165 Mass. 40, 42 N. E. 115; Commonwealth v. Warren, 161 Mass. 281, 37 N. E. 172; 14 A. & E. E. L. 679; 20 Cyc. 893.

[3] Counsel for defendants cite State v. Maynard, 66 W. Va. 522, 66 S. E. 688, as authority for the proposition that, in order to constitute the offense of keeping a common gaming house, it must be shown that it was carried on in a public place. That case was an indictment under section 4 of chapter 151, Code 1906, for playing cards in a public place, and the proof showed that the playing was carried on in a secluded place. It was quite a different case from the present one. There the player was indicted for playing cards at a public place, a statutory offense; here the keepers are indicted for keeping a common gaming house, a common-law offense, and it matters not whether the gambling carried on in the house was visible to the general public or was lawful or unlawful. This case is not controlled by that one.

We find no error in the judgment of the court below, and it will be affirmed.

(69 W. Va. 313)

CLARK v. BEARD.

(Supreme Court of Appeals of West Virginia.
May 2, 1911. Rehearing Denied
May 19, 1911.)

(Syllabus by the Court.)

1. TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION.

Adverse possession between cotenants. Some principles restated.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-62; Dec. Dig. § 15.*]

2. FRAUDS, STATUTE OF (§ 99*)—CONVEYANCE OF TITLE TO LAND—PAROL DISCLAIMER.

Vested title in land cannot be divested by mere parol disclaimer. The following writing does not do so: "This receipt is to show I have no interest in the 350 acres that Preston sold to Cherry River Company. This the 20 day of January, 1900. S. H. Clark."

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 188; Dec. Dig. § 99.*]

3. APPEAL AND ERROR (§ 1015*)—REVIEW— WEIGHT OF EVIDENCE.

The Supreme Court will pass on the weight and effect of oral evidence on a motion for a new trial when the justice of the case, in its opinion, demands it, though there be other ground of reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.*]

Error to Circuit Court, Pocahontas County.

Action by Preston S. Clark against Emma O. Beard. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

R. S. Turk and F. R. Hill, for plaintiff in error. L. M. McClintic and Price, Osenton & McPeak, for defendant in error.

BRANNON, J. A motion was made to reject the evidence because the bill of exceptions does not identify it; but there is the evidence found in the bill. It is certified by the stenographer as the evidence in the case, giving names of witnesses, and the order of the judge showing his execution of the bill naming and identifying the witnesses, and saying that the evidence is duly certified by the stenographer. It is also said there was no exception to the decision of the judge overruling the motion for a new trial; but the bill of exceptions says there was.

This is an action of ejectment by Preston S. Clark against Emma O. Beard involving the ownership of coal. The nature of the case will be found in a former decision in the case in 59 W. Va. 669, 53 S. E. 597. When the case went back from this court to the circuit court, a second trial resulted in a verdict and judgment of recovery by the plaintiff. As was settled in the case by our former decision, Preston S. Clark owned the surface of certain lands and half the coal in those lands, and Sherman Clark owned the other half of the coal in those lands, and Emma C. Beard was owner of this half of the coal by devise from her father, Sherman Clark. Thus Preston S. Clark and Sherman Clark were joint tenants in the undivided coal. This is clear from the record and undisputed. Preston Clark admits this. He does not show the scratch of a pen of paper title to this coal, but he claims that he ousted his brother Sherman and acquired title to the coal under the statute of limitations. He says himself as a witness that that is his only title. On what does this claim rest? Some 30 years before the trial Preston Clark opened a coal mine on his land. A little coal was taken from it, and the mine was not fit for use because it "dipped," and filled with water. Then he opened a second mine, and from it some coal was taken; not a large quantity. There was no coal mining in that country then. The land was in the wilds of Pocahontas county, far from a railroad; the coal not worth

anything then. Preston used coal in his house; but Sherman, living distant, did not. Here is one brother taking a little coal from time to time occasionally, intermittently, for mere home and neighborhood use. No mining operations of any extent. No mining business carried on. The coal belonged to two brothers; the surface to Preston. Preston takes a little coal for his own use and that of neighbors; one brother digging on his own land and taking some coal from the common property. How can it be said that this constitutes an ouster of the other brother? Sherman would not deny his brother the privilege of coal of so little value. Preston paid the tax on the land and his brother would not perhaps for that reason protest against his use of a little coal.

[1] And then Preston owned the surface. Is this hostile possession? The law is old that "it is the intention of the tenant or parcener in possession to hold the common property in severalty and exclusively as his own, with notice or knowledge to his cotenant of such intention, that constitutes disseisin," as we said in *Reed v. Bachman*, 61 W. Va. 452, 57 S. E. 769, 123 Am. St. Rep. 996, citing *Cooley v. Porter*, 22 W. Va. 120. There is no show of intention of Preston to claim adversely until very lately, since his brother's death. As a witness he says he had no thought of adverse claim until he wanted to sell. The books say that when possession is taken there must be then intent to claim adversely. *Hudson v. Putney*, 14 W. Va. 561. Probably he never thought of such claim to his brother's coal until after his death, which was in 1901, and the suit was brought in 1904. As he claimed to have had possession for 20 years before that, why did he not sue his brother? Why did he wait until he was dead, and then sue his daughter? A court should be very rigid about defeating a clear title between cotenants on the ground of limitation. Such claim does not address itself with strong favor to a court of justice. Preston Clark does not show a jot or tittle of claim, except this unfounded claim of adverse possession. Could Sherman Clark infer an intention on his brother's part to claim adversely from his taking a little coal from under the surface of his own land? Plainly not. The act did not import such intention. Therefore the plaintiff's case lacks the essential element demanded by all authorities—intention to claim as an enemy of his brother. But not only must there be such intention, but notice of such hostile intention must be brought home to Sherman Clark. *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102. There must be what is considered in law an ouster, an intention to oust and deprive the true owner, evidenced by acts importing only hostility—acts under circumstances importing hostility. And such acts and intent to claim adversely must be brought

home to the knowledge and notice of the owner. We said in the former decision of this case what seems to have been ignored in the trial, that "the statute of limitations does not begin to run in favor of one cotenant of land in possession against another cotenant thereof until actual ouster by the former or some other act or acts on his part amounting to a total denial of the right of the latter, and until notice or knowledge of the act or acts relied on as an ouster is brought home to him; and that the notice or knowledge required must be either actual, or the act relied on as an ouster must be of such an open and notorious character as to be notice of themselves, or reasonably sufficient to put the disseised cotenant on inquiry which, if diligently pursued, will lead to notice or knowledge in fact." Preston Clark on the witness stand does not pretend to say that he ever let his brother know that he was his enemy. He would have been incompetent to do so; but he gives some evidence in the case which is incompetent, but he omits to say that he served such notice on his brother, and he does not prove it. And is it possible to say that this digging of a little coal for home use, not in a big development, coal almost worthless, dug from under the surface of his own land, who with his brother owned the coal, would be notice of adverse possession? It is unreasonable. Is only the taking of rents and profits by one cotenant for his exclusive use evidence of his adverse possession? It would not be between strangers, especially not between brothers. It would give a right to demand compensation from one cotenant taking more than his share of the rents and profits, but would not be adverse possession. It is shown in this case by a little evidence that Sherman Clark passed by the premises sometimes and may have seen the little coal bank open. But would that tell him of hostile claim? Would he have to go to Preston, and inquire whether it was an act of hostility? Would he not think that his brother was taking the little privilege in friendship and brotherhood? Courts and juries must view men's acts and intentions according to the instincts of human nature and social conduct. "Actual ouster of one cotenant in common cannot be presumed except where the possession has become tortious and wrongful by the disloyal acts of the cotenant which must be open, continuous, and notorious so as to preclude all doubt of the character of his holding or the want of knowledge thereof by his cotenant. This conduct must amount to a clear, positive, and continued disclaimer, and disavowal of his cotenant's title, and an assertion of an adverse right, and a knowledge of this must be brought home to his cotenant," we said in *Reed v. Bachman*, 61 W. Va. 456, 57 S. E. 769, 123 Am. St. Rep. 996, quoting from *Bogges v. Meredith*, 16 W. Va. 1. We said so in this very case. We said also in the *Reed Case*

that: "Mere silent possession ever so long by one taking rents and profits without notice or knowledge of such adverse claim on the part of the other will not be adverse possession under the statute." There is not a bit of evidence in this case to prove ouster but the digging of a little coal irregularly, only on occasions, broken use, having no continuity, hardly any notoriety. Thus we hold that the evidence in this case is wanting to show (1) intent of Preston Clark to claim against his brother adversely; (2) want of such acts as manifested ouster under the circumstances in this case; (3) want of notice to Sherman Clark of hostile intent and purpose; and (4) want of continuity of such use as I have spoken of.

Therefore a new trial should have been granted, not exactly on the theory that it was contrary to the evidence, but without evidence to support it. That the verdict is without evidence to support it is another ground for a new trial. This occurs where there has been no proof whatever of material facts or facts in issue, or where the evidence is plainly insufficient to warrant the verdict. See the volume of cases cited for this proposition in 10 *Encyclopedic Digest of Va. and W. Va. Reports*, 453, 454. I say that this verdict is also contrary to law. Why? Because there are certain essential points that the plaintiff must prove, and his evidence does not do so. The verdict is contrary to the law of disseisin and adverse possession between cotenants. Same authority, p. 454; *Ritz v. City*, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148; *Manse-Bruning Shoe Co. v. Prince*, 51 W. Va. 510, 41 S. E. 907. This court is unanimous in the opinion that, if there had been a demurrer to evidence, this court would render a judgment for the defendant for the coal claimed by her in her disclaimer, except the one-eighth of coal in the 1,355 acres mentioned in her disclaimer, she not having given any evidence on the trial as to that eighth. I would myself not hesitate to do so as it is for reasons which I state in *Hoylman v. Railroad*, 65 W. Va. 264, 64 S. E. 536, 22 L. R. A. (N. S.) 741.

As we remand the case, we may advert to some other matters in the record. It is said there was no issue, and this is relied upon as ground for a reversal. It is hardly worth while to mention this, because I find two entries of the plea of not guilty. Or do counsel mean that there is no similitude? That is dispensed with by Code 1906, c. 134, § 3.

It is assigned as error that the court admitted for the plaintiff evidence that Preston S. Clark posted at the coal bank a notice warning persons against entering the coal entry. This would seem to be admissible as a circumstance to show claim; but Preston Clark on the stand says it was only intended to warn off persons stealing coal. Therefore it did not evince claim against his brother. But we would not reverse for its admission.

It played no part in the case, or ought not to do so.

A lease was introduced by which Clark leased to Walton the coal bank. We do not think it was error to admit this as an item under the claim of adverse possession, though standing alone it would have little effect, as it would not bring home notice of ouster. Evidence not contradicted shows that Sherman Clark also gave people leave to take coal.

[2] There was admitted a paper reading: "This receipt is to show I have no interest in the 350 acres that Preston sold to Cherry River Company. This the 20 day of January, 1900. S. H. Clark." I do not see that this bears on the question of adverse claim. Its only tendency is to show a disclaimer of title. But this rude instrument cannot confer title of its own force. As it seems Clark places great reliance on this paper, it may be well to discuss it. It is a parol disclaimer, not a sealed instrument. It is not a deed. It has no parties, no consideration. The legal title to land was in Sherman Clark, for coal in place is part of the land, and, when legal title is vested, a parol disclaimer cannot be divested except by deed or record. Our statute of frauds requires a deed. Such is the doctrine stated in our former decision in this case. See *Wade v. McDougle*, 59 W. Va. 114, 52 S. E. 1026; cases cited in *High v. Pancake*, 42 W. Va. 607, 28 S. E. 536; *Minor's Law Real Prop.* § 1248. I need cite no authority to prove that an agreed destruction of a deed does not destroy the estate in its grantee. It was error to admit this paper, and this would reverse the case.

[3] We have sometimes said that, where there is other ground for reversal, we will not pass on evidence. That depends on the evidence. If there is apparent probability of the case being bettered, perhaps that practice may in some cases be proper; but that is a matter of discretion. We can pass on the evidence if we choose. When we reflect, we may have gone too far in so saying. The party makes a motion for a new trial. The circuit court is bound to pass on it. Why is not this court likewise bound to do so? If there should be a new trial, what we say of the evidence cannot be read to the jury. It would be for the court. This course tends to end litigation. Why refrain from giving an opinion on the evidence when we are satisfied that the case cannot be materially changed on retrial?

It is pointed out that the motion for a new trial does not specify grounds. That does not matter, if the court deems it proper to look through the record for them. It need not do so in voluminous evidence, without specification; but it may do so.

Judgment reversed, verdict set aside, and case remanded.

(89 W. Va. 190)

HAWKINS v. BLAKE et al.

(Supreme Court of Appeals of West Virginia.
April 18, 1911. Rehearing Denied
May 17, 1911.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 36*)—ACTION TO SET ASIDE CONVEYANCE.

The limitation in section 14 of chapter 104 of the Code of 1906, upon suits to avoid voluntary conveyances, is applicable to such a conveyance made with fraudulent design on the part of the grantor, if such design is not known to, nor participated in by, the grantee.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 173; Dec. Dig. § 36.*]

2. LIMITATION OF ACTIONS (§ 60*)—ACTIONS TO SET ASIDE CONVEYANCE—ACCESSION.

Said statute runs from the date of the conveyance, unless the plaintiff is in a position to claim the benefit of some exception from its operation or suspension thereof.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 336; Dec. Dig. § 60.*]

3. LIMITATION OF ACTIONS (§ 37*)—DISTRRAINT—BAR OF STATUTE.

If a debtor procure a conveyance to be made to himself and his infant children jointly, the latter being volunteers and free from the imputation or charge of fraud by reason of the tenderness of their age, and then execute to the creditor a deed of trust on the land, such deed of trust is not the equivalent of a distraint or levy on the subject of the conveyance or any part thereof, and does not affect the interests of the children.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 37.*]

Appeal from Circuit Court, Raleigh County.

Bill by E. B. Hawkins against Mary Blake and others. Decree for plaintiff, and defendants appeal. Modified and affirmed.

File & File, for appellants. Dillon & Nuckolls, for appellee.

POFFENBARGER, J. The decree from which this appeal was taken grows out of transactions following the conveyance from Blake to Hawkins, involved in the chancery cause of *Blake v. O'Neal*, finally decided by this court, and reported in 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. (N. S.) 1147. By that decision, the grantee of Hawkins lost title to the land conveyed to him by Blake. Thereupon he instituted this suit against Blake and his infant children by a second wife to set aside a conveyance made to them and Blake by Wm. E. Godbey and wife at the instance of Blake and in consideration of purchase money paid by him, part of the money he received from Hawkins, as voluntary and made with intent to hinder, delay, and defraud Blake's creditors and especially the plaintiff as one of them. From the decree granting the prayer of the bill, the children and their mother have appealed.

Blake and wife conveyed a tract of land in Fayette county to Hawkins by deed dated February 12, 1902, for and in consideration of \$1,700. On the 5th day of May, 1902,

the conveyance involved here, covering surface land in Raleigh county, was made, in consideration, it is alleged, of \$200 of the money received from Hawkins for the Fayette county land. C. T. Blake and others commenced their suit against Sue O'Neal and others, claiming the land conveyed to Hawkins, and in which they made that claim good on the 23d day of November, 1903. That litigation ended in 1908. This suit was brought in May, 1909, more than seven years after the date of the conveyance it seeks to set aside. At the date of this conveyance, these children of Blake, to whom he caused three-fourths of the Raleigh land to be conveyed, were of tender age, being 11, 9, and 7 years old, respectively.

[1] As more than five years had intervened between the date of the deed and the institution of the suit attacking it, they rely upon the statute of limitations, (section 14 of chapter 104 of the Code), in so far as lack of consideration is relied upon, and deny the allegations of fraud.

That statute says: "No gift, conveyance, assignment, transfer or charge, which is not on consideration deemed valuable in law, shall be avoided, either in whole or in part, for that cause only, unless within five years after it is made, suit be brought for that purpose, or the subject thereof, or some part of it, be distrained or levied upon by or at the suit of a creditor, as to whom such gift, conveyance, assignment, transfer or charge is declared to be void by the second section of the seventy-fourth chapter of this Code." That it precludes relief on the ground of want of consideration, if applicable under the peculiar circumstances shown here, is not denied, but its applicability is. This position is founded, in part, upon the assumption of accrual of the cause of action on the final adjudication against Hawkins in *Blake v. O'Neal*.

[2] As the statute in express terms fixes the date of the conveyance as the date from which it runs, we are unable to give this view our sanction or approval. It says no such conveyance as is mentioned in that section shall be avoided "unless within five years after it is made."

A further objection to the applicability of this statute is founded upon its terms, saying no conveyance which is not on consideration deemed valuable in law shall be avoided for that purpose only, unless suit be brought for the purpose within five years after it is made; fraud on the part of the grantor being another or additional element charged in the bill as a ground of relief.

[3] Fraud on the part of both grantor and grantee clearly and admittedly takes a case out of this statute, but ordinarily the fraud of the grantor must have been participated in by the grantee, to enable a court to set a conveyance aside. It is rather conceded here that, owing to the tender age of the

grantees, they cannot be deemed to have participated in any fraud on the part of the father; but it is plausibly argued that the fraud of the father is an element or factor in the case which makes the suit one to set aside the conveyance not only because made without consideration, but also because it was made to defraud creditors. Though plausible, this theory has been rejected by this court, after careful consideration, and the limitation held to be applicable to all voluntary conveyances, unless fraudulent on the part of both grantees and grantors. *Laidley v. Reynolds*, 58 W. Va. 418, 52 S. E. 405; *Scrags v. Hill*, 43 W. Va. 162, 27 S. E. 310; *McCue v. McCue*, 41 W. Va. 151, 23 S. E. 689; *Mfg. Co. v. Carr*, 65 W. Va. 673, 64 S. E. 1030. We have again re-examined the statute, and see no reason for changing our conclusion. The question has been fully discussed from every point of view in the opinion in *Laidley v. Reynolds*, and nothing of value could be added here.

Regarding the deed of trust by which Blake, the father of the infant defendants, conveyed his interest to a trustee, to indemnify the plaintiff against loss from failure of title to the Fayette county lands, as being in effect a distraint of the Raleigh county land, or the equivalent thereof, the benefit of an exception in the statute is claimed. This exception says the limitation shall not apply if, within the period of five years from the date of the gift or conveyance, the subject thereof, or some part of it, be distrained or levied upon by or at the suit of a creditor, as to whom the gift, conveyance, assignment, transfer, or charge is declared to be void. The deed of trust reaches only the interest of Lewis Blake, the father of the infant defendants. If it could be regarded as the equivalent of a distraint or levy, it does not affect the interests of the latter. It is neither a distraint nor a levy upon any part of the land as to them or their interest therein. However, we do not regard it as the equivalent of either a distraint or a levy. Hence we think the case is not within this exception.

These conclusions render it wholly unnecessary to enter upon any inquiry as to whether the conveyance made to the children, at the instance of their father, was a gift superinduced by a fraudulent purpose on his part. If such purpose existed, but was not participated in by the donees, it cannot avail the plaintiff now. We are also of the opinion that the tender age of these infant defendants relieves them of any imputation or charge of participation in such fraudulent purpose, if it existed.

The decree ascertained and declared a lien by reason of the deed of trust on an undivided one-fourth of the land in favor of the plaintiff and ordered a sale thereof. It also ascertained and ordered paid the amount of money expended by the plaintiff in the de-

fense of said cause of Blake v. O'Neal, secured by the deed of trust, in addition to the purchase money of the Fayette county land. Uncertainty in the deed of trust as to the amount of the lien debt and the interest in the land conveyed by that instrument probably justified resort to a court of equity to have them settled and determined before sale. Whether this be true or not, these matters were properly involved in the cause, and, as to them, there is no error.

For these reasons, the decree will be reversed and annulled in so far, and only so far, as the same holds the undivided three-fourths of the 59.5 acre tract of land, belonging to the infant defendants, Dennis, Kenneth, and Augusta V. Blake, in the bill and proceedings mentioned and described. Liable to be sold for the indebtedness of Lewis Blake and Mary Blake, or either of them, to the plaintiff, and subjects the same to such indebtedness in any manner, or any of the costs of this suit, and orders sale thereof, and impairs or affects the title of the said Dennis, Kenneth, and Augusta V. Blake to said interest in said tract of land, and, as to the said Dennis, Kenneth, and Augusta V. Blake and their said interest in said land, the bill and amended bill will be dismissed; but in all other respects the decree will be affirmed and the cause remanded. Costs in this court and the court below will be decreed to the said infant defendants.

(40 W. Va. 268)

McDERMITT v. FORBES.

(Supreme Court of Appeals of West Virginia.
April 26, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 548*)—REVIEW—BILL OF EXCEPTIONS—EXCLUSION OF EVIDENCE.

If written evidence offered is excluded by the trial court, it should be made a part of the record by a bill of exceptions, if the party offering it desires to have the action of the trial court in excluding it reviewed on writ of error.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.*]

2. EJECTMENT (§ 90*)—EVIDENCE—COMMISSIONER'S DEED.

A special commissioner's deed, not recorded for as much as 10 years, and unaccompanied by any portion of the record of the cause in which it purports to have been made, is not even prima facie evidence of title.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 90.*]

3. EJECTMENT (§ 9*)—TITLE OF PLAINTIFF—OUSTER BY TRESPASSER.

A plaintiff who has been in peaceable possession of land, and who is entered upon and ousted by a mere intruder or trespasser having no semblance of right or claim to the land, may recover in ejectment without proof of legal title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 19; Dec. Dig. § 9.*]

4. EJECTMENT (§ 109*)—EVIDENCE—DIRECTING VERDICT.

If the evidence upon a trial in ejectment is sufficient to warrant the jury in believing that defendant was a mere trespasser upon plaintiff's previous quiet possession of land, it is error for the court to direct a verdict for defendant, even though plaintiff has failed to prove legal title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 312; Dec. Dig. § 109.*]

Error to Circuit Court, Mason County.

Action by George McDermitt against Lewis Forbes. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

John L. Whitten and B. H. Blagg, for plaintiff in error. J. E. Beller, for defendant in error.

WILLIAMS, P. McDermitt brought ejectment against Forbes in the circuit court of Mason county, and the court, on motion of defendant, excluded plaintiff's evidence from the jury, directed a verdict for the defendant, and entered judgment thereon; and plaintiff has brought the case here on writ of error. The action involves title to a tract of about two acres of ground. Plaintiff claims title by two sources: First, by a special commissioner's deed executed to him July 1, 1908; and, second, by long-continued adverse possession by himself, and by others under whom he claims. The two acres is inclosed by fence. It has an orchard and stable upon it, and has been in actual use and occupancy for 30 or 40 years by those under whom plaintiff claims.

Plaintiff offered in evidence the special commissioner's deed, and the court excluded it. An objection was made and an exception noted on the record, and the deed also appears in the record; but it does not appear that the court was asked to incorporate the deed in the bill of exceptions. The first assignment of error relates to the exclusion of the deed, and we are confronted with the preliminary question whether it is a part of the record or not. The following memorandum was made in the bill of exceptions by the judge at the time he signed it, to wit: "The deed was not filed in the papers, and is not in the papers at this time, and the court was not asked to put it in a bill of exceptions, and did not do so, and the court cannot say whether the following is a correct copy or not." The deed which appears in the record corresponds to the description of the deed that was offered, by date, consideration paid, etc. But, in view of what we are about to say, we do not think it necessary to decide whether the deed is or is not a part of the record. If plaintiff was not prejudiced by its exclusion, the question becomes immaterial.

[1] It appears in the record, otherwise than by the deed itself, that the deed which was offered was dated July 1, 1908, and was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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made by a special commissioner of the court; but no part of the record of the suit, or proceeding, in which the land was sold appears in this record. The record was offered and was excluded by the court and an exception taken, but the excluded record is not made a part of the record in the present case. We are unable, therefore, to see whether or not the court erred in excluding it. We do not know what the record which was excluded contained, and cannot say it was error to exclude it. It is necessary that error should affirmatively appear, and, so far as the action of the court relates to the excluding of the record, it is not made to appear that it erred. The title to the land may have been before the court, and it may have been properly disposed of in that proceeding, in which case the record would have been proper evidence in this case. But the record may have been excluded because it showed that the title to the land in question was not before the court in that proceeding, or because of some other irregularity. The record should have been made a part of the record in this case by a bill of exceptions, but was not.

[2] There being no error shown in excluding the record as evidence, it follows that there was no prejudicial error in excluding the commissioner's deed as evidence. The deed was made under authority of decrees rendered in that case. Its recitals, even if we are authorized to consider the deed as part of the record, are not sufficient proof of the facts recited to make the deed evidence of title (*Feder, Adm'r. v. Hager*, 64 W. Va. 452, 63 S. E. 285; *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 387; *Ronk v. Higginbotham*, 54 W. Va. 137, 48 S. E. 128), and the deed is of too recent date to be of any service to plaintiff as color of title. Section 2, c. 76, Acts 1907, dispenses with proof of the authority of the commissioner to make the deed. Presumptively the commissioner had authority. But in order to be even prima facie evidence of title, unsupported as it is by the record of the cause, the deed must have been recorded for at least 10 years; and, not having been recorded for 10 years, and not being accompanied by the record, so as to show that the title was properly before the court and was properly disposed of by it, the deed was not evidence of title; and it was not prejudicial error to exclude it.

[3] But the court erred in excluding plaintiff's parol evidence from the jury. There was testimony tending to prove that plaintiff was in possession of the land, and was entered upon and ousted by defendant; that plaintiff was claiming under Stover from whom he held a deed to an undivided half interest in a tract of nine acres adjoining the land in dispute; that the two acres was considered as a part of the nine acres; and that it had been occupied and used continuously by plaintiff and those under whom he

claims for a long period of time, more than 30 years. It does not appear by what right defendant claims the land. He offered no evidence. There is also testimony tending to prove that defendant was a mere trespasser. Plaintiff says that he had plowed up a part of the ground, and that defendant came upon the land and took possession of it and planted what he had plowed. If defendant is a mere trespasser, having no semblance of right, the plaintiff can recover in ejectment upon his previous peaceable possession without proof of title. *Tapscott v. Cobbs*, 11 Grat. (Va.) 172; *Witten v. St. Clair*, 27 W. Va. 771.

[4] It was error to strike plaintiff's oral evidence from the jury; and the judgment will be reversed, the verdict of the jury set aside, and the case will be remanded for a new trial.

(69 W. Va. 129)

S. M. SMITH INS. AGENCY v. HAMILTON FIRE INS. CO.

(Supreme Court of Appeals of West Virginia.
April 11, 1911. Rehearing Denied
May 17, 1911.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 668*)—SUMMONS—MOTION TO QUASH.

Withdrawal from the State by a foreign insurance company, after liability incurred, but before suit brought, if otherwise available in abatement of the suit, such fact not appearing on the face of the summons or return of service thereof, is not good ground for quashing the summons.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.*]

2. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—SERVICE OF PROCESS.

The statute prescribing no form for acceptance of service of process by the auditor, for and on behalf of a foreign corporation, authorized by section 3805, Code 1906, such acceptance, signed by the auditor, neither the process nor acceptance showing that defendant is a foreign corporation, or sued as such, is sufficient, unless the fact be controverted by plea in abatement, properly verified, and filed at rules, to confer jurisdiction, and to affirmatively show the necessary jurisdictional facts.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.*]

3. MONEY PAID (§ 6*)—PAYMENT BY THIRD PARTY—RELIEF IN EQUITY—ALTERNATIVE RELIEF.

If a stranger pays the debt of another, without the debtor's request, such payment not having been ratified by the debtor, the stranger may sue the debtor in equity, and if such payment be not then ratified, the debt may be enforced against the debtor, in favor of such stranger, as equitable assignee thereof; or, if then ratified, he may be decreed repayment of the amount paid for the use of the debtor.

[Ed. Note.—For other cases, see *Money Paid*, Dec. Dig. § 6.*]

4. INSURANCE (§ 26*)—FOREIGN INSURANCE—CONTRACTS—JURISDICTION OF COURT.

Withdrawal by a foreign insurance company from doing business in this State, will not deprive the courts of this State of jurisdiction of actions subsequently brought against it

for liabilities incurred and accruing here before such withdrawal.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.*]

5. INSURANCE (§ 125*)—CONTRACT—PROPERTY IN ANOTHER STATE.

A policy of fire insurance of a foreign insurance company, which provides that it shall not be valid until countersigned by an agent located in this State, although the property covered by the policy be located in another State, and which provides for no particular place of payment of the loss, becomes a contract in this State and of the county where so countersigned, giving the circuit court of that county jurisdiction of the subject matter of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 173-175; Dec. Dig. § 125.*]

6. INSURANCE (§ 539*)—PROOFS OF LOSS—WAIVER.

Although a policy of fire insurance requires that proof of loss shall be furnished within sixty days after the fire occurs, unless the time be extended by the company, but there is no provision therein forfeiting the policy for failure to comply with this requirement, the effect of such provision is to postpone right of action until such proof be furnished, but not to wholly destroy all right of recovery thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.*]

Appeal from Circuit Court, Mercer County.

Appeal by the S. M. Smith Insurance Agency against the Hamilton Fire Insurance Company. Decree for plaintiff, and defendant appeals. Affirmed.

J. R. Henry, for appellant. Sanders & Crockett, for appellee.

MILLER, J. The decree appealed from adjudged plaintiff to be the equitable assignee or owner of a demand of six hundred and sixty-eight dollars and seventy-five cents, due from the defendant company to J. H. Maness, for loss by fire of his saw mill, covered by a policy of insurance of said company; and that plaintiff recover from defendant seven hundred and forty-eight dollars and thirty-nine cents, principal and interest accrued to the date of said decree, with interest thereon from that date until paid, and costs.

Jurisdiction in equity is predicated on the theory that after said loss, and liability to Maness, plaintiff, at his solicitation and request, but without the knowledge or assent of defendant, paid Maness on account of said loss seven hundred dollars, assuming, the loss being total, or practically so, that defendant was liable to Maness, for eight hundred dollars, the full amount of the policy; that though there was no assignment, or express agreement by Maness to assign to plaintiff seven hundred dollars of his claim against defendant, it was nevertheless the intention of both that plaintiff should be substituted and succeed to all the rights and benefits of Maness, as against the defendant company, to the extent of the sum so paid him; and that plaintiff should be decreed, as

it was decreed, to be the equitable assignee and owner to that extent of his demand against defendant.

The defendant company, before answering, as it did, under protest, without waiving its rights, appeared specially, to challenge the jurisdiction of the court, either of the person of defendant, or of the subject-matter of the suit. First, it moved the court to quash the summons, and dismiss the suit from the docket, assigning as grounds therefor, that it had withdrawn from and had ceased to do business in the State of West Virginia, not before the policy was written, in 1906, or the loss occurred, in March, 1907, but on January 1, 1908, before suit brought, and could not, therefore, be sued on said policy in the courts of West Virginia; and that the acceptance of A. C. Scherr, Auditor, endorsed on said summons, as follows, "Service of the within process accepted for Hamilton Fire Insurance Company this 13th day of January, 1908. A. C. Scherr, Auditor," was of no effect, null and void.

[1] The first question is, did the court below err in denying said motion? Withdrawal from the State before suit brought, a fact not appearing on the face of the summons, or in the acceptance of service thereof, if otherwise available, would certainly not be good ground for quashing the summons. That would be matter of abatement, pleadable, if good, by proper plea filed at rules. Sections 15 and 16, chapter 125, Code 1906. Such a plea must not only be filed at rules, as required by said section 16, but by section 39 of said chapter, it must be verified by affidavit. No such plea was filed. Defendant does set up the same matter in its answer, not verified, but the answer, if it had been verified, was not filed within the time required for a plea in abatement.

[2] But it is said jurisdiction must affirmatively appear on the face of the summons and acceptance of service, and as neither the summons nor the acceptance of service shows defendant to have been a foreign corporation, or sued as such, or the auditor's acceptance a valid exercise of authority conferred by statute or by power of attorney, jurisdiction was not thereby made to affirmatively appear, and defendant was therefore never legally brought before the court. For this proposition counsel rely on *Hunter v. Spotswood*, 1 Wash. (Va.) 145; *Moore v. Holt*, 55 W. Va. 507, 47 S. E. 252; *Pennsylvania R. R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178, and *Railway Co. v. Wright*, 50 W. Va. 653, 41 S. E. 147. Neither of these cases support the proposition stated. *Railway Co. v. Wright*, and *Railroad Co. v. Rogers* relate to the sufficiency of service on a corporation of process from justice's court, as provided by section 38, chapter 50, Code 1906, which required that the officer's return should show on

whom service was had, and that he was served in the county in which he resided. This was because the statute so required. The statute does not prescribe any form of service on foreign corporations, or of acceptance of service by the auditor on their behalf. Of course jurisdiction must always affirmatively appear by proper process, and due and legal execution on or acceptance of service by or on behalf of defendant. But the statute, section 3805, Code 1906, constituting the auditor attorney in fact for and on behalf of every foreign, and non-resident corporation, doing business in this State, and authorizing service of process on him, and empowering him to accept service of process, prescribes no particular form of service. The question presented then is, was the auditor's acceptance of service in this case sufficient? We are of opinion that it was, and that jurisdiction thereby appeared. Having accepted service as auditor, and in the form shown, the court must regard it a declaration on its face, either that defendant was a foreign, or a non-resident corporation, and in either case, the auditor was authorized by law to accept service, binding defendant. The only way in which defendant could put this fact in issue was by plea in abatement, filed at rules, duly verified, as the statute requires. The reason is plain, for mere defect in the form of service or acceptance of service is correctible. Section 15, chapter 125, Code 1906. We conclude, therefore, that there was sufficient process, and service thereof, appearing, to confer jurisdiction on the court.

We need not inquire therefore, whether defendant waived its rights to object to the jurisdiction by subsequent appearances, and defenses to the suit. We must dispose of the case on the issues presented by the pleadings and proofs.

[3] Several questions, some arising on the demurrer alone, others on both demurrer and answer, and the evidence, are presented. The first is had equity jurisdiction in the premises? Whatever may be the rule in other jurisdictions, we think this question is foreclosed in this State by *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794, and *Crumlish v. Improvement Co.*, 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872. Point three of the syllabus of the latter case, substantially point four of the syllabus in the former case, and particularly applicable here is: "A stranger who pays a debt without request by the debtor, when his payment is not ratified by the debtor, may bring a suit in equity praying relief in the alternative; that is, that if the debtor do not ratify such payment, the debt may be enforced in his favor as its equitable assignee, or, if so ratified, that he be decreed repayment of the amount paid for the use of the debtor." The allegations of the bill in this case, and the proofs taken, make out such a case of equitable jurisdiction.

As the amount advanced or paid Maness was more than the amount of principal decreed, we see no force in the suggestion that the assignment must be complete. At law this is the general rule, but not in equity.

[4] Another question is, did the court below have jurisdiction of the subject-matter? It is argued that because the property destroyed was located in Virginia, the cause of action arose there, and as defendant had withdrawn from and had ceased to do business in this State at the time the suit was brought, the lower court was without jurisdiction of the subject matter thereof. Withdrawal from the State, while liability remained on account of business previously transacted, could not defeat action on a contract made before such withdrawal, nor render void service on or acceptance of process by the auditor. Section 16, chapter 34, Code 1906. This section provides that, "As long as any liability of the company in this State remains unsatisfied, no revocation of any such power of attorney shall be of any effect, until after a like power to some other person residing in this State has been filed by the said company in the office of the auditor. And when any such attorney dies or resigns, the company shall immediately make a new appointment and file the evidence thereof as aforesaid, until all its liabilities in this State are discharged."

[5] But did the cause of action arise in Mercer County? giving the court jurisdiction on that ground? The policy of insurance provides, on its face, that it shall not be valid until countersigned by the duly authorized agent of the company at Bluefield, West Virginia. The policy was countersigned by S. M. Smith, Agent, at that place. This court has decided that if a policy so provides, and be so countersigned, it is a contract of the State where so countersigned. *Galloway v. Standard Fire Insurance Co.*, 45 W. Va. 237, 31 S. E. 969. This case also decides, citing authority, that if a policy does not say the loss shall be payable in any particular place it shall be payable at the place where issued. The policy involved here provides for no particular place of payment. It was payable therefore at Bluefield, where issued, and mailed to the assured. Clearly then the court below had jurisdiction of the subject matter.

Another point made is, that the contract is invalid by the laws of Virginia. This point is sufficiently answered by what has just been said on the question of want of jurisdiction.

[6] Lastly, was right of action forfeited by the failure of the assured to furnish proofs of loss within the time provided by the policy? This was the only ground on which liability was denied by defendant, on receipt of the proofs of loss, mailed to it June 5, 1907. The policy does provide that the insured shall furnish the proofs of loss within sixty days after the fire, unless the time

be extended by the company. But there is no provision forfeiting the policy for failure to comply with this requirement. This point is fully covered by the fifth point of the syllabus of *Munson v. German Insurance Company*, 55 W. Va. 423, 47 S. E. 160, as follows: "If a fire insurance policy provide that proof of loss shall be furnished within a given time, and that no action shall be brought upon it until such proof is furnished, and provide for its forfeiture for certain causes, but not for failure to furnish such proof of loss, failure to furnish such proof of loss within the given time does not wholly destroy all right of recovery, but only delays right of action; but action upon it cannot be brought until such proof is furnished."

No other point deserving consideration being presented, and seeing no error therein, we affirm the judgment below.

(68 W. Va. 779)

SLATER v. WILLIAMSBURG CITY FIRE INS. CO.

(Supreme Court of Appeals of West Virginia.
Oct. 18, 1910. On Petition to Rehear, May 19, 1911.)

(Syllabus by the Court.)

INSURANCE (§ 556*)—POWER OF ADJUSTER—WAIVER OF PROOFS OF LOSS.

An adjuster of an insurance company has no authority or power, as such, to waive proof of loss, required by the policy, as a condition precedent to a right of action, by denying liability on the part of the insurer upon other grounds, when the policy contains the clause, limiting the authority of agents, found in the standard insurance policy.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1374-1377; Dec. Dig. § 556.*]

Error from Circuit Court, Mingo County.

Action by D. F. Slater against the Williamsburg City Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed, and judgment rendered for defendant.

Holt & Duncan, for plaintiff in error.
Stokes & Bronson, for defendant in error.

POFFENBARGER, J. In an action, upon a fire insurance policy, against the Williamsburg City Fire Insurance Company, D. F. Slater recovered a judgment for \$1,000, in the circuit court of Mingo county. The defendant relied chiefly upon failure of the plaintiff to furnish a proof of loss. None was furnished within the time specified in the policy, nor at any time before the action was commenced. Denial of liability, on other grounds, by an adjuster, is relied upon by the plaintiff as a waiver of fulfillment of this condition. There was a demurrer to the plaintiff's evidence and a conditional verdict, on which the court rendered judgment, after overruling the demurrer.

If the adjuster had no power or authority to waive this condition of the policy, and it was not waived, no right of action had accrued, for performance thereof was made a condition precedent to a right of action, by the terms of the policy. There is no evidence or claim of waiver by any other representative of the company, nor by the company otherwise than by the acts and conduct of the adjuster. Under the policy sued on, no agent could waive any of its promissory warranties. It is a standard policy, containing a clause limiting the authority of the officers and agents of the company, such as that found in the policy sued on in *Morris v. Duchess Ins. Co.*, 68 S. E. 22, in which it was held that an adjuster, without special authority so to do, cannot waive performance of this condition of the policy by denial of the company's liability or otherwise. See, also, *Cooley's Briefs L. Ins.* vol. 3, p. 2497. This conclusion renders it unnecessary to inquire whether the conduct of the adjuster would have constituted a waiver, if he had had authority to waive conditions.

As no right of action on the policy has accrued, there is no occasion to consider the other defenses and controversies, disclosed by the record.

It results from these conclusions, that the judgment must be reversed, the demurrer to the evidence sustained, and judgment rendered for the defendant.

On Petition to Rehear.

The argument accompanying the petition to rehear discloses considerable authority against the conclusion here stated, based upon the theory of limitation of the nonwaiver clause to the life of the policy antedating the loss. They say this clause is inapplicable after the loss occurs, since the policy has run its course and is no longer operative in the sense of protecting property, and it only remains to agree upon the amount of the loss and pay it. This is a plausible theory, but we find no warrant in the terms of the policy for its adoption. The nonwaiver clause is broad, withholding from agents power to waive "any provision or condition" of the policy otherwise than in a prescribed manner. We see no room in this clause for any exception.

We have re-examined the evidence as to the authority of the adjuster and find nothing to sustain the claim of general authority in him. Though he says he was sent to the scene of the fire to adjust the loss, and that no other person had had anything to do with the matter, or authority to have anything to do with it, these facts do not make out a general agency in him. The language means only that the adjustment had not been delegated to any other person. Adjustment does not include liability and payment.

These questions need not be committed to agents in the field. Authority in an adjudicator to deal with them must rest upon more than mere surmise, suspicion, or slight inference.

(59 W. Va. 233)

HOFFMAN v. SHOEMAKER.
(Supreme Court of Appeals of West Virginia.
April 25, 1911. Rehearing Denied
May 19, 1911.)

(Syllabus by the Court.)

1. JUDGMENT (§ 743*)—CONCLUSIVENESS—TRESPASS QUARE CLAUSUM FREGIT.

A judgment for the plaintiff in an action of trespass quare clausum fregit against a defendant, claiming a way over the premises on which the act of alleged trespass was done, is not conclusive of the right claimed by the defendant, unless it is shown to have been relied upon by the latter as a defense and actually litigated in the action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1275-1277; Dec. Dig. § 743.*]

2. EASEMENTS (§ 18*)—WAYS.

A grantor may claim a way over the granted premises, as reserved by implication, if it is shown to be strictly necessary to the use and enjoyment of adjacent land retained by him, and the intent to reserve it is not negated by any express terms of the deed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

3. EASEMENTS (§ 17*)—GRANT OR RESERVATION BY IMPLICATION—WAYS—NECESSITY FOR CONTINUITY.

The legal principle, requiring an easement to be "continuous" as a requisite to a grant or reservation thereof by implication, is not applicable to a way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 45-49; Dec. Dig. § 17.*]

(Additional Syllabus by Editorial Staff.)

4. EASEMENTS (§ 1*)—"CONTINUOUS EASEMENT."

A continuous easement is one which operates without the interference of man, such as a water course or a drainpipe, and a way is said not to be continuous, because, in the use of it, there is involved the personal action of the owner in setting his foot upon it or driving his team or cattle upon it.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, p. 1511.]

Robinson, J., dissenting.

Appeal from Circuit Court, Mineral County.

Suit by Charles S. Hoffman against Charles W. Shoemaker. Decree for plaintiff, and defendant appeals. Reversed and dismissed.

H. K. Drane and W. H. Griffith, for appellant. Frank C. Reynolds and Taylor Morrison, for appellee.

POFFENBARGER, J. In this suit by a landowner to enjoin the defendant from the use of a right of way over his land claimed in part by a deed and in part by prescription and long user, the defenses were a former adjudication in favor of the plaintiff and in-

sufficiency of the defendant's evidence to establish the right claimed by him. The decree appealed from, general in form and without indication as to its legal basis, is for the plaintiff, and perpetually enjoins the defendant from the use of said right of way.

The plaintiff owns three contiguous tracts of land, adjacent to the northwestern end of which lies the farm of the defendant. From the latter an old road, holding a southeasterly course, runs over the farm of the plaintiff, consisting of said three tracts to a public road called the "New Creek Pike." The evidence conclusively shows that this road has been used by persons residing back of the plaintiff's land for a long time, 40 or 50 years, and by the defendant and his predecessors in title for at least 25 or 30 years, and possibly for the whole period aforesaid. If nothing else appeared, this would make under our decisions a clear case of a right of way by prescription. But there are some other facts to be considered. The three tracts of land constituting the plaintiff's farm seem to have been owned at one time by James B. Rees as a single tract. The deeds exhibited indicate this. By deed dated February 6, 1884, said Rees conveyed to Joseph W. Parish a tract of about 56 acres practically out of the center of what now constitutes the plaintiff's farm. In that deed he granted to Parish a right of way over the land thereby conveyed, determinable as to location by the old existing road, out to the public road. He also reserved a right of way over the land granted to Parish "for the use and benefit of William Leatherman, his heirs and assigns." At that time Leatherman owned the farm now owned and occupied by the defendant. Hence this reservation constituted an exception from the grant to Parish in favor of Leatherman, the predecessor in title of Charles W. Shoemaker, the defendant here. The right of way, so given to him or recognized by these deeds, did not extend up to Leatherman's land, but he used and enjoyed a right of way over Rees' land down to the road so provided for him over the Parish land. Robert Burkhisser having apparently acquired the Parish land and the James B. Rees land lying between it and the public road, containing 104 acres, conveyed both of these tracts to the plaintiff, C. S. Hoffman, by deed dated April 3, 1900. Just one year later William S. Leatherman conveyed to Charles W. Shoemaker his tract of land. In the meantime some other conveyances had taken place. S. S. Rees who, in some way, became the successor of James B. Rees to the northwestern part of the Rees land, adjoined by the Leatherman land, conveyed it to A. T. Leatherman, the son of William S. Leatherman, by deed dated December 10, 1889. A. T. Leatherman, by deed dated December 15, 1889, conveyed to his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

father, William S. Leatherman, a small portion of this land, containing about 18 acres. A part of the old road leading from Leatherman's land down to the Parish tract was wholly on this 18 acres and the balance of it on the line between it and the other land then held by A. T. Leatherman. The evidence tends to show that W. S. Leatherman made this purchase to strengthen and secure his right of way. The Leathermans being unable to pay for this land, Rees took it back, by a deed from A. T. Leatherman, dated December 11, 1895; W. S. Leatherman having reconveyed the 18 acres to A. T. Leatherman on the same day. In this reconveyance W. S. Leatherman did not reserve his road over the 18 acres, but from the date of that deed, December 11, 1895, until April 3, 1901, he continued to use the road without objection from Rees, and also without objection from Hoffman, who acquired the Rees land by deed dated April 3, 1900. Thereafter Chas. W. Shoemaker, who became the owner of the Leatherman land April 3, 1901, used the road over this Rees land without objection from the plaintiff until about the year 1903. Some time in the year 1903, the latter placed a wire fence across the road, and the defendant applied for, but did not obtain, an injunction, and the fence was removed. Plaintiff says he removed it and suffered the defendant to continue the use of the road, but not that there was any agreement between them or that, with the consent of the defendant, the subsequent user was permissive only. All that appears is that the fence was put up, the injunction applied for, the fence removed, in two or three days from the date of its construction, and the defendant continued the use of the road. Later there were some negotiations between the parties in an effort to compromise and settle the controversy by agreement. This having failed, the plaintiff some time in 1908 locked the gates and built additional fences across the road. These the defendant opened by cutting a gate from its hinges, cutting a wire fence and hitching a horse to another fence and a gate and pulling them down. Thereupon the plaintiff instituted an action of trespass against him and recovered a judgment for \$1.50, which is the one relied upon as a former adjudication.

[1] As to the effect of a judgment in such an action upon title, the authorities are in great conflict. *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824; *Clark v. Dower*, 67 W. Va. 298, 68 S. E. 369. In the latter case the judgment was held not to be appealable, although a special plea was entered by the defendant, setting up a right of way by prescription. In the former the title was held not to have been settled and determined, although the defendant entered both a plea of not guilty and plea of *liberum tenementum*, and evidence was adduced on the question of title. No good purpose would be subserved here in attempting to analyze or reconcile

the conflicting authorities, or deduce from them the true rule, since we are of the opinion that the right claimed by defendant was not litigated in the action of law. The only plea shown by any order entered in the case was that of not guilty. A paper is certified by the clerk of the trial court which purports to be a copy of a special plea, setting up the right of way by prescription, but we find no order showing it to have been tendered or filed, or in any way made a part of the record. Though it is not clearly shown that any of the evidence used in that action has been made a part of the evidence in this cause, or that the right was litigated and determined, what on its face seems to have been evidence used in the action at law has been incorporated in this record. No witness testifies that it is the evidence in that case nor does the clerk of the circuit court certify that it was. However, conceding it to be such, it only shows the title of the plaintiff to the land, the erection of fences and locking of gates across the road and the breaking of the same by the defendant and his continued use of the road. No evidence of any prescriptive right was introduced or offered by the defendant. Hence we are clearly of the opinion that neither by plea nor evidence was the defendant's right of way put in issue. So we hold the defense of former adjudication to be unsustainable.

[2] The all-important question remaining to be considered is the effect of the deed made by William S. Leatherman to S. S. Rees, conveying land on which a part of the road is without a reservation thereof. Ordinarily a grantor is not permitted to set up by parol any reservation against his deed purporting on its face to grant all of his right, title, and interest in a tract or parcel of land. Of course, he cannot claim any of the land against his deed. Such a construction of a deed would render it nugatory and defeat its purpose in whole or in part. Under a well-settled rule, it must be so construed as to give it effect to the extent of its entire subject-matter. It is nevertheless possible for a grantor to claim, under exceptional and peculiar circumstances, an easement over the land granted as appurtenant to other lands retained by him. This easement is not the land itself, and the retention thereof does not wholly defeat the deed as to any part of it. It is a mere right of use, not title. In such cases the question is one of intention, but the circumstances must be such as to disclose the existence of that intent beyond any reasonable doubt, and such intent must arise from necessity, else the doubt is not excluded and the reservation cannot be maintained. The law on this subject is stated as follows in *Jones on Easements*, § 136: "There is no implied reservation of an easement in case one sells a part of his land over which he has previously exercised a privilege in favor of the land he retains, unless the burden is ap-

parent, continuous, and strictly necessary for the enjoyment of the land retained. A grantor cannot derogate from his own grant, and as a general rule he can retain a right over a portion of his land conveyed absolutely only by express reservation." Again, in section 138, this author says, quoting from Lord Justice Cotton: "So, again, where there is existing at the time that which is said to be a continuous easement, and of necessity—not an easement strictly, but that which is in the nature of an easement—as a way of necessity, of that there is or may be an implied reservation. Take the common case of a man having a field, which he does not sell, in the midst of land which he sells. Of course, it is implied that he intends to have the power of using the field not sold, and not to give the exclusive right or control over it to the person to whom he sells the surrounding land, and a way over that is said to be a way of necessity, and that is reserved without express words as an implied reservation."

[3] In the text-books and decided cases we are told that the easement to pass to the grantee, or be retained by the grantor by implication only, must be apparent, continuous, and necessary. Naturally the use of these terms is sometimes confusing, for the reason that they are employed in the long course of discussion, and not always defined. Each has its own definition with which the reader is supposed to be familiar. An apparent easement need not be actually visible. It is enough that the facts and circumstances fairly construed will disclose it, as in the case of a drainpipe under the surface into which the water is conducted from a roof. There are different kinds of necessity. A thing may be necessary in the physical sense or in a practical or legal sense. So the word "continuous" has its different meanings. In a practical sense a road is continuous as long as it is maintained and used, although the use is unautomatic, and from necessity intermittent. But it is not continuous within the meaning of the technical law of easements.

[4] The distinction made is that a continuous easement is one which operates without the interference of man, such as a water course or a drainpipe. A way is said not to be continuous, because, in the use of it, there is involved the personal action of the owner in setting his foot upon it or driving his team or cattle upon it. Jones on Easements, §§ 143-153, inclusive. Judges and text-writers do not always stop to define these terms. Hence the danger of misapprehension on the part of the reader and the necessity of noting the facts in respect to the terms used.

In some decisions it has been held, though perhaps erroneously, that an apparent and technically continuous easement would always pass to a grantee, or be reserved to the grantor, by implication, even though it did

not appear to be necessary. In other words, if the owner of two adjacent pieces of property having subjected one to the use of the other by making a drain over it or running an undersurface ditch through it, or otherwise connected them, and this connection was apparent, it was a continuous easement, because it was self-acting, and, being apparent, if he conveyed away the servient estate, without an express reservation of the easement, it was reserved to him by implication as matter of intent arising from the known facts and circumstances, and without any consideration of the element of necessity. *Lampman v. Milks*, 21 N. Y. 505. For this proposition, Selden, Judge, delivering the opinion, referred to the case of *Coppy*, 11 Henry VII, 25, cited from the Year Books by Gale & Whately on Easements, p. 41. In *Nicholas v. Chamberlain*, Cro. Jac. 121, "It was held by all the court, upon demurrer, that if one erect a house, and build a conduit thereto, in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and quasi appendant thereto; and he shall have the liberty by law to dig in the land for mending the pipes, or making them new, as the case may require." That case has been regarded as authority for the same proposition. Another case propounding the doctrine is *Robins v. Barnes*, Hob. 131. In these old cases, it is said to have been held that, if the common owner, having used the two properties as connected by a lead pipe or some other continuous arrangement, sell one piece of the land and cut that pipe or otherwise break the connection, he thereby altered the rule by signifying intent to destroy the easement. He thereby rendered the easement no longer continuous in nature, and overcame the presumption of intent either to grant or reserve the easement, arising from the condition of the property.

This rule of construction came in time to be regarded as too liberal, and the later authorities added the element of necessity, holding that an easement of this kind must be not only apparent and continuous, but also necessary. This addition has in later years been a subject of learned and earnest discussion in both England and America, and is now generally accepted. Accordingly, we find this in Jones on Easements, § 156: "To establish an easement by an implied reservation, where there has been a unity of possession, and a subsequent sale of a portion of the land over which the easement is claimed, such easement must have been apparent, continuous, and necessary at the time of such sale." As authorities for this proposition, the author cites cases involving, not ways, but drains and other such easements as would have been

retained by implication, under the old common law, without the element of necessity. They are *Crosland v. Rogers*, 32 S. C. 130, 10 S. E. 874; *Ferguson v. Witsell*, 5 Rich. Law (S. C.) 280, 57 Am. Dec. 744, and *Elllott v. Rhett*, 5 Rich. Law (S. C.) 405, 57 Am. Dec. 750, all involving drains. There is reason for saying a drain must be continuous, for that is its nature. It is one of its essential elements or qualities. It is continuous by operation in and of itself without human aid. To be a drain, therefore, it must have this quality, and, to have an easement for drainage, a dominant owner must have either an artificial or a natural means of continuous drainage, though continuous and unceasing flowage is not necessary. Close scrutiny of the history of the use of the terms "apparent" and "continuous" will disclose that they are applicable only to technically continuous easements or quasi easements, and not at all to noncontinuous easements. The latter rest upon necessity only, cannot be continuous, and probably need not be apparent.

This quality or characteristic of continuousness does not belong to a right of way. Such an easement is not self-operating. It is only a place in which its owner operates. So it is not continuous in the technical sense of the word. *Jones on Easements*, § 143. Therefore, to say that, in order to pass to a grantee, or be retained by a grantor, by implication, a right of way must be apparent, continuous, and necessary, is to state that which can never be true of such an easement, and also that it never can pass or be retained in that way. It seems clear, therefore, that a right of way, to pass or be retained by implication, need not be continuous. If it must, it never can be the subject of an implied grant or reservation. That it can be is put beyond doubt by authority, both English and American. A way of necessity may be reserved to a grantor by implication, though it is confessedly not continuous. *Pinnington v. Galland*, 10 Eng. Rul. Cas. 35, 9 Ex. 1. In that case *Martin*, Baron, said it might be both granted and reserved by implication. For the first proposition he quotes from the note of Mr. Serjt. Williams to the case of *Pomfret v. Ricroft* as follows: "Where a man, having a close surrounded with his own land, grants the close to another in fee, for life, or for years, the grantee shall have a way over the grantor's land as incident to the grant; for without it he cannot derive any benefit from the grant." As to the other proposition, he said: "There is no doubt, apparently, a greater difficulty in holding the right of way to exist in this case than in the other; but, according to the same very great authority, the law is the same, for the note proceeds thus: 'So it is when he grants the land and reserves the close to himself.' And he cites several authorities which fully bear him out.

Clark v. Cogge, *Staple v. Heydon*, *Chichester v. Lethbridge*, *Willes*, 72, note. It no doubt seems extraordinary that a man should have a right which derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in *Dutton v. Taylor*, that it was for the public good, as otherwise the close surrounded would not be capable of cultivation." That case is one of actual decision, not mere dictum. In discussing the law generally in a case not involving a right of way nor a continuous easement, *Bacon*, Chancellor, said in *Wheelodon v. Burrows*, 12 Ch. Div. 31, 44: "But I take it that the rule of implication is founded upon the mere necessity of the case, and the impossibility of admitting that the contract and the intention of the parties to it would be complete without the implication. The subject of the implication is held to have been involved in the terms of the contract, and the justice and honesty of the transaction require that the law should supply that, the expression of which by the inadvertence of the parties has not been expressed in words. Upon this principle every one of the cases referred to is founded, and all are reconcilable; and no case has been cited, nor, as I believe, can any be found, in which an implication has been made not based upon necessity and the justice which that necessity imperatively calls into active operation." This is a broad and liberal view, stripped of all fanciful, narrow, and technical considerations, not applicable to any particular kind of easements, but universally reducing the whole question to one of intent, determinable by the rule of necessity. It accords with the just and reasonable observation found in *Jones'* quotation from Lord Justice Cotton in *Russell v. Watts*, 25 Ch. Div. 559. The rule of necessity as justifying a grant or reservation of a right of way by implication is recognized and asserted in *Fetters v. Humphreys*, 18 N. J. Eq. 260, but the way was there denied, because it was not necessary to the beneficial enjoyment of the land. The chancellor in that case distinguishes between continuous and noncontinuous easements, holding that the former may pass by implication without necessity, but that the latter cannot. After reviewing the decisions at great length, he said: "Discontinuous easements not constantly apparent are continued or created by a severance only when they are necessary." He concluded by saying: "The property of the complainant could be better and more beneficially enjoyed by the use of this alley, as it was used by the testator in his lifetime, but it is not necessary to the beneficial enjoyment of it. The right of way therefore cannot arise by implication from the devise to her." The proposition, with its limitations, is also recognized in *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; the court holding that a right of way may be

reserved by implication in a case of strict necessity, but denying it in the particular case, because such necessity was not shown. It is stated in the same way in *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688. In that case Mr. Justice Hoar said: "A way when it is strictly a way of necessity has been considered as falling under the same rule, and as passing to the grantee, or being reserved by the grantor, without any express words of grant or reservation. In the case at bar, the way and other privileges claimed by defendant were not annexed to the sugar house estate by any natural or legal necessity." In *Pingree v. McDuffie*, 56 N. H. 306, the court held as follows: "A party having conveyed a portion of his land over which was the only means of access to the remaining land, held, that a right of way by necessity to the remaining land was reserved." A right of way to the grantor by necessity was sustained in *Davies v. Sear*, L. R. 7 Eq. Cas. 427. In this state a way of necessity may be granted by implication. This is so well settled that no authority need be cited for it. Like reason for an implied reservation is obvious.

These authorities amply justify the view that Leatherman impliedly reserved the right of way over the land he granted by his deed of December 11, 1895, if such right of way was strictly necessary to the enjoyment of his property. He clearly has a right of way by prescription over the Parish and Burkhiser lands down to the public road. He had formerly enjoyed the use of a road over the Rees-Leatherman 18 acres, down to the terminus of the old road at the northern Parish line. The reservation of this, if sustainable, completed his outlet to the public road. Was such reservation necessary to the enjoyment of his land in the strict and extreme sense of the term? On this question the evidence is not as complete as it might have been made. It is not shown that the defendant's lands are surrounded by lands of strangers over which he has no right of way. But it seems to be conceded that neither he nor his predecessors in title had any other means of access to the land. The plaintiff himself told the defendant, shortly after he had purchased it, he was surprised at his purchasing it, if he had no outlet or no right of way from it, and that "he had no right of way out of the land and he couldn't get in and out of it"; and admits that thereupon the defendant said he had the right of way he now claims. This question was propounded to the defendant: "Have you any other outlet or means by which you can get from your farm to the New Creek Pike, except over the road running through the Hoffman farm?" His answer was: "No, sir. None at all." Leatherman was put on the witness stand, and in

the course of his examination this question was propounded to him: "You may state, Mr. Leatherman, whether or not this is the only way by which you could get out from the place formerly owned by you, which you sold to Charley Shoemaker, over this road-way that you have talked about?" His answer was: "Well, there could be other ways you could get out, of course, but it's the only way there has been since I have been there. It was always a free road, so we could get in and out as we pleased, so we kept the gaps up." This answer seems to relate to the physical possibility of making a road in a different location upon the same land or upon other lands, if the right had been or could be acquired for it; but it does not import any right to make a road over any other land, or that defendant's lands extend to a public road or any other he has the right to use. On the whole, we think it sufficiently appears that neither the defendant nor his predecessor could get out over his own land to any public road or had any right of way over any lands, other than those in question here.

These conclusions result in a reversal of the decree, dissolution of the injunction, and dismissal of the bill.

ROBINSON, J., dissenting.

(69 W. Va. 80)

KING et al. v. PORTER et al.
(Supreme Court of Appeals of West Virginia.
April 4, 1911. Rehearing Denied
May 17, 1911.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASER—NOTICE.

To be notice to a purchaser, possession of land by one other than the vendor must be actual, distinct and visible. It must be such as is inconsistent with the title of the vendor. A mere unoccupied improvement is not notice of another's rights.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

2. VENDOR AND PURCHASER (§ 238*)—BONA FIDE PURCHASER—NOTICE.

A purchaser with notice from a purchaser without notice is protected in his title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 580-582; Dec. Dig. § 238.*]

Appeal from Circuit Court, Randolph County.

Bill by J. J. King and others against W. A. Porter and others. Decree for defendants, and plaintiffs appeal. Affirmed.

W. B. Maxwell, for appellants. Talbott & Hoover, for appellees.

ROBINSON, J. By this suit, the heirs of Peter King claim title to 150 acres of land as against H. Yokum, Trustee, and the Roar-

ing Creek Lumber Company. The plaintiffs allege title and possession in themselves and seek to annul the claim of title on the part of the defendants as a cloud. From a decree dismissing the bill on a hearing, the plaintiffs have appealed.

The merits of the case are against the plaintiffs, and the decree is plainly right. It is useless to consider the question of the demurrer to the bill, and some other minor questions that have been raised. While we assume the broadest view, in every particular, that can be taken for the plaintiffs, we cannot grant them relief.

In 1856, Peter King purchased of Henry O. Middleton 150 acres of land by a contract in writing which was never recorded. The vendee took possession of the land and resided thereon until 1870. He then removed to Grafton, and later to Pittsburg, residing at the latter place until his death, in 1897. It is claimed that he left the land in charge of John A. King, who lived on a tract adjoining. But, even though we look to testimony that cannot properly be considered in the cause, certain it is that there is no evidence as to actual possession of the land in behalf of Peter King after he left the premises, except for the short period of a year or two, and that only of the most desultory and uncertain nature. The fences around the limited improvements which Peter King had made were totally destroyed by fire, and the small area that he had improved in time became covered with brambles, laurel, and second growth timber. Some stones of a chimney only were left to indicate that there had once been a house on the land. The land lay in a mountainous region and was a part of the unfenced forest. Peter King never had the land entered for taxation and never paid any taxes thereon. Nor did he ever take steps to obtain a deed from Middleton, or to protect the tract from the adversary possession of others. The whole story, only a few details of which we have given, indeed makes a case of abandonment of the land and relinquishment of claim to ownership thereof.

Now, this tract of 150 acres was a part of a large territory of land embraced in several adjoining surveys that had been patented to Middleton. Middleton died in 1867. His will empowered his personal representatives to sell the lands owned by him in this state. The administrator with the will annexed, in 1874, sold and conveyed to Totten a tract of 1050 acres which included the Peter King parcel. The deed described the land conveyed, by specific metes and bounds, and then immediately recited: "Containing one thousand and fifty acres more or less, the tract of land being the residue unsold out of several larger surveys granted to Henry O. Middleton, to-wit: one survey of 1000 acres, one of 825 acres, one of 6000 acres, and one of 1650 acres." There is no evidence that any one had any sort of possession of the Peter

King parcel at the time Totten purchased the 1050 acres which embraces it. Nothing in the case brings notice to Totten of any rights of Peter King, unless it be the fact that there were no doubt evidences that at a prior time some one had been in possession and made small improvements. But Peter King had left the land before Totten purchased, and it is not proved that Totten was put on notice or even inquiry of King's rights, unless the mere evidences of former improvement did it. It does not even appear that a house stood on the land at this time. A little later, Totten conveyed to Kutz and others, and one Jabez Wolley became an owner of an interest in the 1050 acres. Wolley maintained a tenant, Lantz, on the 1050 acres for several years prior to the conveyance of the same made by Wolley and others to Yokum, Trustee, and Lantz continued as the tenant of the latter to the time of the institution of this suit. So the defendants and those under whom they hold have had actual possession under the Totten deed to the 1050 acres for a period longer than the statutory bar.

In 1905, one of the heirs of Peter King came from Pittsburg and took up his residence on the 150 acres. The Coal & Coke Railroad had been built through the tract, and the land had evidently become quite valuable. No more was it the wild, cheap mountain land which his father had deserted and failed to protect from the ownership of others. On behalf of himself and the other heirs, he sought the legal title which his father had failed to call in from Middleton. By a suit against Middleton's heirs only some of whom were proceeded against as unknown, the heirs of Peter King were given a deed, through the offices of a special commissioner. It is upon a legal title so obtained that the plaintiffs by this suit seek to cancel the title of Yokum, Trustee, as far as it affects the 150 acres, and to enjoin the cutting of the timber thereon by the Roaring Creek Lumber Company, which now owns the standing timber on the 1050 acres through a conveyance of the same by Yokum.

Presumably the taxes on the whole 1050 acres were paid by Middleton and those that succeeded him in title through the conveyance made by his administrator. That fact being true, and the legal title to the 150 acres not having been severed from that to the 1050 acres, the King claim cannot be considered as forfeited for nonpayment of taxes. If King had good equitable title to the 150 acres, of which those who purchased the 1050 acres had notice, and the owners of the 1050 acres paid the taxes on the whole, they did so in King's behalf, as far as the 150 acres was concerned, since they must be considered as trustees holding the legal title for him. We do not consider the question of forfeiture as pertinent. But a pertinent question is: Did Totten buy and take a conveyance from Middleton's administrator with

notice of King's rights under his contract of purchase?

[1] We have stated that the evidence shows no notice to Totten relative to King's rights, at the time he purchased, unless it be that the mere mark of a former improvement on the land put him on inquiry. Did it do so? It is certainly true that one purchasing land must take notice of the rights of another in actual possession of the land. 18 Enc. Digest Va. & W. Va. 598; also *Preston v. West* (decided this term) 70 S. E. 853. But to be notice the possession must be actual and existing. It must be that which is inconsistent with the title for which the purchaser is negotiating. A mere mark of former possession is not notice, for that is entirely consistent with the legal title. A vacant house or unoccupied field does not put a purchaser to notice. Neither raises a presumption against the legal title, for it is by no means inconsistent with one's title to have such things on land. The following from a standard work is in point: "With respect to the character of possession which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of rights or equities in persons other than those having a title of record, it is well established by an unbroken current of authority that such possession and occupation must be actual, open and visible; it must not be equivocal, occasional or for a special or temporary purpose; neither must it be consistent with the title of the apparent owner of record. All the cases agree that notice will not be imputed to a purchaser except where it is a reasonable and just inference from visible facts; and these can only exist where there is an exclusive possession, actual and distinct, and manifested by such acts of ownership as would naturally be observed and known by others." 1 *Warvelle on Vendors*, § 271.

[2] The argument that the Roaring Creek Lumber Company had notice of the King claim before it purchased is not tenable, even if the fact asserted is true. That company is protected because it is a purchaser of the Totten title. Since Totten purchased of Middleton's administrator without notice of King's rights, then those who hold under Totten are protected, even if they had notice. A purchaser with notice from a purchaser without notice is protected in his title. If it were otherwise an innocent purchaser might be deprived of the benefit of disposing of his estate. 2 *Minor's Inst.* (4th Ed.) 234; 13 Enc. Digest Va. & W. Va. 589.

Plaintiffs urge that the deed to Totten, by the recital in it which we have quoted above, imparted notice of the King claim to him and all who hold under him. In other words, they say that the deed, by the use of the words "the tract of land being the residue unsold," gave notice that there were

vended parcels within the 1050 acres conveyed. This recital surely imparts exactly the contrary sense to that claimed for it. The clause virtually says that none of the land within the boundary of the 1050 acres has been sold. It indeed asserts that all within the boundary was "unsold."

The defendants, as parties holding under one who was a purchaser without notice, are protected against the claim of plaintiffs. The title of defendants is not a cloud on plaintiffs' rights; it is the real protected title to the land. Even were defendants not protected on this score, it would seem that plaintiffs would be barred from the relief sought by reason of laches and adversary possession. But it is unnecessary to discuss these features of the case.

An order will be entered affirming the decree.

BRANNON, J., absent.

(89 W. Va. 51)

JUSTICE v. MOORE.

(Supreme Court of Appeals of West Virginia.
March 14, 1911. Rehearing Denied
May 17, 1911.)

(Syllabus by the Court.)

1. DETINUE (§ 17*)—PLEADING—ALLEGATION OF VALUE.

A declaration in detinue for sawlogs, stating the average value of each and the aggregate value of all, suffices as to specification of value.

[Ed. Note.—For other cases, see *Detinue*, Cent. Dig. §§ 26-33; Dec. Dig. § 17.*]

2. LOGS AND LOGGING (§ 3*)—VENDOR'S LIEN.

A vendor of timber, severed from his land by the vendee, under a written contract, may, in the absence of a stipulation to the contrary, retain possession thereof to secure payment of the purchase money, although the title has passed to the vendee, and such right of retention is not relinquished nor destroyed by a clause in the contract, saying the timber shall "stand good for the purchase money."

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 10; Dec. Dig. § 3.*]

3. CHATTEL MORTGAGES (§ 140*)—VENDOR'S LIEN.

If the vendee in such case execute a deed of trust upon the property so sold, while it remains upon the lands of the vendor, the right of the trustee therein to possession of the timber is subordinate to that of the vendor.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 237, 238; Dec. Dig. § 140.*]

4. DETINUE (§ 5*)—RIGHT OF ACTION—SUFFICIENCY OF POSSESSION.

If a vendor, having such right of possession, repurchase the timber in consideration of his claim for purchase money, after execution of the deed of trust and with notice thereof, and then make delivery of the same, under a contract of sale from him to a stranger, at a place on his own land or land of another, under a license secured by him for the purpose, and thereafter the trustee in the deed of trust take possession of the same, such vendor has sufficient prior possession to enable him to maintain detinue against the trustee.

[Ed. Note.—For other cases, see *Detinue*, Cent. Dig. §§ 5-9; Dec. Dig. § 5.*]

5. DETINUE (§ 8*)—DEFENSES—OUTSTANDING TITLE IN THIRD PERSON.

A defendant in an action of detinue cannot set up, against a plaintiff whose possession he has wrongfully invaded by taking the property, an outstanding title in a third person, under which he does not claim.

[Ed. Note.—For other cases, see *Detinue*, Cent. Dig. § 14; Dec. Dig. § 8.*]

Error to Circuit Court, Logan County.

Action by W. E. Justice against J. M. Moore, trustee. Judgment for plaintiff, and defendant brings error. Affirmed.

Lilly & Shrewsbury, for plaintiff in error. Campbell, Brown & Davis, for defendant in error.

POFFENBARGER, J. Right to the possession of certain sawlogs is the matter involved in the judgment to which this writ of error was obtained.

W. E. Justice, by a written contract, dated January 18, 1896, sold to Aaron Browning & Co. certain poplar trees, divided into classes, according to size, for determination of purchase prices, which were \$1 and \$2 per tree. Along with the timber, he sold a log cart at the price of \$60. The last sentence in the contract reads as follows: "The said timber to stand good for the purchase money and expense." Under it, the Brownings cut the timber and marketed a portion of it. In so doing, they became indebted to Justice for goods and supplies to the amount of \$300, and the stumpage or price of the timber amounted to \$500. For these two items, amounting to \$800, a note was given. The Brownings also incurred indebtedness, for merchandise and supplies, to the Standard Mercantile Company, of which U. B. Buskirk was president and manager. To secure this, they executed a deed of trust on the timber, dated January 15, 1897, in which J. M. Moore and Joseph Anderson were made trustees. Having become financially embarrassed and unable to complete their timber enterprise, the Brownings, some time in the same year, resold the timber, or relinquished their rights and interest in it, to Justice, in consideration of what they owed him, said to be \$500; payment of \$300 on the note being claimed. At this time some of it had been rafted and sold, and the balance having been cut down lay in the woods as felled trees on the land of Justice. He cut them up into logs, 216 in number, hauled them to the Guyandotte river, at the mouth of Leatherwood creek, branded them, and put some of them over the bank and into the river, and sold them to Newman & Spanner along with other timber, and they measured, branded, and paid for them. As to the exact condition he left them in, there is some controversy. At this juncture Moore, the trustee in the deed of trust, and Buskirk appeared upon the scene, claiming title to the logs and right of possession, branded, took possession of, and

advertised them for sale under the deed of trust. Thereupon Justice brought this action of detinue, regained possession of the logs by giving a bond, and, after some two or three abortive jury trials, a verdict and judgment that he retain possession thereof. In the meantime, Newman & Spanner were permitted by Justice to take them under their purchase from him.

The demurrer to the declaration, founded upon alleged insufficiency of specification of the value of the property, was properly overruled. The declaration demands 216 sawlogs of the average value of \$5.25 and a total value of \$1,134. Good pleading in detinue requires specification of the value of each article sued for. The purpose of this is to give the defendant notice of what is demanded of him. It is not the function of the declaration to fix unalterably the value of the property, but only to apprise the defendant of the nature and amount of the demand. The averment of value in this declaration puts a price upon each log. It may be, in some instances, too high, and in others too low; but the actual value is a matter for determination upon the evidence. We think the declaration sufficient.

The giving of two instructions, at the instance of the plaintiff, is assigned as error. One of these told the jury they should find for the plaintiff, if they believed from the evidence that Buskirk, president of the Standard Mercantile Company, had notice of the contract for the purchase of the timber at the time he took the deed of trust; and the other that the plaintiff could maintain his action, if the jury should find the logs had not been put into the stream by him, in pursuance of the contract to sell them to Newman & Spanner, at the time at which Moore, the trustee, took possession of them.

The first of these two instructions proceeds upon the theory of a right of retention of the possession of the timber in the plaintiff, to secure payment of his purchase money, founded upon the clause in the contract or sale, saying the timber was to stand good for the purchase money and expense, notice of which to the mercantile company, at the time it took the deed of trust, is indicated by some evidence adduced. The clause upon which Justice relies for this claim is not as broad in its terms as those considered and enforced in *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432, and *Wiggin v. Mankin*, 65 W. Va. 219, 63 S. E. 1091. In each of those cases the contract expressly stated that the timber or lumber should not be removed until paid for. This clause says only that the timber shall stand good for the purchase money. Right of retention of possession is not in terms reserved, and the purchasers were allowed to remove and sell some of the timber without having paid for it. The seller also took the promissory note of the pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

chasers for it. This conduct, however, is not irreconcilable with right of retention. His release of part of it does not necessarily imply intent to release the residue. Though the lien clause does not expressly reserve right to detain the timber until paid for, the vendor had such right as long as it remained upon his land, under principles declared in *Curtin v. Isaacsen*, 36 W. Va. 391, 15 S. E. 171. It is a common-law right in the seller, which the lien clause in the contract does not relinquish in express terms, nor by necessary implication. This clause could have been intended to secure to the seller a lien in addition to that given by the common law, one continuing after removal from the premises, and may have been inserted in the contract for this purpose. *Jones on Liens*, § 816. However this may be, nothing in its terms indicates intent to abrogate the seller's common-law lien. As this timber was all on the premises of the plaintiff at the date of the execution of the deed of trust, the right created by that instrument, as to possession, was necessarily subordinate to that of Justice. By it the trustee secured only such right as the vendees of the timber had under their contract. They may have had title; but, if so, they had no right to possession, and therefore could not confer it upon the trustee, otherwise than subject to the precedent condition—that of payment of the purchase money before removal. This instruction was good, therefore, unless the direction in it to find for the plaintiff was improper for some reason other than that based upon the defendant's claim as to the construction of the contract between Justice and the Brownings.

Whether it is bad for such other reason depends upon the inquiry raised by said second instruction, the theory of which is that the plaintiff was not barred of right of recovery by reason of his sale of the timber to Newman & Spanner. Though he took the timber back from the Brownings in satisfaction of his claim for purchase money, he could fall back on his original lien and right of retention, if his right as purchaser from the Brownings failed, and pass that right to Newman & Spanner. As to this we have no doubt. His purchase was subject to the trust deed lien, but his own lien prior, and his right to possession superior, unless lost by the sale to Newman & Spanner. But said second instruction enunciates the principle that a defendant in detinue cannot defeat the plaintiff's action by showing an outstanding title in a third person, unless he claims under it. As the defendant here does not claim under Newman & Spanner, but only under the Brownings, he has not connected himself with their outstanding title. Hence, if the theory of the instruction is legally sound, we must ascertain whether it applies under the circumstances of this case. If the plaintiff has not had previous possession, but relies solely upon legal title in

himself, his action may be defeated by showing an outstanding title in a third person. Under such circumstances, the question is one of title, pure and simple, and the plaintiff, in order to prevail, must show that he has it, as in the case of ejectment and unlawful detainer. 14 Cyc. 248; 6 Ency. Pl. & Pr. 657. But, if the defendant has acquired his possession by a wrongful invasion of the actual possession of the plaintiff, then, under a principle observed in ejectment and unlawful detainer law, he cannot prevail by showing outstanding title or right in a third person, unless he claims under, or connects himself with, it in some way. As to this exception to the general rule, there is some conflict in the decisions; but the decided weight of authority, as well as reason, sustains it. 14 Cyc. 248. "Where, however, a plaintiff in detinue has shown a prior possession and made out a prima facie case, the defendant cannot defeat a recovery by showing merely an outstanding title in a third person, without connecting himself therewith." 6 Ency. Pl. & Pr. 657. See, also, *Miller v. Jones*, 26 Ala. 247; *Hall v. Chapman*, 35 Ala. 559; *Gafford v. Stearns*, 51 Ala. 434; *Tanner v. Allison*, 3 Dana (Ky.) 422; *Townsend v. Burton*, 24 S. W. 1069, 15 Ky. Law Rep. 648; *Banking Co. v. Bank*, 34 Neb. 93, 51 N. W. 596; *Calvit v. Clond*, 14 Tex. 53. If, therefore, the plaintiff had possession and was ousted thereof by the defendant, the case falls within the exception, and the title of Newman & Spanner cannot be relied upon as a defense.

The other members of the court are of the opinion that the plaintiff had sufficient possession to claim the benefit of this exception. His written contract with Newman & Spanner required him to deliver the logs on the banks of Leatherwood creek and Guyandotte river, there to be measured and paid for by the purchasers. He had made delivery thereof at the places designated, and the purchasers had measured, branded, and paid for the logs. No further obligation rested upon the plaintiff, except a duty to roll the logs into the streams. Whether they were on his land is not shown by the record. If they were, his continued possession thereof would seem to be clear, as their presence on his land would indicate a bailment or custody of the same for and on behalf of his vendees. It seems to me that, to make out a case of continued possession, he should have shown, if he could, that the logs were still upon his premises. For this omission in the proof, I would hold his possession did not continue, and that the further requirement of the contract was one of mere service for the purchasers. In other words, I think his contract was so far executed as to divest him of title, actual possession, and right of possession, and the service he owed the purchasers had been substantially performed, as nearly all the logs were down over the banks of the streams. The other

members of the court, however, think they were either upon land owned by him, or land which he had the right to use for deposit thereof, and therefore his own land, for the purposes of this case, and, as some of the logs were still on top of the banks, he was bound to bestow further labor upon them. This conclusion relieves said first instruction of the possible objection to it above noted, and also sustains the action of the court in giving the second, excluding the defense of title in Newman & Spanner. My own conclusion would render both instructions bad and reverse the judgment.

For the reasons stated, the judgment will be affirmed.

(68 W. Va. 734)

CURTIS et al. v. PINEY COLLIERY CO.
et al.

(Supreme Court of Appeals of West Virginia.
Feb. 28, 1911. Rehearing Denied
May 17, 1911.)

(Syllabus by the Court.)

**MINES AND MINERALS (§ 55*)—CONVEYANCES
—EXCEPTIONS.**

A deed to defendants' predecessors in title conveyed to the grantees, with general warranty, "all the coal and other minerals in, upon and under" a certain tract of land; but contained the following exception, under which plaintiffs claim: "And said grantors reserve the top vein of coal in hill tops above my dwelling house." Considered in the light of all the facts and circumstances known to and surrounding the grantors at the time, this exception should be construed as applying to a vein of coal then existing, and of which the grantors are shown to have had some knowledge, and believed by them to exist in the hill tops back of said dwelling, and not to the vein or seam of coal in controversy then and prior thereto, sometimes referred to as the "top vein," and by other names, found some sixty or seventy feet under ground at said dwelling house, and not in the hill tops back of said dwelling.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153-185; Dec. Dig. § 55.*]

Error to Circuit Court, Raleigh County.

Action by Milton Curtis and others against the Piney Colliery Company and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

File & File, for plaintiffs in error. McGinnis & Hatcher and Brown, Jackson & Knight, for defendants in error.

MILLER, J. In ejectment, after plaintiffs had introduced all their evidence, oral and documentary, defendant offering no evidence, the court below on its motion struck out all the evidence and directed a verdict for defendant, and to the judgment of the circuit court thereon, that plaintiffs take nothing by their action, they obtained a writ of error from this court.

The property sued for, as the declaration in three counts alleges, is the "Sewell seam or vein of coal, * * * now also known

as and called the No. 5 seam or vein of coal, and which * * * was on the 10th day of December, 1888, and for many years prior" thereto "known as and called the top vein or seam of coal," and which is in and underlying the tract of land in Raleigh county, described in the declaration, by metes and bounds, as containing 108½ acres, and of which it is alleged plaintiffs were possessed of an estate in fee simple absolute.

Plaintiffs and defendant have a common source of title, and their respective rights to the coal in controversy depend on the construction to be given to the deed from Amos Williams and Susan A., his wife, to H. A. Gray, and others, trustees, dated December 10th, 1888, whereby, for the consideration therein expressed, the grantors granted unto the grantees with general warranty, "all the coal and other minerals in, upon and under" said tract or parcel of land further described as "containing by recent survey 108½ acres, and known on the plat of the lands of the C. C. C. L. Association as No. 6, and bounded," as described in the declaration. After this grant the deed contains this exception or reservation: "And said grantors reserve the top vein of coal in hill tops above my dwelling house." By a subsequent clause in the deed the usual mining rights are also granted to said second parties.

Plaintiffs claim the coal excepted or reserved in said deed, by a subsequent deed from said Susan A. Williams, widow, and Elsie W. Williams, sole heir of said Amos Williams, deceased, dated March 10th, 1904, granting unto each of them, with general warranty, a one-half undivided interest, being all the right, title and interest, both legal and equitable, to the said tract of land, described as in said declaration, excepting therefrom, however, "a part of the coal and other minerals as heretofore conveyed to H. A. Gray," of record in said Raleigh county, in Deed Book "J," page 341. Defendants by mesne conveyances have derived title to the coal and mining rights granted to said Gray and others, trustees.

Counsel for plaintiffs have in their brief argued elaborately, with copious citations of authorities, the question of plaintiffs' remedy by ejectment; also the question whether the clause in the deed of December 10th, 1888, reserving "the top vein of coal in hill tops above my dwelling house," should be construed as an exception or a reservation. Defendants' counsel concede the remedy, and admit that the so called reservation should be construed as an exception. So we need not trouble ourselves for the purposes of this case with these questions. Indeed, we think, there can be no doubt as to the remedy by ejectment; nor as to the proposition that the reservation in the deed, properly construed, is an exception.

So we have but the one question, what was excepted from the grant? Was it, as plaintiffs claim, the Sewell, or No. 5 seam, described in the declaration, or, as defendants contend, some other vein actually existing or believed by the grantors at the time to exist "in the hill tops above my dwelling house"?

Plaintiffs' contention and theory is that on and prior to the date of the deed, in the vicinity of this land, there was but the one seam or vein of coal known and recognized as the top vein or seam, namely, the one now in controversy, from four to five feet in thickness, and that this seam or vein of necessity must have been the one referred to, and excepted in the grant of 1888. The evidence, however, shows that this seam had then been opened on the William Warden land adjoining the Williams tract on the south, and within about three hundred yards of his South West line, at an elevation of about 123.19 feet, an outcrop thereof also appearing in a little branch or stream of water traversing both tracts from North East to South West, about a hundred yards north of the first opening, at an elevation of about 117.19 feet, and also at one or two other places within a mile or so of the Williams tract as early as the year 1889, and which seam was also referred to by various names, "McNamee Seam;" "Top Seam;" "Upper Seam;" "Warden Seam;" "Bill Warden Coal Bank," &c. These coal banks had never up to the date of the deed been worked, except in a small way for local and domestic use. The evidence further shows that this seam of coal does not exist in the hill tops back of the dwelling house. The hill tops are there, but the seam of coal is not found present. It was found, however, before the deed, at the bore hole south of the house, and a little north of Warden's line at about the depth of thirteen feet, and later at the house, situated two to three thousand feet north of the opening on the William Warden land, at an elevation of 149.34 feet, and at a depth below the house of from sixty to seventy feet, and at an increased depth as you go north and north east on adjoining lands.

But notwithstanding the existence of these physical facts respecting the location of the Sewell or No. 5 seam, it is insisted that that seam, must, in the light of the surrounding facts and circumstances, by proper construction, be regarded as the subject matter of the exception in the deed, even though to do so requires us to wholly disregard the words of description therein, "in the hill tops above my dwelling house." Many decisions are cited and relied on, and rules of construction invoked in able and exhaustive briefs of learned counsel pro and con this proposition. Included among the cases cited is our own case of *Armstrong v. Ross*, 61 W. Va. 38, 55 S. E. 895, which plaintiffs' counsel regard as decisive of the case at bar.

But the view we take of the documentary and oral evidence does not require us to here examine the many decisions cited, or to apply all the various rules of construction relied on.

The general rule to be observed in construction of deeds as of all other contracts, and which we think is the only rule we need observe in disposing of this case, is that in construing a deed the object is to ascertain the intention of the makers, as gathered from the language used, and the general purpose and scope of the instrument in the light of the surrounding circumstances, and when such intention clearly appears by giving the words their natural and ordinary meaning technical rules of construction will not be invoked to defeat it. Citation of authority for this proposition seems wholly unnecessary, but we cite *Uhl v. Railroad Co.*, 51 W. Va. 107, point 6, 41 S. E. 340; *McDougal v. Musgrave*, 46 W. Va. 509, point 2, 33 S. E. 281; 17 Am. & Eng. Ency. Law (2d Ed.) 7; *Devlin on Deeds* (2d Ed.) §§ 837, 850; *Preston v. White*, 57 W. Va. 280, 283, 50 S. E. 236.

If we could view the evidence as counsel for plaintiffs view it, there would be great force in their argument, that in construing the deed here and applying the exception to the subject matter we should reject the description "in the hill tops above my dwelling." They assume that the Sewell seam, as then exposed on the William Warden land, in the light of the surrounding facts and circumstances, was necessarily the subject of that exception, and the only seam or vein to which the parties could have had reference in the execution of the deed. But we cannot so view the evidence. We cannot view the words of description, which we are asked to reject, otherwise than as having great force. While it is true the Sewell seam was sometimes referred to as the top seam, it does not follow that that was the seam intended to be excepted. It is practically conceded that the grantors must have thought that the top seam intended to be excepted, and described as located "in the hill tops back of my dwelling" actually existed there, else they would not in the deed have located it there. But it is said that in this supposition they were evidently mistaken, and as they call for the "top vein" in their exception the parties must have had in mind the Sewell seam, or the vein of coal exposed on the Warden and other lands in that vicinity, a seam now shown to be from sixty to seventy feet below the surface at the dwelling house, and at a still greater depth under the hill tops back of the house. The evidence, however, also discloses the fact that there is and then was a vein of coal answering more or less accurately the description in the deed, located in the hill tops above the dwelling house, at or below a small sulphur spring, at an elevation of about five feet above the bottom sill of the house and at a

distance of from three to four hundred feet therefrom, and about five and a half inches thick, and which has been found cropping out at one or two other points. It is argued by counsel, however, that the evidence shows that this small insignificant vein had not then been discovered, and was unknown to the grantors, prior to or at the date of the deed, and that it cannot be assumed the parties were contracting with reference to a vein or seam of coal unknown to them. For this proposition *Armstrong v. Ross*, supra, is cited and relied upon. That decision would be in point if the facts were as assumed. Aside from the fact that the description in the deed points to a vein of coal in the hill tops above the dwelling, the evidence satisfies us that the grantors, at the date of their deed, did have actual knowledge or belief in the existence of a seam of coal in the vicinity of the sulphur spring. The evidence shows that he and others had prospected for coal in that vicinity. Witness Jeff Warden says, that prior to the death of Williams, he had been at this sulphur spring a number of times; he could not say how often. The last time he remembers to have been there was a month or two prior to the death of Williams. There was then "a space as big as this court room of brush, and amidst the brush was a spring just flowing out of the hill, and they called it the sulphur spring." When asked about the condition of the ground, with reference to having been prospected for coal, he says, there was "just a little coal in the mouth, in the flow of the spring, that was all." Frank Greer, another witness, referring to a time before the death of Williams, and to the prospecting that had been done for coal at or near this spring, says, that there had been some prospecting done there just opposite the spring on the left hand side, but he does not know that any coal was found there, but says, there might have been. John Williams, a brother of the grantor, testifies that prior to his brother's death he and his brother had prospected for coal in the vicinity of this spring, but he professes not to have found any coal there. Josiah Teel and Levi Williams, two other witnesses say, that after the death of Williams they were both at this sulphur spring looking for coal; the former says this was the next fall after Williams' death, "that we aimed to open up the coal for his wife." The latter says: "We went there to look for coal," and "found a little bit." On cross-examination the former says, that he had never seen any prospecting done there before that; he had heard that the water came off of coal, but had never heard that there was coal back there. True all this evidence may not be proof positive that Williams had seen this coal at the spring; but his reference in the deed to the existence of coal in that vicinity, and the fact that at least one witness proved that coal was ex-

posed in the opening of that spring, and other witnesses proved prospecting to have been done there, and that Williams was there with one or more of these witnesses prospecting for coal, we think conclusive of the fact that he at least believed coal existed there, and that the subject of the exception in his deed was the vein of coal there, or supposed to be there when he made the deed. Another very strong fact and circumstance proved, supporting our conclusion is, that prior to making the deed the prospective purchasers had made tests of this and adjoining lands for this Warden seam of coal, so called, and that one, if not more, of these bore holes had been put down on the Williams land, the first, already referred to, near the south western boundary line of the Williams tract, and where the Warden or Sewell seam or vein was found at the depth of some thirteen feet below the surface. The proof is that Williams himself was there at that hole, and knew that the purchaser was then making a test of his land for that very Sewell seam. Other seams of commercial value have since been located below the Sewell seam, but these have not been proved by actual test to be present under the Williams tract. These lower veins of coal, the first found some three hundred feet below the Sewell seam, and others at still lower depths, had not then been discovered or worked, and it is quite evident that these lower veins were not the only veins covered by the grant to the grantees in the deed. Before their purchase they tested the land for the Sewell seam. Williams knew this. We must assume also that he had knowledge of the conditions existing about the sulphur spring, and believed that a vein of coal existed there. Coal appeared in the spring. The fact that that vein is of little, if any, commercial value is unimportant. If that was the vein excepted, or intended to be, and we think it undoubtedly was, the exception must be applied to that vein as its subject matter.

But we cannot further detail the evidence. It suffices to say, that after having carefully read and considered all the evidence, and the many authorities cited and relied upon by counsel, we have concluded that the judgment below was clearly right, and should be affirmed, and it will be so ordered.

BRANNON, J., absent.

(155 N. C. 212)

YOUNT et al. v. SETZER.

(Supreme Court of North Carolina. May 11, 1911.)

1. INJUNCTION (§ 16*)—ADEQUACY OF LEGAL REMEDY—SALE OF PERSONAL PROPERTY.

As a rule, an injunction will not issue to restrain the sale of personal property, when it can be recovered in a legal action.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 15; Dec. Dig. § 16.*]

2. INJUNCTION (§ 12*)—RIGHT TO RELIEF—DEFENSES—COMMISSION OF ACT.

An injunction will not issue to restrain an act which has already been committed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 12; Dec. Dig. § 12.*]

3. INJUNCTION (§ 18*)—ADEQUACY OF LEGAL REMEDY—INSOLVENCY.

Except where made unnecessary by statute, an allegation of insolvency is necessary to authorize the issuance of an injunction to restrain the disposition of personalty if damages would afford an adequate remedy, unless the injury would be irreparable irrespective of insolvency.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 17; Dec. Dig. § 18.*]

4. PLEADING (§ 37*)—ANSWER—FAILURE TO PLEAD—FACTS WITHIN DEFENDANT'S KNOWLEDGE.

Where defendant knows facts which would relieve him from liability, it is his duty to allege them, and, failing to do so, the inference most unfavorable to him may be taken.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 87, 88; Dec. Dig. § 37.*]

5. EQUITY (§ 21*)—JURISDICTION—PURPOSES OF RELIEF—PROTECTION OF FIDUCIARY RIGHTS.

The jurisdiction of equity to restrain any violation of fiduciary obligations or equitable interests is commensurate with the equitable remedies to enforce fiduciary duties; there being no legal remedy.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 48, 49; Dec. Dig. § 21.*]

6. INJUNCTION (§ 18*)—PURPOSES OF RELIEF—VIOLATION OF FIDUCIARY RIGHTS.

Sureties on a guardian's bond having become such upon an agreement that they should hold the proceeds of the sale of the ward's lands for their indemnity, the land was sold, and a negotiable note, secured by a mortgage, was taken for the deferred payment. A short time thereafter the guardian's husband procured the note and mortgage from her against her will, and turned it over to defendant, who claimed to hold it as collateral security for an obligation of the guardian's husband; defendant having knowledge that the mortgage and note were obtained from the sale of the ward's lands. Plaintiff's affidavit for an injunction alleged that the guardian's husband was insolvent, and that, if the note was collected, the bondsmen would be unindemnified, and the guardian would not be able to pay over the funds to the sureties as agreed, and that defendant is trying to sell the note. It did not appear that the note was beyond defendant's control. *Held*, that an injunction would issue to enjoin defendant from disposing of the note under the general equity jurisdiction to protect fiduciary property, though he was not alleged to be insolvent.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 18.*]

7. INJUNCTION (§ 163*)—PRELIMINARY INJUNCTION—CONTINUANCE TO HEARING.

Where there is a serious controversy between the parties raising issues which must be determined by a jury, the restraining order should be continued to the hearing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357-371; Dec. Dig. § 163.*]

Appeal from Superior Court, Catawba County; Long, Judge.

Action by Ora J. Yount and others against P. C. Setzer. Decree for plaintiffs, and defendant appeals. Affirmed.

The plaintiffs are Ora J. Yount, guardian of George Hoke, and E. C. Burns and T. L. Henkel, sureties on the guardian bond.

The plaintiffs allege in their affidavit: "That from about 30 to 40 days ago the plaintiff, Ora J. Yount, applied to the said E. C. Burns and T. L. Henkel to become her sureties upon a guardian bond, so that she might file a petition and procure the sale of some of the real estate left by her first husband at the time of his death and which was inherited by her said son, George Hoke. That said sureties agreed to become such upon her bond if she would agree that the amount which the land would bring, less the cash payment, should be held by T. L. Henkel, one of said bondsmen, so that the said bondsmen might be protected and indemnified against loss or defalcation by reason of their suretyship. That the said Ora J. Yount acceded to the terms of the bondsmen, and agreed that if they would become such that the said T. L. Henkel, one of them, should hold the proceeds arising from the sale of the lands that were to be sold, except the cash payment, and thereupon the said Henkel and the said Burns, said sureties, signed the said bond. That immediately after the said bond was filed the plaintiff, Ora J. Yount, qualified as guardian as aforesaid. She filed a petition in the superior court of Iredell county and procured the sale of a portion of the real estate left by her said husband to his son, George Hoke, and at such sale one Lee Bradford of Iredell county became the purchaser at the price of \$1,600, of which amount the sum of \$500 was paid down, and the residue secured by a note and mortgage—the mortgage being duly registered in Iredell county, the said guardian, Ora J. Yount, having first made to the purchaser a deed to the land in accordance with the order of the court. That, after said sale was made, the said Ora J. Yount, guardian as aforesaid, neglected turning over the said note and mortgage to T. L. Henkel as agreed, and that a short time after receiving it, to wit, about a week or ten days ago, the husband of the said Ora J. Yount procured said note and mortgage from her, and turned the same over to P. C. Setzer, who now holds the same, claiming that he holds it as collateral security or indemnity to himself on account of a transaction between said Setzer and said C. J. Yount, the facts being, as affiant avers, that prior to the time when said note and mortgage was turned over to said Setzer by the said C. J. Yount that said Setzer had become surety for said Yount at the bank for a sum of money, and the said Setzer required that said Yount turn said paper over to him as indemnity as aforesaid. That at the time said note and mortgage was so turned over said Setzer knew, as affiant is informed and believes, that the same had

been obtained by her from the sale of the land of her ward, George Hoke, and that the mortgage deed was taken back upon the land so sold by her as guardian. That said note and mortgage were not turned over by her voluntarily to her said husband, and that she only surrendered it to him after she had been importuned to do so, by him. Affiant further avers that her said husband has become involved in debt and is insolvent, and that she is not solvent or responsible in law, and that, if said note is collected and the funds used by the said P. C. Setzer, defendant, the bondsmen will be compelled to meet any defalcation that she may make, and she verily believes that she will not be able to respond to her obligation and pay over the funds which have come into her hands as guardian for her son. That the said Setzer since he has procured said note, as affiant is informed and believes, has been trying to sell and dispose of the same, and is claiming his right to hold the same and refuses to surrender the same, although he has been asked to do so. That plaintiffs have commenced a civil action in Catawba superior court by the issuance of summons for the recovery of the possession of said note and mortgage." The note referred to in the affidavit was exhibited to the court, and it is negotiable and not due. It is payable to the order of Ora J. Yount, and is indorsed in blank by her. The defendant filed an affidavit, denying all the material parts of the affidavit of the plaintiffs, and, among other things, alleges: "It is not denied that the defendant, P. C. Setzer, undertook to sell and dispose of the note and mortgage hereinbefore mentioned, and this defendant respectfully sheweth to the court that before the issuing and serving of the restraining order herein that he had transferred and assigned the said note to the First National Bank of the city of Hickory."

A restraining order was issued, and on the return day it was continued to the final hearing, and the defendant appealed. The defendant denies the right of the plaintiffs to a restraining order: (1) Because the action is to recover personal property and there is an adequate remedy at law. (2) Because there is no allegation that the defendant is insolvent. (3) Because it appears that the note was transferred before the restraining order was issued.

A. A. Whitener, for appellant. Council & Yount, W. A. Self, and O. L. Whitener, for appellees.

ALLEN, J. (after stating the facts as above). [1, 2] It is true, as contended by the defendant, that ordinarily the equitable jurisdiction of the court cannot be invoked to restrain the sale or other disposition of personal property when an action at law may be maintained to recover the property (Baxter v. Baxter, 77 N. C. 119; Kistler v.

Weaver, 135 N. C. 391, 47 S. E. 478), and it requires no authority to sustain the proposition that, if the act has been committed, it cannot be restrained.

[3] It is also true that an allegation of insolvency is necessary, except where dispensed with by statute, in cases where compensation in damages afford an adequate remedy. *McKay v. Chapin*, 120 N. C. 159, 26 S. E. 701; *James v. Markham*, 125 N. C. 145, 34 S. E. 241; *Porter v. Armstrong*, 132 N. C. 66, 43 S. E. 542; *Kistler v. Weaver*, 135 N. C. 388, 47 S. E. 478.

We do not think, however, that these principles are applicable to the facts of this case. The subject-matter of the controversy is a negotiable instrument that has not been dishonored, and it may be assigned to an innocent purchaser. If so assigned, the holder would become the owner and could enforce payment (Revisal 1905, § 2201, 2206), and the right of the plaintiffs to recover the property would be thereby defeated; while in the ordinary action by the owner to recover personal property a sale by the defendant would not have this effect. It is also, if the allegations of the plaintiffs are true, a trust fund, which belongs to the ward, George Hoke, and the plaintiffs, who seek to recover it, are the guardian and the sureties on her bond.

[4] Nor does it appear that the note is beyond the control of the defendant. He says it has been transferred and assigned to the bank, but he does not allege that the assignment was for value, and there is no pretense that it was a gift. He knows the facts, and it was his duty to disclose them. If he remains silent, we are justified in concluding that his assignment is not beyond recall, and particularly when the bank makes no claim to the note. The failure to allege insolvency is not decisive of the right to a restraining order, although in many cases it is material. *Railway v. Mining Co.*, 112 N. C. 662, 17 S. E. 77. It is no more than evidence on the question of irreparable injury, and, if such injury is shown without proof of insolvency, a court of equity will intervene. Irreparable injury is frequently dependent on the nature of the subject-matter. Chief Justice Marshall, in *Osborne v. Bank*, 9 Wheat. 845, 6 L. Ed. 204, speaking of the grounds on which the jurisdiction of the court of equity to restrain may be placed, says: "One which appears to be ample for the purpose is that a court will always interpose to prevent the transfer of a specific article, which, if transferred, will be lost to the owner. Thus the holder of negotiable securities, indorsed in the usual manner, if he acquired them fraudulently, will be enjoined from negotiating them, because, if negotiated, the maker or indorser must pay them. Thus, too, a transfer of stock will be restrained in favor of a person having the real property in the article. In these cases

the injured party would have his remedy at law. * * * But it is the province of a court of equity in such cases to arrest the injury and prevent the wrong. The remedy is more beneficial and complete than the law can give."

[5, 6] The doctrine is stated accurately and clearly in Pom. Eq. Jur. §§ 1839, 1840, as follows:

"Sec. 1839. The jurisdiction to grant injunctions restraining acts in violation of trusts and fiduciary obligations, or in violation of any other purely equitable estates, interests, or claims in and to specific property, is really commensurate with the equitable remedies given to enforce trusts and fiduciary duties, or to establish and enforce any other equitable estates, interests or claims, with respect to specific things, whether lands, chattels, securities, or funds of money, or to relieve against mistake or fraud done or contemplated with respect to such things. In all such cases the question whether the remedy at law is adequate cannot arise; much less can it be the criterion by which to determine whether an injunction can be granted; for there is no remedy at law.

"Sec. 1840. Among the instances in which equity will grant an injunction, preliminary or final, in pursuance of the general doctrine as stated in the foregoing paragraph, the following are some of the most important, and they fully illustrate and establish the doctrine itself, in all its generality, and the grounds upon which it rests: To prevent the transfer of negotiable instruments, at the suit of the defrauded maker or acceptor, or of the party claiming to be the true owner, or who have an interest in them; or the transfer, under like circumstances, of stocks or other securities not strictly negotiable."

The rule was applied in *Caldwell v. Stirewalt*, 100 N. C. 205, 6 S. E. 262, and a restraining order granted, although there was no allegation of insolvency. See, also, *Manf. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522.

[7] There is a serious controversy in this action between the plaintiffs and defendant, and issues are raised which must be settled by a jury, and under such conditions the restraining order should be continued to the hearing. *Hyatt v. De Hart*, 140 N. C. 270, 52 S. E. 781; *Tise v. Hardware Co.*, 144 N. C. 507, 57 S. E. 210.

The case of *Zeiger v. Stephenson*, 153 N. C. 528, 69 S. E. 611, in which the same rule is stated, is in many respects like the one we have under consideration, but it is chiefly valuable for the learned discussion of the distinction between common and special injunctions by Justice Walker.

We find no error.

Affirmed.

HOKE, J., not sitting.

(155 N. C. 494)

STATE v. BALDWIN.

(Supreme Court of North Carolina. May 11, 1911.)

1. HOMICIDE (§ 203*)—EVIDENCE—"DYING DECLARATIONS."

That statements of deceased may be admitted as "dying declarations," they must have been made in the expectancy and contemplation of impending death.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*

For other definitions, see *Words and Phrases*, vol. 3, pp. 2297, 2298.]

2. HOMICIDE (§ 190*)—EVIDENCE—UNCOMMUNICATED THREATS OF DECEASED.

Uncommunicated threats of deceased, uttered shortly before the homicide, tending to show animosity towards defendant and a purpose to do him serious bodily harm, are admissible in connection with evidence tending to show a killing in necessary self-defense, such evidence tending to throw light on the occurrence; evidence of such threats being admissible under such circumstances, as well as where they tend to corroborate communicated threats.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 399-413; Dec. Dig. § 190.*]

3. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

The portion of a charge that, if defendant fought willingly at any time up to the fatal moment, it would be the jury's duty to convict him of manslaughter, erroneous because, though fighting willingly, he might be fighting rightfully in necessary self-defense, was not sufficiently qualified by the concluding portion; there being no evidence that he retreated or otherwise showed that he abandoned the fight; but if you should find that he entered into the combat unwillingly, then you should proceed to consider his plea of self-defense, to correct it.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Appeal from Superior Court, Watauga County; Pell, Judge.

William Baldwin was convicted of manslaughter, and appeals. Reversed, and new trial ordered.

L. D. Lowe and T. A. Love, for appellant. Atty Gen. Bickett and Geo. L. Jones, Asst. Atty. Gen., for the State.

PER CURIAM. On a former appeal in this cause, the prisoner having been convicted of murder in the first degree, it was held that the testimony as it then appeared of record did not justify such a verdict, and a new trial was awarded, with the direction that if the evidence was the same the prisoner should be tried on the question of his guilt or innocence of the crime of manslaughter. *State v. Baldwin*, 152 N. C. 822, 68 S. E. 148, where the facts are very fully reported. This opinion having been certified down, and the evidence relevant to the inquiry being substantially the same as that received on the former trial, the case was submitted on the issue as indicated, and defendant, having been convicted of manslaughter, again appeals, assigning errors committed on the second trial.

[1] It was urged that the court improperly

excluded relevant statements of the deceased, tending to support the plea and claim of self-defense on the part of the prisoner, the same having been offered as dying declarations; but it is essential to the admissibility of such statements that they be made in the expectancy and contemplation of impending death, and we concur with his honor in the view that the facts as they now appear of record do not establish the conditions required.

[2] It was insisted, further, that his honor made an erroneous ruling in excluding evidence of certain uncommunicated threats of the deceased, uttered shortly before the homicide, tending to show animosity towards the prisoner, and a purpose to do him serious bodily harm. It is now generally recognized that in trials for homicide uncommunicated threats are admissible, where they tend to corroborate threats which have been communicated to the prisoner; second, where they tend to throw light on the occurrence and aid the jury to a correct interpretation of the same, and there is testimony ultra sufficient to carry the case to the jury, tending to show that the killing may have been done from a principle of self-preservation, or the evidence is wholly circumstantial, and the character of the transaction is in doubt. *Turpin's Case*, 77 N. C. 473, 24 Am. Rep. 455; *State v. McIver*, 125 N. C. 645, 34 S. E. 439; *Horhigan & Thompson, Self-Defense*, p. 927; *Stokes' Case*, 53 N. Y. 164, 13 Am. Rep. 492; *Holler v. State*, 37 Ind. 57, 10 Am. Rep. 74; *Cornelius v. Commonwealth*, 54 Ky. 539. In the present case, while there was evidence on the part of the state tending to show that the prisoner fought wrongfully and killed without necessity, there is testimony on his part tending to show a homicide in his necessary self-defense, and the proposed evidence, tending as it did to throw light upon the occurrence, should have been received.

[3] The prisoner excepts, further, that his honor charged the jury in part as follows: "Now, gentlemen of the jury, I repeat, if you should find that he fought willingly at any time up to the fatal moment, it would be your duty to convict the defendant of manslaughter, there being no evidence that he retreated or otherwise showed that he abandoned the fight; but, if you should find that he entered into the combat unwillingly, then you should proceed to consider his plea of self-defense." In *Garland's Case*, 138 N. C. 675-678, 50 S. E. 853, 854, the court said: "It is the law of this state that, where a man provokes a fight by unlawfully assaulting another, and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill, in order to save his own life" (citing *Foster's*

Criminal Law, p. 276); but authority does not justify the position, as contained in the excerpt from his honor's charge, "That if he fought willingly at any time up to the fatal moment, it would be your duty to convict of manslaughter." This would be to inculcate a man who fought willingly, but rightfully, and in his necessary self-defense. True the concluding portion of the statement would seem to qualify the position to some extent, but not sufficiently so to correct it, and in a case of this importance, and as a matter goes back for another hearing, we have considered it best to advert to the error.

For the reasons stated, we think the prisoner is entitled to have his cause tried before another jury, and it is so ordered.

Venire de novo.

(155 N. C. 208)

JINKINS et ux. v. NORFOLK & S. RY. CO.
et al.

(Supreme Court of North Carolina. May 11, 1911.)

1. RAILROADS (§ 327*)—CROSSINGS—DUTY TO LOOK AND LISTEN.

It is the duty of one approaching a railroad crossing to look, listen, and take every reasonable precaution to avoid a collision.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

2. RAILROADS (§ 312*)—CROSSINGS—SIGNALS FROM TRAINS.

It is a railroad engineer's duty to blow his whistle or ring his bell at a reasonable distance from a crossing, to warn those approaching the crossing with a view to passing over the tracks.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 988-1003; Dec. Dig. § 312.*]

3. RAILROADS (§ 348*)—CROSSING ACCIDENTS —CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for injuries to one whose horse was frightened by a train at a crossing, evidence held insufficient to show contributory negligence on plaintiff's part.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.*]

4. RAILROADS (§ 360*)—OPERATION—PERSONAL INJURIES—FRIGHTENING STOCK.

A railroad is not liable for injuries received from horses becoming frightened on a highway at the mere sight of trains, or the noises necessarily incident to the running of trains and the operation of the road.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1241-1244; Dec. Dig. § 360.*]

Appeal from Superior Court, Lenoir County; Justice, Judge.

Action by J. F. Jenkins and wife against the Norfolk & Southern Railway Company and others. Judgment for plaintiffs, and defendants appeal. No error.

The action was brought to recover damages for alleged negligence in frightening the feme plaintiff's pony, whereby she was thrown from a buggy and injured. The usual issues were submitted and answered in

favor of the plaintiff, and her damages assessed at \$500.

Rouse & Land, for appellants. Emmett Wooten and Murray Allen, for appellees.

BROWN, J. The feme plaintiff was driving in a buggy with her father, and as they approached within 10 or 12 feet of McIlwain street crossing, for purpose of passing over the defendant's track, an engine and train rushed over the crossing and badly frightened the pony, causing him to swerve suddenly and throw the feme plaintiff from the buggy, injuring her.

The motion to nonsuit presents two questions:

(1) Is there any evidence of negligence? The evidence of plaintiff, as well as of her father, appears to be quite positive that the engineer gave no signal, either by bell or whistle, as he approached the crossing. The plaintiff states that she listened and could have heard the signal of an approaching train, but that none was given. The plaintiff's father says with equal positiveness that no signal was given, no whistle blown, or bell rung, but that train ran on the crossing without warning.

[1, 2] It has been repeatedly held in this state that it is the duty of a person approaching a railroad crossing to look, listen, and to take every reasonable precaution to avoid collision; and that it is likewise the duty of the engineer to blow his whistle or ring his bell at a reasonable distance from the crossing, in order to enable travelers approaching the crossing, for the purpose of passing over the tracks, to avoid danger. *Gilmore v. Railroad*, 115 N. C. 657, 20 S. E. 371; *Hinkle v. Railroad*, 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581; *Russell v. Railroad*, 118 N. C. 1098, 24 S. E. 512; *Butts v. Railroad*, 133 N. C. 82, 45 S. E. 472.

[3] (2) Does the evidence introduced by the plaintiff make out a case of contributory negligence? This evidence, if taken to be true, establishes that when she turned into McIlwain street the view of all that part of the track from whence the train approached was entirely obstructed by a building 75 yards long and situated within 25 feet of the track, so that neither she nor her father could see the train; that both looked up and down the track at the last available point; that the pony was gentle, and they were driving very slowly; that the pony saw the train first when within 10 feet of the track and swerved suddenly and threw plaintiff out. The evidence is positive and unequivocal that the plaintiff and her father looked for approaching trains at the last available moment before approaching the track.

It was, of course, plaintiff's duty, as well as that of her father, who was driving the pony, to listen for approaching trains, and

especially so as the view of the track was obstructed by the house. After reading their evidence, we do not think that the inference is necessarily to be drawn from it that they did not listen for the train signal. On the contrary, from many of the answers, it would seem that the plaintiff listened for train signals and is positive none were given. While the plaintiff's evidence upon this phase of the case is not as clear as it should have been made, we do not think, as matter of law, a motion to nonsuit could have been properly sustained, upon the ground that, in any view of it, the plaintiff contributed by her own negligence to her injury.

[4] It is true, as contended by defendant, that a railroad company is not liable for injuries received from horses becoming frightened upon a highway at the mere sight of its trains, or the noises necessarily incident to the running of the train and the operation of the road. 3 Elliott, R. R. 1264, and cases cited. But the basis of plaintiff's cause of action is the negligence of the defendant in failing to give a signal in reasonable time to warn her of the approach of its train to a public crossing. If it had been given, she avers she would have heard it and stopped, before getting in such dangerous proximity to the track, and thereby avoided injury.

Taking the evidence as a whole, we think the case was properly submitted to the jury in a charge which followed the settled decisions of this court.

No error.

(155 N. C. 219)

COMMISSIONERS OF LEXINGTON v. AETNA INDEMNITY CO. OF HARTFORD, CONN., et al.

(Supreme Court of North Carolina. May 11, 1911.)

1. INDEMNITY (§ 14*)—CONCLUSIVENESS OF JUDGMENT.

Generally, in an action for indemnity, brought by one held liable for negligence, for which another, as between themselves, is primarily liable, the judgment in the action against the party indemnified is evidence of his liability, and, when notice to defend was given the indemnitor, of the amount of damages; but it does not establish which of the wrongdoers is primarily liable.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. § 41; Dec. Dig. § 14.*]

2. INDEMNITY (§ 14*)—JUDGMENT—CONCLUSIVENESS.

In an action by a municipality on an indemnity bond, given by a street contractor, for reimbursement on account of recovery by a pedestrian who fell into an unguarded excavation, judgment in the pedestrian's suit established the contractor's primary liability, as well as the town's liability, where such primary liability is shown by the record in that suit.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. § 41; Dec. Dig. § 14.*]

3. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

Any error in instructing that primary liability for negligence claimed to be covered by

an indemnity bond should be determined by the bond was harmless, where such liability was established by the undisputed facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

4. INDEMNITY (§ 8*)—MUNICIPAL CONTRACTORS—SCOPE OF BOND.

A street contractor's bond to indemnify a town against actions for injuries to persons from causes under the contractor's control, or for his negligence in guarding the work, entitles the town to indemnity against recovery by a pedestrian, injured through falling into a trench left unguarded by the contractor.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 10-15; Dec. Dig. § 8.*]

5. INDEMNITY (§ 4*)—MUNICIPAL CONTRACTORS—VALIDITY OF BOND.

A street contractor's bond to indemnify a town against actions for injuries to persons from causes under the contractor's control, or for his negligence in guarding the work, is not opposed to public policy.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 2-6; Dec. Dig. § 4.*]

Appeal from Superior Court, Davidson County; W. J. Adams, Judge.

Action by Commissioners of Lexington against the Ætna Indemnity Company of Hartford, Connecticut, and another. Judgment for plaintiff, and defendant company appeals. Affirmed.

The West Construction Company contracted with the town of Lexington to do certain work in grading, paving, macadamizing, and otherwise improving its streets, according to plans and specifications furnished; and, to secure the faithful performance of the work in a proper and careful manner, it executed to the town its bond with the other defendant, Ætna Indemnity Company, as surety, by which it agreed to indemnify the town and save it harmless "from all suits, actions, proceedings of every name or description, in law or equity, brought against the said town or any officer or officers, agents or servants thereof, for or on account of any injuries or damages received or sustained by any person, structure or property, by or from said contractor, his servants or agents, and also to indemnify and save harmless the said (town) from all suits or actions for any injuries or damages sustained by any party or parties by or from any causes under the control of said contractor while in the construction of the streets or any part thereof, or any negligence in guarding the same or by or on account of any act of omission of said contractor or his agents or employés." The construction company, while in the prosecution of the work, caused a trench to be dug across a sidewalk, and piled earth and rocks near it, which made it very dangerous to the public using the street, and failed to place lights or barriers around it, so as to warn pedestrians and render the use of the sidewalk safe.

C. M. Clodfelter, while walking along the sidewalk at night, fell into the excavation

without any negligence or fault on his part, and was seriously injured. He brought an action against the town and the construction company, alleging substantially the foregoing facts, and, further, that he was injured by the negligence of the construction company in digging the trench and not properly safeguarding it, and by the negligence of the town, in that the latter did not cause the trench to be thus safeguarded by lights or barriers, in order to prevent injury to persons passing along the sidewalk. There was a recovery in that action against the town and the construction company upon issues and a verdict of the jury, which found that Clodfelter had been injured by the negligence of the construction company and the town, as alleged in the complaint; that is, that the construction company was negligent in not putting up lights or barriers at the trench to prevent injury to pedestrians, and that the town was negligent for the same reason. The jury assessed Clodfelter's damages at \$1,700, and judgment was entered upon the verdict for that amount, which was paid by the town. The indemnity company was duly notified of the pendency of that action and requested to come in and defend the same. This action was brought against the construction company and the indemnity company, as its surety upon their bond, to recover the amount of damages sustained by the plaintiff and costs. Issues were submitted to the jury and found in favor of the plaintiff. Judgment was rendered upon the verdict for the damages assessed, and the defendant appealed.

Walser & Walser, for appellant. Emery E. Raper, for appellee.

WALKER, J. (after stating the facts as above). [1] As a general rule, when indemnity is sought by one who has been adjudged liable for damages arising from negligence for which another, as between themselves, is primarily liable, the judgment in the action against the former is evidence in the action brought for indemnity that the defendant in the first action, plaintiff in the second, was liable for the damages, and, when notice has been given to defend, of the amount of the damages arising from the injury; but it does not establish which of the wrongdoers is primarily liable, unless that question was involved in the issue and decided. *Mayor v. Brady*, 70 Hun, 250, 24 N. Y. Supp. 296; *O. S. Nav. Co. v. C. T. Espanola*, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685.

[2] But in this case we are of the opinion that the judgment in the first action must be given greater effect than it would have under the ordinary rule, as by referring to the record in that case, which was in evidence, we can see clearly, by reading the verdict in connection with the pleadings, that the jury have found such facts as establish the

primary liability of the West Construction Company for the injury to Clodfelter, and, besides, the undisputed facts in this case show the same liability. The facts are that the construction company dug the trench and failed to place lights there, or to erect barriers around the trench, to warn persons using the walk. It was the author of the injury and the principal wrongdoer. As between it and the town, the latter has committed no wrong. An illustration of the rule will be found in *Mayor v. Brady*, supra, where it is said: "The right to lay the pipe carried with it to the contractors the obligation to so protect and guard it as to warn passers-by, and thus save them from injury. Consent by a municipal corporation to a person to do a lawful act merely permits it to be done in a careful, prudent, and lawful manner, and when it is performed in any other manner, and injury to third persons ensues, the author of the injury is liable therefor. Had the contractors performed their full duty by so guarding the pipe as to warn travelers of its presence on the walk, there could have been no recovery in the action of Cruikshank against the city."

So in *Port Jervis v. Bank*, 96 N. Y. 550, it was said: "It is well settled that a municipal corporation, which has been compelled to pay a judgment recovered against it for damages sustained by an individual through an obstruction, defect, or excavation in the sidewalk or street of such corporation, has an action over against the person who negligently or unlawfully created the defect which causes the injury. *City of Rochester v. Montgomery*, 72 N. Y. 67, and cases there cited. This liability grows out of the affirmative act of the defendant and renders him liable, not only to the party injured, but also mediately liable to any party who has been damaged by his neglect. Liability in such a case is predicated upon the negligent character of the act which caused the injury, and the general principle of law which makes a party responsible for the consequences of his own wrongful conduct. *Clark v. Fry*, 8 Ohio St. 359 [72 Am. Dec. 590]; *Ellis v. Sheffield Gas Co.*, 75 Eng. C. L. 767. Consent given by a corporation to a citizen to make an excavation in a public street does not vary the rights or liabilities of the parties in respect to such a cause of action, when it is based upon the wrongful and negligent manner in which the act was done, and not upon its unlawfulness. Upon receiving a license from the body authorized to grant it to dig in a street, the licensee impliedly agrees to perform the act in such a manner as to save the public from danger and the municipality from liability."

The town of Lexington had a right to suppose that the construction company would guard the excavation it had made, so as to prevent injury to the public. "Under such circumstances, the parties cannot be said to be in *pari delicto*. It is true that the plain-

tiffs thereby became liable to the party who suffered injury in consequence of this neglect; but they were under no obligation to shield the defendants from the consequence of their own omissions. The decisions in *Swansey v. Chace*, 16 Gray (Mass.) 303, and other cases above cited, fully sustain the position that the party which placed the obstruction in the highway cannot resist the claim of the town to indemnify for damages paid, on the ground that the neglect of the town to remove the obstruction contributed to the injury." *Woburn v. Railroad*, 109 Mass. 283. But more to the point is the decision in the leading case of *Lowell v. Railroad*, 23 Pick. (Mass.) 24, 34 Am. Dec. 33, where the principle was thus stated and applied: "The distinction in all these cases is the same. The parties are not in *pari delicto*, and the principal offender is held responsible. This distinction is manifest in the case under consideration. The defendants' agent, who had the superintendence of their works, was the first and principal wrongdoer. It was his duty to see to it that the barriers were put up when the works were left at night; his omission to do so was gross negligence, and for this the defendants were clearly responsible to the parties injured. In this negligence of the defendants' agent, the plaintiffs had no participation. Their subsequent negligence was rather constructive than actual. The most that can be said of it is that one of their selectmen confided in the promise of the defendants' agent to keep up the barriers; and by this misplaced confidence the plaintiffs have been held responsible for damages to the injured parties. If the defendants had been prosecuted, instead of the town, they must have been held liable for damages, and from this liability they have been relieved by the plaintiffs. It cannot, therefore, be controverted that the plaintiffs' claim is founded in manifest equity. The defendants are bound in justice to indemnify them, so far as they have been relieved from a legal liability; and the policy of the law does not, in the present instance, interfere with the claim of justice. The circumstances of the case distinguished it from those cases where both parties are in *pari delicto*, and one of them, having paid the whole damages, sues the other for contribution."

The case of *Waterbury v. Traction Co.*, 74 Conn. 152, 50 Atl. 3, presented facts very similar to those in this case, and the court held: "The primary cause of the accident was the act and fault of the defendant in taking down the railing and failing to restore it, assuming that the defendant took it down as alleged. As between the plaintiff and defendant, there was no co-operation in the act of negligence which caused the injury. The plaintiff did not permit the defendant to leave the railing down. If the defendant took it down, it promised impliedly, if not expressly, to do so in a way not to endanger public travel, and to put it up

again. If it failed to keep that promise, it cannot justly charge the plaintiff with negligence, either in having relied upon such promise or in having failed to compel its performance. If the defendant removed the railing and left it down, as alleged, the fact that the plaintiff had knowledge of the defect and neglected to repair it, although it had a fair opportunity to do so, will not prevent a recovery in this action." The subject was discussed to some extent in *Gregg v. Wilmington*, 70 S. E. 1070, at this term, and the two cases, while not precisely alike, have some features in common.

The jury in this case, under the instructions of the court, found that the injury was caused by the negligence of the West Construction Company, and that, as to Clodfelter, the town of Lexington concurred in that negligence; but that the construction company was primarily liable, as between it and the town. This is the meaning of the verdict, when it is read in the light of the evidence and the charge of the court. So far as the liability of the construction company to the town is concerned, the fact that the city did not guard against the consequences of the negligent act committed by the construction company, by lighting the dangerous place or erecting barriers there, does not prevent its recovery against that company for its primary negligence. The original wrong which caused the injury was done by it, and not by the town, and, as between the two, it cannot be correctly said that the town participated in its wrong or was codefendant, or a joint tort-feasor. If the town was under the obligation to see that the negligence of its contractor was so guarded against as to prevent injury to pedestrians, and to take proper measures of precaution for that purpose, before it could recover from him such damages as it had been compelled to pay to a person injured by his negligence, the doctrine we have stated would be of little or no practical value for the protection or indemnification of the town. If the construction company had given proper warning to Clodfelter, as he approached the trench, by lights, or had erected sufficient barriers there to prevent his falling in it, the accident would not have happened, whether the town had lighted its streets or not. The wrong done to Clodfelter is, therefore, traceable directly to its negligence in having an unguarded trench in the sidewalk. It had promised, with its surety, that the work of construction should be performed carefully, and that the town should be indemnified from "all suits against it for any injuries or damages sustained by any person by or from any cause under its control, while in the construction of the streets, or any part thereof, or any negligence in guarding the same, or by or on account of any act or omission of said contractor or its agents or employes." This provision is certainly broad enough in its terms to cover

this case, and to entitle the plaintiff to full indemnity from loss by reason of the negligence of the construction company, which caused the injury to Clodfelter.

[3] The judge may have erred when he told the jury that the primary liability of the construction company should be determined by the terms of the indemnity bond; but this is not such an error as will vitiate the trial, for the reason that it appears from the entire case and the real facts, which are not disputed that the primary liability did exist in law, and, consequently, that the defendants are liable to the plaintiff. We would grant a new trial for this error, if we thought it was a substantial and prejudicial one; but we do not think so. The main question upon which the case was contested in the court below, and in this court, by the defendants, we have decided against them; and, if the case should be returned to the court below for another trial, the result upon the facts must inevitably be against the defendants. It would therefore serve no useful purpose to do so. In *Cherry v. Canal Co.*, 140 N. C. 422, 53 S. E. 188, 111 Am. St. Rep. 850, Justice Hoke thus states the rule which should prevail in such cases: "In 2 Am. & Eng. Enc. Pl. & Pr. 499, we find it stated that 'appellate courts deal with judicial acts, and it would not avail to reverse a ruling or judgment correct on the record, though it may be founded on an erroneous reason.' And again, in the same volume, at page 500: 'This system of appeals is founded on public policy, and appellate courts will not encourage litigation by reversing judgments for technical, formal, or other objections which the record shows could not have prejudiced the appellant's rights.' The decided cases in this and other jurisdictions support this position. In *Butts v. Screws*, 93 N. C. 215, *Asha, J.*, for the court, says: 'A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant.' See, also, *Ratliff v. Huntly*, 27 N. C. 545; *Fry v. Bank*, 75 Ala. 473. The rule also finds support in the case of *Shackleford v. Staton*, 117 N. C. 73 [23 S. E. 101]." The verdict and judgment, upon the merits of the case, were right. *City of Rochester v. Montgomery*, 9 Hun (N. Y.) 394; *Brookville v. Arthurs*, 130 Pa. 501, 18 Atl. 1076; *Seattle v. Regan*, 52 Wash. 262, 100 Pac. 731, 132 Am. St. Rep. 963; *Milford v. Holbrook*, 9 Allen (Mass.) 17, 85 Am. Dec. 735.

[4] But we think the instruction of the court on the sixth issue, as to the primary liability of the construction company, may be sustained as a correct one in the following view of it. It must, of course, be considered and construed with reference to the pleadings, the facts of the case, and the issues. The construction company, as we have shown, committed the original wrong which caused the injury, and the city was

not, in a legal sense, *particeps delicti*. It was liable to Clodfelter, because it failed to discharge the duty of keeping the walk in proper repair, and preventing injury to others from the wrong of the construction company. This brought the case within the terms of the indemnity bond, and by its very words the construction and indemnity companies are liable over to the town for what it has paid under the judgment, with reasonable attorney's fees and costs. The question of primary and secondary liability, as between the plaintiff and the construction company, depended upon whether they were joint tortfeasors, and not upon the fact that a bond had been given to indemnify the town; but, as it appears that they did not unite in committing the wrong, the construction company being the active and principal offender, the court properly instructed the jury that the defendants were liable upon their undertaking to indemnify the plaintiff from "any negligence in guarding the trench," or from the consequences of "any act or omission of the construction company," and directed the jury to answer the issue in the affirmative, as the execution of the bond was admitted. This was correct, even if they were not otherwise liable.

[5] The contract of indemnity between the plaintiff and defendants was a lawful one. There is no stipulation in it which is contrary to public policy. *K. C., M. & B. Railroad Co. v. S. R. News Company*, 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. Rep. 545; *T. P. Railway Co. v. G. L. Indemnity Co.*, 60 N. J. Law, 246, 37 Atl. 609, 44 L. R. A. 213.

We find no error in the case.

No error.

(155 N. C. 196)

TOWN OF SHELBY et al. v. CLEVELAND MILL & POWER CO.

(Supreme Court of North Carolina. May 11, 1911.)

1. CONSTITUTIONAL LAW (§ 81*)—HEALTH (§ 20*)—POLICE POWER—PRESERVATION OF PUBLIC HEALTH AND MORALS.

The preservation of the public health and morals is within the police power of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81;* Health, Cent. Dig. § 24; Dec. Dig. § 20.*]

2. ADVERSE POSSESSION (§ 7*)—AGAINST WHOM PRESCRIPTION MAY BE CLAIMED—PUBLIC.

In the absence of statute, no title can be acquired against the public by user alone, nor lost to the public by nonuser.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. § 7.*]

3. NUISANCE (§ 66*)—WATERS AND WATER COURSES (§ 196*)—POLLUTING STREAMS—PRESCRIPTION.

One does not acquire by prescription, by over 20 years' use, a right to empty its raw sewage into a river, and it is not exempted from the operation of Revisal 1905, § 3051, pro-

hibiting the discharge of sewage into streams from which a public drinking water supply is taken, unless the same has passed through a well-known system of purification, since the right which the state seeks to enforce is a right to protect public health.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 139; Dec. Dig. § 66;* Waters and Water Courses, Cent. Dig. § 270; Dec. Dig. § 196.*]

4. CONSTITUTIONAL LAW (§ 26*)—NUISANCE (§ 60*)—LEGISLATIVE POWER.

The power of the Legislature to pass laws, except when barred by the Constitution, is plenary, and the Legislature may declare places or practices to the detriment of the health, morals, or welfare of the community public nuisances.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. § 26;* Nuisance, Cent. Dig. § 137; Dec. Dig. § 60.*]

5. CONSTITUTIONAL LAW (§ 81*)—POLICE POWER—RIGHT TO EXERCISE.

The state may not divest itself of the right to exercise its police power inherent in the state for the protection of the public.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

6. CONSTITUTIONAL LAW (§ 70*)—POLICE POWER—PROTECTION OF HEALTH—VALIDITY OF REGULATION.

The question whether the pollution of a stream by raw sewage, poured into it from a mill settlement where hundreds of operatives are employed, is dangerous to the public health, so that the Legislature may prohibit it, is a legislative question, for the power of the Legislature in such cases is not limited to cases where actual injury is shown to have occurred.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132; Dec. Dig. § 70.*]

7. CONSTITUTIONAL LAW (§ 70*)—POLICE POWER—JUDICIAL QUESTIONS.

The police power must be exercised for the general good, and every intendment will be made in favor of the lawfulness of regulations made by the Legislature, and the courts, except in clear cases, will not interfere with the exercise by the Legislature of such power, so that, where a regulation for the protection of public health bears a real relation to that object, the courts will not interfere.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132; Dec. Dig. § 70.*]

8. EMINENT DOMAIN (§ 2*)—VESTED RIGHTS—REGULATIONS TO PROMOTE PUBLIC HEALTH.

Where one could not acquire any vested right to drain its raw sewage into a river, Revisal 1905, § 3051, prohibiting the discharge of raw sewage into streams, enacted to protect the public health, is not invalid, as a taking of property for public use without compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 6; Dec. Dig. § 2.*]

9. EMINENT DOMAIN (§ 2*)—POLICE POWER.

The power of the state to protect the health, morals, and safety of the public cannot be burdened with the condition that the state must compensate individuals for pecuniary losses sustained, because they will not be permitted, by a noxious use of their property, to inflict injury on the community.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 6; Dec. Dig. § 2.*]

Appeal from Superior Court, Cleveland County; Biggs, Judge.

Action by the Town of Shelby and another against the Cleveland Mill & Power Company. From a judgment for plaintiffs, rendered after sustaining a demurrer to the answer, defendant appeals. Affirmed.

The plaintiffs seek to enjoin the defendant from turning its raw sewage into the First Broad river some eight miles above the intake of the Shelby waterworks system. The defendant answers, admitting the material allegations of the complaint, and that it does empty the raw sewage from its mills and water-closets into said river, and claims the prescriptive right to do so, and further avers that the water supply of the plaintiff town is not contaminated thereby. The plaintiffs demur to the answer. The court sustained the demurrer and gave judgment against defendant, which excepted and appealed.

Burwell & Cansler, John F. Schenck, and Ryburn & Hoey, for appellant. Bickett & White, and Webb & Mull, for appellees.

BROWN, J. The plaintiffs do not rely upon the principles of the common law, but rest their case solely upon section 3051 of the Revisal of 1905, which reads as follows: "No person or municipality shall flow or discharge sewage into any drain, brook, creek or river from which a public drinking water supply is taken, unless the same shall have been passed through some well-known system of sewage purification approved by the State Board of Health; and the continual flow and discharge of such sewage may be enjoined upon application of any person." A violation of this statute is made a misdemeanor, punishable by fine and imprisonment, by section 3858.

The defendant contends, as a matter of law, that it cannot be restrained from emptying its raw sewage into the river in question, because that, prior to the enactment of the statute forbidding it, it had acquired the prescriptive right to do so, and that consequently the statute, if it was ever intended to apply to such a case, is void to the extent that it undertakes to deprive the defendant of a valuable property right without making compensation therefor.

The propositions sought to be maintained in their brief by the learned counsel for defendant are: (1) Whether the right to pollute a stream can be acquired by prescription, and, if it can, (2) whether, when such right has been acquired, it can be destroyed by a statute, making no provision for compensation therefor.

The statute upon which this action is founded is one of several laws enacted in pursuance of what appears to be an intelligent purpose upon the part of the General Assembly to protect the health and well-being of the citizens of the state, by guarding the watersheds and public water supplies of the cities and towns of the state from

contamination as far as possible. The value and wisdom of such legislation is established by experience and needs no defense at our hands, even if it was a subject within our domain. It is in line with the most enlightened legislation of Great Britain and of states of this Union.

[1] The preservation of the public health, as well as public morals, is a duty devolving on the state, the discharge of which is denominated an exercise of the police power, and it is under such power that such legislation is sustained and enforced.

This particular statute was considered by this court, in the case of *City of Durham v. Eno Cotton Mills*, 141 N. C. 615, 54 S. E. 453, 7 L. R. A. (N. S.) 321, and 144 N. C. 706, 57 S. E. 465, 11 L. R. A. (N. S.) 1163, and its constitutionality sustained at all points in well-considered opinions by Mr. Justice Walker, in which practically all the authorities are cited and discussed. It is unnecessary to review them here.

The only point not considered in those opinions is the contention of the defendant that by over 20 years' continuous usage it has acquired a prescriptive right to empty its raw sewage into the river, with which the state has no power to interfere without making provision for compensation. There are authorities to the effect that, as against a private individual lower down on the stream, the right to pollute it to a greater extent than is permissible at common law may be acquired by prescription by an upper riparian owner. But we are not now dealing with the rights of riparian owners, but with the rights of the public at large, as represented by the General Assembly.

[2] It is well settled that, unless by legislative enactment, no title can be acquired against the public by user alone, nor lost to the public by nonuser. *Commonwealth v. Moorehead*, 118 Pa. 344, 12 Atl. 424, 4 Am. St. Rep. 601, and cases cited; 22 Am. & Eng. p. 1190. Public rights are never destroyed by long-continued encroachments or permissive trespasses.

[3] If it was in the power of the General Assembly, in the exercise of its police power, as we have held in the *Durham Case*, to enact this law and make its violation a misdemeanor, it necessarily follows that the defendant could not acquire a right by prescription which would exempt it from the operation of the statute.

Whether the pollution of this stream by emptying raw sewage into it was a nuisance at common law it is unnecessary to consider. Since the passage of the statute it may be classified as a public nuisance, unless the provisions of the act be complied with. The learned counsel properly admits that, if a stream should be polluted, to the extent, and under such circumstances as to create a public nuisance, then no prescription would justify such nuisance.

[4] The power of the General Assembly to

pass all needful laws, except when barred by constitutional restrictions, is plenary, and the Legislature has the power to declare places or practices to the detriment of the health, morals, or welfare of the community public nuisances, although not such at common law. This seems to be well settled. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 818; *State v. Tower*, 185 Mo. 79, 84 S. W. 10, 68 L. R. A. 406.

The right which the state is seeking to enforce through this statute is a public right—a right to protect the health of the people of the state. As against such public rights, prescription cannot run. There is no such thing as a prescriptive right to maintain a public nuisance. *Joyce on Nuisances*, § 51; *Cyc.* 29, 1207; *Jones on Easements*, § 178; *McMoran & Willis on Sewers and Drains*, 238. In *Commonwealth v. Upton*, 6 Gray (Mass.) 473-476, the court says: "It is therefore immaterial, so far as the government is concerned, in the administration of the law for the general welfare, how long a noxious practice may have prevailed, or illegal acts been persisted in. Easements may be created in lands and the rights of the individuals may be wholly changed by adverse use and enjoyment, if it is sufficiently protracted; but lapse of time does not equally affect the rights of the state." See, also, cases collected in 3 Am. & Eng. Ann. Cas. p. 25. The General Assembly cannot grant a right to maintain a public nuisance of this character which a succeeding General Assembly could not repeal.

[5] The state cannot divest itself of the right to exercise its police power for the general good. Such power is conceded to be one inherent in the state for the protection of the public, and of such character that the state may not waive or divest itself of the right to exercise it. *State v. Holman*, 104 N. C. 861, 10 S. E. 758; 1 Abbott on Mun. Corp. 209; In re O'Brien, 29 Mont. 530, 75 Pac. 196; 1 Am. & Eng. Ann. Cas. 373; *Portland v. Cook*, 48 Or. 550, 87 Pac. 772, 9 L. R. A. (N. S.) 733; *Miles City v. Board of Health*, 39 Mont. 406, 102 Pac. 696, 25 L. R. A. (N. S.) 591. As said by the Supreme Court, in *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079: "All agree that the Legislature cannot bargain away the police power of the state."

It follows from these, and many other authorities, that the defendant could not acquire any right by prescription, or otherwise, which would prevent the General Assembly of the state, at any time, from exercising its police power to regulate the discharge of sewage into the First Broad river.

[6] The issue attempted to be raised by the pleadings that the stream is not dangerously polluted by the raw sewage poured into it from a large mill settlement, working

hundreds of operatives, can be of no avail to defendant. That is a matter for the judgment of the Legislature. Such legislation is preventive, and to limit it to cases where actual injury is shown to have occurred would be to deprive it of its most effective force. To be of value, such laws must be able to restrain acts which have a tendency to produce public injury.

[7] The police power of a state is to be exercised for the general good, and every intendment is to be made in favor of the lawfulness of regulations, such as the statute under consideration, intended to protect the public health and safety. It is not the province of the judicial authority, except in clear cases, to obstruct or interfere with the exercise of such power. The General Assembly, chosen biennially by the people, are better judges than we are of what regulations are necessary to promote the public health and comfort of the citizens of the state.

The Supreme Court of the United States, which has always upheld every reasonable exercise of the police power of the states, has said: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not an unrestricted license to act according to one's own will." *Crowley v. Christensen*, 137 U. S. 83, 11 Sup. Ct. 13, 34 L. Ed. 620. If a regulation enacted by the Legislature for the protection of the public health bears, as this does, a real and substantial relation to that object, the courts will not strike it down, although it may appear to bear hard upon some individual.

[8] The second proposition of the defendant, that the right to drain its raw sewage into the river cannot be taken from it without compensation, necessarily falls with the first. As the defendant could acquire no vested right of the character claimed, there is no taking of property for a public use, and nothing to compensate the defendant for. The state takes no right from the defendant, but only prescribes the conditions upon which it may use the river for its private purposes.

[9] The present case is governed by principles that do not at all involve an exercise of the power of eminent domain. As said by the Supreme Court of the United States, in *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205: "The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they much sustain, by reason of their not being permitted, by a noxious use of their property, to inflict

injury upon the community." See, also, Sedgewick on Statutory and Const. Law, pp. 434, 435; *Reduction Co. v. Sanitary Works*, 199 U. S. 307, 26 Sup. Ct. 100, 50 L. Ed. 204; *Durham v. Cotton Mills*, 141 N. C. 640, 54 S. E. 453, 7 L. R. A. (N. S.) 321.

The judgment of the superior court is affirmed.

(155 N. C. 121)

ANDERSON v. AMERICAN SUBURBAN CORPORATION.

(Supreme Court of North Carolina. May 3, 1911.)

1. EVIDENCE (§ 443*)—PAROL EVIDENCE—VARYING WRITTEN CONTRACTS.

A written contract for the sale of lots near the suburbs of a city, executed by the owner who divided the tract into lots, is not contradicted or varied by a parol agreement, whereby the owner guaranteed the extension of a street car line to the property, the putting in of granolithic walks, and other improvements; the agreement being collateral to the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2048-2051; Dec. Dig. § 443.*]

2. CORPORATIONS (§ 433*)—SALE OF REAL ESTATE—REPRESENTATIONS.

Whether a corporation owning and subdividing into lots a tract near the suburbs of a city, and offering the same for sale through an agent, who made representations to intended purchasers, had authorized the agent to make such representations, so as to be bound thereby, *held*, under the evidence for the jury.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 433.*]

3. CORPORATIONS (§ 426*)—CORPORATE ACTS—REPUDIATION.

A corporation may not repudiate the representations of its agent employed to sell its real estate, where the agent acted in good faith, with the knowledge and authority of the principal officers of the corporation, while it still retains the purchase money paid by purchasers relying on such representations.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 426.*]

4. VENDOR AND PURCHASER (§ 207*)—CONTRACTS ASSIGNABLE.

A contract for the sale and purchase of real estate, induced by representations of the vendor, is assignable by the purchaser; the assignee being thereby vested with the rights of the purchaser, including the right to sue, as the real party in interest, on the contract for the vendor's failure to comply with his representations.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 423; Dec. Dig. § 207.*]

Appeal from Superior Court, Guilford County; Daniels, Judge.

Action by J. W. Anderson against the American Suburban Corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

This issue was submitted: "Is the defendant indebted to the plaintiff? If so, in what amount? Answer: Yes; in the amount of \$700 and 6 per cent. interest from the time indicated in the complaint." From the judgment rendered, the defendant appealed. The facts are stated in the opinion of the court.

Justice & Broadhurst, for appellant. A. L. Brooks and C. A. Hall, for appellee.

BROWN, J. There is evidence tending to prove that Dr. Z. T. Brooks contracted to buy 10 lots of land of the defendant of a tract which the defendant had purchased and divided up in lots, and was offering for sale through its agent, Anderson, the present plaintiff. The land was situated near the suburbs of Greensboro. The agreement in writing is entitled "Bond for a deed," and is signed by defendant and Z. T. Brooks. It contains a number of stipulations and restrictions which it is unnecessary to set out.

The plaintiff was permitted to offer evidence that he was the agent of the defendant, and that, as such, and with defendant's knowledge, he guaranteed to Dr. Z. T. Brooks that if he would purchase said lots and give his obligation therefor that the defendant corporation would guarantee to build a street car line to and make certain improvements upon the property sought to be sold within 12 months from the signing of the contract, and that if the improvements were not so made that his money would be refunded and the contract canceled. With this understanding and agreement, Dr. Z. T. Brooks entered into the contract for the purchase of the lots and paid \$550 thereunder. At the expiration of 12 months, the defendant corporation had not built the street car line as guaranteed, had not made the improvements connected with the lots, to wit, put in granolithic sidewalks, extended the water main, and other improvements guaranteed, whereupon Dr. Z. T. Brooks demanded of the defendant the return of the money paid, \$550, and a cancellation of the contract. The company refused this demand, and the plaintiff, J. W. Anderson, himself made demand upon the company to carry out its contract with Dr. Z. T. Brooks. Upon their refusal to do so, he notified them that he would take an assignment of the contract from Dr. Z. T. Brooks, pay the additional \$150 then due upon same, and sue the defendant company for the total amount of \$700 unjustly held by them. Dr. Z. T. Brooks thereupon assigned these several contracts to the plaintiff, and with the knowledge of all the facts the defendant corporation accepted the assignment and substituted the plaintiff as assignee to all the rights of Dr. Z. T. Brooks under the contract.

There are eight assignments of error set out in the record, and we think six of them relate to the competency of the evidence tending to prove a parol contract or guaranty on the part of the defendant that if Brooks would buy the lots the defendant would build the car line and make the improvements referred to.

[1] We are of opinion that the evidence admitted does not tend to contradict or vary

the paper writing executed by Brooks and the defendant; the terms of which are confined to the payments, restrictions, and stipulations under which Brooks was to hold the property. The agreement to extend the street car line, put in granolithic walks, and other improvements was a separate and distinct contract, or representation amounting to a contract, and was not required to be in writing. Such evidence did not in the least contradict or vary the terms of the written instrument, but is consistent with it, and both can stand together. The principle is well expressed in *Kernodle v. Williams*, 153 N. C. 475, 69 S. E. 431, citing *Nissen v. Mining Co.*, 104 N. C. 310, 10 S. E. 512, as follows: "While it is true that a contemporaneous parol agreement is not competent to vary, alter, or contradict the written agreement, still, when a contract is not required to be in writing, it may be partly written and partly oral, and in such cases when the written contract is put in evidence it is admissible to prove the oral part thereof." These collateral agreements, which do not contradict the writing, but are entirely consistent with it, are generally enforceable, and may be proved by parol, notwithstanding the rule excluding parol evidence to vary or contradict the terms of the contract. *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847; *Penniman v. Alexander*, 111 N. C. 427, 16 S. E. 408; *Typewriter Co. v. Hardware Co.*, 143 N. C. 97, 55 S. E. 417; *Hughes v. Crocker*, 148 N. C. 318, 62 S. E. 429, 128 Am. St. Rep. 606; *Kelly v. Oliver*, 113 N. C. 442, 18 S. E. 698.

[2] The seventh assignment of error is that the court erred in charging the jury, as appears in exception No. 12, and in submitting to the jury the question as to whether the plaintiff was authorized to make to Z. T. Brooks the representations which the plaintiff alleges he did make, when there was not sufficient evidence to go to the jury that the defendant had authorized any such representations to be made. There is abundant evidence to justify the court in submitting to the jury the question as to how far defendant's principal officers knew of and authorized such representations, such as newspaper advertisements by the defendant, printed cards, and the like. As a sample of one advertisement, we note the following: "Watch the new town grow. Look at Piedmont Heights lots before you purchase. Listen to our representatives who will call on you to explain our proposition and to tell you what we propose and guarantee to do, and it will make you money. Water pipes have arrived and will be distributed over the property in a few days and be laid. The cars will be running within twelve months or your money refunded. The company's representatives are R. Y. Zachary, E. W. Wilcox, J. W. Anderson, T. N. Ramsey, W. S. Mallory, D. R. Creecy, Jr. We are already making improve-

ments to the lots equal to any in the heart of the city. Go out and investigate, it costs you nothing to look. Call up the office over phone No. 932, and the company's representatives will take you out and show you the property. Piedmont Heights Co., Room 308, City National Bank Building."

There is also evidence that the president of defendant company gave to the plaintiff, who was then acting as its sales agent, a card for exhibition to purchasers which reads as follows: "Piedmont Heights. Lots \$240 to \$290. Terms \$10 cash and \$5 per month. No interest whatever, and no taxes until paid for in full. Free deed in case of death. Electric cars, city water, granolithic sidewalks, etc., guaranteed within 12 months. American Suburban Corporation, Room 308, City National Bank Building, Greensboro, N. C. Telephone 932. Presented by J. W. Anderson, Agent." The law would be untrue to itself if it permitted corporations engaged in developing and selling property to publish such advertisements and issue such cards, to sell the lots, receive the purchase money, and then repudiate the acts of its agents as unauthorized.

[3] As said by Mr. Justice Rodman: "A corporation can only act through its agents, and must be responsible for their acts. It is the greatest public importance that it should be so. If a manufacturing or trading corporation is not responsible for the false and fraudulent representations of its agents, those who deal with it will be practically without redress, and the corporation can commit fraud with impunity." *Peebles v. Guano Co.*, 77 N. C. 233, 24 Am. Rep. 447; *Unitype Co. v. Ashcraft*, 71 S. E. 61, this term. In this case the agent, Anderson, appears to have acted in good faith, and to have made the representations with the knowledge and authority of the principal officers of the defendant. It cannot be permitted to repudiate his acts, and at same time retain the purchase money paid because of such representations.

[4] The eighth assignment of error relates to the right of the plaintiff to maintain this action, and is likewise untenable. This is clearly a contract that can be assigned, and the assignment by Dr. Brooks to the plaintiff vested in the assignee all the rights, title, and interest of the assignor, and the assignee has the legal right to maintain the action as the real party in interest.

No error.

(156 N. C. 179)

JONES v. WILLIAMS et al.

(Supreme Court of North Carolina. May 11, 1911.)

1. LIS PENDENS (§ 25*)—PURCHASE OF PENDING SUIT.

One purchasing notes and mortgages from the mortgagee, after the complaint in an action to foreclose a subsequent mortgage was filed,

acquired them, subject to any judgment rendered in the foreclosure suit; it being a *lis pendens*.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 47-57; Dec. Dig. § 25.*]

2. LIS PENDENS (§ 13*)—PENDENCY OF ACTION—FILING LIS PENDENS.

The filing of a formal *lis pendens* in a mortgage foreclosure suit is not necessary to affect purchasers with notice of the proceeding, if the suit is brought in the county where the land is situated.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. § 23; Dec. Dig. § 13.*]

3. MORTGAGES (§ 497*)—FORECLOSURE—PARTIES—JUNIOR MORTGAGOR.

The lien of a junior mortgagee under a registered mortgage was not affected by judgment of foreclosure in a suit by a prior mortgagee, where the junior mortgagee was not made a party thereto, even though he was not a necessary party.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1460-1473; Dec. Dig. § 497.*]

4. COURTS (§ 100*)—PRECEDENT—BINDING EFFECT.

Persons may rely upon the decisions of the Supreme Court in acquiring titles, and titles so acquired will not be prejudiced by the subsequent reversal of a decision.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 341-343; Dec. Dig. § 100.*]

5. MORTGAGES (§ 390*)—FORECLOSURE—EQUITABLE FORECLOSURE.

Though the mortgage contains a power of sale, the mortgagee may foreclose the equity of redemption without resorting to the power; the court acting under its general equitable jurisdiction in such case, and granting relief, irrespective of its provisions.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1156; Dec. Dig. § 390.*]

6. MORTGAGES (§§ 242, 340*)—TRANSFER OF TITLE—TITLE OF MORTGAGEE.

Since the mortgage deed passes legal title at once to the mortgagee, defeasible by subsequent performance of its conditions, the assignment of the note and mortgage by the mortgagee did not vest the legal title, nor, as an incident thereto, the power of sale contained in the mortgage, in the assignee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 627, 1037; Dec. Dig. §§ 242, 340.*]

7. MORTGAGES (§ 517*)—FORECLOSURE—SALE.

One bidding at a mortgage foreclosure sale was a mere proposer, until it was accepted, and the sale confirmed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1519; Dec. Dig. § 517.*]

8. MORTGAGES (§ 489*)—FORECLOSURE.

A mortgagee upon foreclosure is not entitled to recover more than the amount of his debt, or such part thereof as remains unsatisfied.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 489.*]

9. EQUITY (§ 39*)—RELIEF.

When a court of equity is invoked to grant relief, it will do justice between the parties, and not deprive a party of property without a hearing.

[Ed. Note.—For other cases, see *Equity*, Dec. Dig. § 39.*]

Clark, C. J., dissenting.

Appeal from Superior Court, Duplin County; Whedbee, Judge.

Action by Anderson Jones against A. F.

Williams and others. From a judgment for defendant named, plaintiff appeals. Reversed, and new trial granted.

This action was brought by the plaintiff to foreclose a mortgage on a tract of land, containing originally 245 acres, executed to him by the defendants, Rufus Branch and wife, to secure a debt of \$379.50 therein described. The other defendant, Fred Martin, trading under the name and style of E. J. Martin & Son, was made a party, as Rufus Branch and wife had also mortgaged the land to him, and he had assigned his notes and mortgages to his codefendant, A. F. Williams.

The following facts appear in the case: Summons was issued on the 24th day of December, 1903, in behalf of the plaintiff and against Fred Martin, trading under the firm name and style of E. J. Martin & Son, Rufus Branch and wife, Christiana Branch, and was served the 18th day of January, 1904, on Rufus Branch and wife, Christiana Branch, and the 15th day of January, 1904, on Fred Martin. Complaint and answer were duly filed, and at the March term, 1904, upon affidavit, A. F. Williams was made a party defendant; he having purchased the two mortgages of E. J. Martin & Son. At August term, 1904, an order was made, directing summons to issue to A. F. Williams, and on October, 1904, summons was served upon him. The plaintiff, Anderson Jones, prior to 1890, sold to the defendant Rufus Branch a tract of land containing 245 acres, and the latter made various payments up to January 16, 1902, on which date Rufus Branch and wife executed to Anderson Jones their mortgage upon the tract of land to secure the balance of the purchase money of \$379.50, which mortgage was duly recorded on October 24, 1902. In part payment of the purchase price of said tract of land, Rufus Branch and wife, on November 23, 1901, reconveyed to Anderson Jones 46 of the 245-acre tract of land by deed, which was duly recorded on the 17th day of November, 1902. On the 30th day of October, 1901, Rufus Branch and wife executed a mortgage deed to Fred Martin, trading as E. J. Martin & Son, to secure an indebtedness of \$328 on the 245-acre tract of land, which mortgage was duly recorded on the 2d day of November, 1901. On the 16th day of January, 1902, Rufus Branch and wife executed to Fred Martin, trading as aforesaid, a mortgage upon the 245-acre tract of land, to secure an indebtedness of \$250, which was duly recorded January 25, 1902. On the 3d day of March, 1904, A. F. Williams commenced an action in the superior court of Duplin county against Rufus Branch and wife, to foreclose the mortgage assigned to him by Fred Martin, and Branch and wife filed no answer. At the August term, 1904, the court rendered a judgment, ordering the land to be

sold, and the land was sold by a commissioner and bought by A. F. Williams, and a final decree entered at the November term, 1904, confirming the sale and authorizing the purchase price of the land to be credited on Williams' judgment, and directing a deed to be made to him for the land. A deed was made and registered November 26, 1904.

Anderson Jones alleged in his complaint that the defendant Rufus Branch executed to him the mortgage on the land to secure the purchase money, and was indebted to him on that account in the sum of \$544.50, and also alleged that he had purchased the 46-acre tract, describing it by metes and bounds, and paid him \$150 for the same, and received a deed therefor. He also alleged that the defendant Rufus Branch executed to E. J. Martin & Son the notes and mortgages hereinbefore described, and that the defendant A. F. Williams purchased the notes and mortgages after they were due, and since the institution of this action, and while the same was pending, and that the defendant A. F. Williams went into the possession of all the land, except the 46 acres, and received the rents and profits therefrom, and asked for an accounting and a sale of the land to pay off both debts. It is admitted that the defendant A. F. Williams became the owner of the notes and mortgages of Fred Martin, executed to him by Rufus Branch and wife, after the maturity of the notes and mortgages. It is also admitted that A. F. Williams has been in possession of the 199 acres of land since the notes and mortgages were signed to him by Martin, receiving the rents and profits. The evidence showed the annual rental value of the 199 acres of land was \$100, and the annual rental of the 46 acres was \$35.

It was admitted that A. F. Williams commenced the action against Rufus Branch and wife after he had been made a party to this suit by order of the court, although summons was not served upon him until October 5, 1904. The court submitted to the jury certain issues, which, with the answers thereto, are as follows: "(1) What amount, if anything, is due Anderson Jones on account of his notes and mortgage, executed by Rufus Branch and wife? Answer: \$379.50, with interest from November 1, 1902, subject to credit of \$16.24, made November 1, 1902. (2) What sum, if anything, is due upon the mortgage assigned to A. F. Williams by E. J. Martin & Son? Answer: \$250, with interest at 6 per cent. from the 16th day of January, 1902, until paid, subject to a credit of \$13.91, made December 31, 1902; \$164. with interest at 6 per cent. from the 30th day of October, 1901; and \$328, with interest at 6 per cent. from the 30th day of October, 1901, until paid. (3) Is the defendant A. F. Williams the owner and entitled to the possession of all the land described in the complaint? Answer: Yes. (4) What is the annual rental value of the 46 acres of land men-

tioned in the complaint? Answer: Thirty-five dollars." The first two issues were submitted at the request of the plaintiff, and to the third and fourth he excepted and tendered the following additional issue: "What is the annual rental value of the 199 acres of land which has been in the possession of the defendant A. F. Williams?" The court refused to submit this issue, and held, and so adjudged, that in no view of the evidence was the plaintiff entitled to recover with respect to the 46 acres, either the land or any interest therein, and charged the jury that, if they believed the evidence, they should answer the third issue, "Yes." The court further held, as matter of law, that the plaintiff was not entitled to a foreclosure, and the defendant Williams was not liable to account for the rents and profits which he had received while in possession of the 199 acres of land. Exceptions were duly taken by plaintiff to the several rulings of the court. It was adjudged upon the verdict that A. F. Williams is the owner of all the land—that is, the 245 acres—and that he recover possession of the same from the plaintiff, with \$175, the rental value of the 46 acres. Plaintiff excepted and appealed.

Stevens, Beasley & Weeks, for appellant.
W. S. O'B. Robinson & Son, for appellees.

WALKER, J. (after stating the facts as above). [1] We think it may fairly be inferred from the record that A. F. Williams bought the notes and the mortgages from Fred Martin during the pendency of this action, and after the complaint had been filed therein. If so, he acquired his interest in them, subject to any judgment rendered herein, for this suit would be a complete lis pendens. Lord Bacon stated the common-law rule to be that: "No decree bindeth any that cometh in bona fide by conveyance of the defendant before the bill exhibiteth, and is made no party, neither by bill or order; but when he comes in pendente lite, and while the suit is in full prosecution, and without any order of allowance or privy by the court, then regularly the decree bindeth." This rule had its origin in the civil law, and was pungently stated in the legal maxim, "Pendente lite, nihil innovetur." 4 Bacon's Works, p. 515. Sir William Grant said, in *Bishop of Winchester v. Paine*, 11 Vesey, 194-201, that: "He who purchases during the pendency of the suit, is bound by the decree that may be made against the person from whom he derives the title; the litigating parties are exempted from the necessity of taking any notice of a title so acquired; as to them it is as if no such title existed; otherwise suits would be interminable, or, which would be the same in effect, it would be the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship, but general convenience requires it." *Wiltale*,

Mortgage Foreclosures, § 41, and notes. It may therefore be taken as well settled that a judgment, in an action in rem or one to foreclose a mortgage, binds, not only the parties actually litigating and their privies, but also all others claiming or deriving title under them by a transfer pendente lite.

[2] The filing a formal lis pendens is not required for the application of this recognized principle, when the suit is brought in the county where the land is situated. *Dancy v. Duncan*, 96 N. C. 111, 1 S. E. 455; *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868; *Overton v. Hinton*, 123 N. C. 2, 31 S. E. 285; *Harris v. Davenport*, 132 N. C. 697, 44 S. E. 406; *Morgan v. Bostic*, 132 N. C. 743, 44 S. E. 639; *Pell's Revisal*, § 460, and notes; *Wiltsie*, § 40. While the facts relating to the lis pendens are not very clearly set out in the record, we think it sufficiently appears that A. F. Williams was a purchaser pendente lite and must be held bound by the judgment in this action; but there is another question raised in the case which we think was erroneously decided. Our decision is based upon both grounds.

[3] The defendant Williams failed to make the plaintiff, who was a junior incumbrancer, a party to the foreclosure suit brought by him against Rufus Branch, the mortgagor. The plaintiff is therefore not bound by the proceedings and judgment in that case, and his lien upon the land was not affected thereby.

In treating of this question, *Wiltsie*, in section 60, says that persons who have acquired an interest in the equity of redemption by incumbrance, such as a mortgage, subsequent to the execution of the mortgage under foreclosure, are necessarily parties to the foreclosure suit, in order to extinguish their claims. "The theory of the law is, that such an incumbrance is a pledge of the equity for the debt, and gives the lienor an equitable interest in the mortgaged premises. As the owner of the equity may, by an absolute conveyance, transfer his entire interest, and thereby make his transferee a necessary party, as we have seen, so he can on the same principle pledge, by a mortgage, judgment, or otherwise, a part or the whole of his interest in the premises, and thereby render the incumbrancer a necessary party, in order to wipe out his interest. Though a lienor does not acquire the fee title to the equity, he acquires an interest in the premises which the statutes of the various states have long established, and which the courts have long recognized and sustained, and which parties, dealing with the premises, cannot ignore, except at their own peril."

He thus sums up the law upon the subject: "All authorities, in all countries where mortgages are foreclosed by equitable actions, are agreed that subsequent and junior mortgages are necessary parties to the foreclosure of a prior mortgage, in order to extinguish and cut off their liens. The action can be

sustained without them, but a defective title would be offered at the sale, which no court would compel a bidder to accept. The rule has long been settled that in a bill to foreclose a mortgage, the rights of incumbrancers, not made parties to the suit, are not barred or affected by the decree. If a junior mortgagee is omitted as a party, his remedy is to redeem from the sale under foreclosure." *Wiltsie*, § 61. He cites numerous and well-considered cases to sustain his views.

In *Gage v. Brewster*, 81 N. Y. 218, a case much like ours, the court said: "The plaintiff was not affected by the foreclosure suit upon the defendants' mortgage, to which he was not made a party. He was therefore entitled to redeem, precisely as though no such action had been brought, namely, by paying the mortgage debt and interest. * * * When seeking to extinguish the equity of redemption and to bring the premises to a sale, it was his duty to ascertain to whom that equity of redemption belonged. It was the subject of transfer by sale or mortgage, and it had been actually mortgaged to the plaintiff, and his mortgages were on record."

So it was said in *Gould v. Wheeler*, 28 N. J. Eq. 541: "The complainant would be entitled to a decree of foreclosure and sale, but for the fact that it appears by her bill that there is a subsequent incumbrancer, a mortgagee, who is not made a party to the suit. That mortgagee is a necessary party. A mortgagee who comes into court for foreclosure and sale of the mortgaged premises is not at liberty to omit, as parties to the proceedings, those who hold incumbrances subsequent to his own. The general rule is that the holders of all incumbrances existing at the time of commencing the suit must be made parties. *Story's Eq. Pl.* § 193; *Ensworth v. Lambert*, 4 Johns. Ch. (N. Y.) 605; *Adams v. Paynter*, 1 Col. C. C. 530; 1 *Fisher on Mortgages*, 554, 555, 556. It is true that, if they be not made parties, the proceedings are of no avail against them; but that is no reason for making a suit for foreclosure and sale of mortgaged premises an exception to the general rule of equity, which requires that all persons in interest be parties to the suit. It is manifestly unjust to all persons interested in the proceeds of the sale of the mortgaged premises that the sale be made subject to an outstanding right to redeem, for that invariably and inevitably prejudices the sale. The bill must be amended by making the holder of the mortgage given by Stewart (the third mortgage) a party, and he must be brought into court, and the cause be proceeded in regularly as against him. In the meantime the suit will be stayed." Cases directly in point are *Murphy v. Farwell*, 9 Wis. 102; *Carpentier v. Brenham*, 40 Cal. 221; *Johnson v. Hosford*, 110 Ind. 572, 10 N. E. 407; *County of Floyd v. Cheney*, 57 Iowa, 160, 10 N. W. 324; *Stewart v. Johnson*, 30 Ohio St. 24; *Johnson v. Hambleton*,

52 Md. 378; *Watson v. D. M. & T. Investment Co.*, 12 Or. 474, 8 Pac. 548; *Rogers v. Holyoke*, 14 Minn. 220 (Gil. 158); *Smith v. Chapman*, 4 Conn. 344; *Hodgen v. Guttery*, 58 Ill. 431. The case last cited is strikingly like the case at the bar in its facts.

In *Hall v. Hall*, 11 Tex. 547 (approved afterwards in *Mills v. Traylor*, 30 Tex. 7), it is said: "All persons having an interest in the equity of redemption should be made parties to a bill of foreclosure. If such incumbrancers, whether prior or subsequent, are not made parties, the decree of foreclosure does not bind them, as also a decree of sale would not. The prior incumbrancers are not bound, because their rights are paramount to those of the foreclosing party. The subsequent incumbrancers are not bound, because their interest would otherwise be concluded, without an opportunity to assert or protect them. In the case now under consideration, the lands were sold to the appellees subsequent to the mortgage to appellants, and it may be held, that the appellees took the property, subject to that incumbrance. They should, however, not have been precluded or affected by a proceeding had in their absence, and without notice."

In *Cram v. Cotrell*, 48 Neb. 646, 67 N. W. 452, 58 Am. St. Rep. 714, the court applied the principle, and said: "The plaintiffs were not made parties to the foreclosure suit, and were not bound by those proceedings. The mere fact that they had notice of its pendency did not make them parties or bind them by the decree. This is elementary. The foreclosure and sale were therefore utterly ineffectual to bar plaintiff's mortgage. A junior mortgagee who has not been made a party to the proceeding foreclosing the senior mortgage has thereafter a right to redeem from such senior mortgagee (the purchaser at the judicial sale). *Renard v. Brown*, 7 Neb. 449. Therefore, when this foreclosure was properly pleaded in the present case, the facts demanded that the plaintiffs, instead of merely having their mortgage re-established, should be permitted to redeem the Stoddard mortgage. Why the court denied this relief and denied plaintiffs any relief, the record does not inform us. * * * If he (Stoddard) did not know of plaintiffs' rights when he took the mortgage, he learned them within a very few days thereafter. At the time of the foreclosure sale, this very suit was pending, in which he is a party. He had full notice of all the facts. A mistake of law would not protect him."

The court, in *Howard v. Railway Co.*, 101 U. S. 837, 25 L. Ed. 1081, held that while the senior mortgagee can proceed by suit to foreclose against the mortgagor alone, and in that sense a subsequent lienor or incumbrancer is not a necessary party, the decree is not binding upon the latter, so as to supersede or displace his lien, but it left him still the right, as a second incumbrancer, to redeem, which he may do if his right is not

lost by laches or lapse of time. "Subsequent incumbrancers," says Justice Clifford, who delivered the opinion, "when not made parties to a bill for foreclosure or sale, are not bound by the decree; nor is that rule violated in the least degree when it is held that the title of the defendants is paramount, as that consequence flows from the fact that the lien of the judgment under which the defendants claim is prior to that under which the plaintiff claims his title. Whatever rights the plaintiff had, prior to the sale in equity, which gives the defendants the paramount title, he still has, wholly unimpeached by that sale or by any other cause, unless they are barred by lapse of time or laches. Process against the plaintiff under that decree could not affect his rights, as he was not a party to the proceeding; consequently the lien of his judgment still remained in full force. Even if the plaintiff had been made a party to that proceeding, the only effect would have been to cut off his equity of redemption, and, as he was not made a party, his equity of redemption is not extinguished."

The counsel of defendant Williams, Mr. John Robinson, in his excellent brief, and also at the bar, in his well-prepared and forceful argument, relied on the following cases: *Kornegay v. Steamboat Co.*, 107 N. C. 115, 12 S. E. 123; *Lumber Co. v. Hotel Co.*, 109 N. C. 658, 14 S. E. 35; *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501; and *Gammon v. Johnson*, 126 N. C. 64, 35 S. E. 185; and contended that it had been decided by them that a second incumbrancer is not a necessary party to a foreclosure suit by the first lienholder or mortgagee. This may be conceded, and yet the deduction drawn therefrom, that he will be barred of his right to redeem, is not warranted. We have said he is not a necessary party, in the sense that the decree will be void without him as to those who are parties; but he is clearly entitled to redeem, and we think that the court, in *Williams v. Kerr* and *Gammon v. Johnson*, approves the principle as we have stated it. In the case last mentioned, he is said to be a necessary, or at least a proper, party, in order to have a complete adjustment of the rights of all interested persons, and, further, that the court should, ex mero motu, require him to be brought in by process, so as to conclude him. In *Williams v. Kerr*, the assignee of the mortgagor was held, for special reasons, to be affected by the foreclosure suit, as a lis pendens, and to be bound by its orders and decrees. In the *Kornegay* and *Lumber Company Cases*, the court had under consideration the priority of a lien, under the statute, of a mechanic or materialman. In none of those cases, as we read and understand them, was the precise question raised which is now before us for decision, and we think that all those cases may be reconciled with what we have hereinbefore said as to the effect of a decree upon a junior

incumbrancer, not a party to the foreclosure sale. *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489.

There is nothing decided in *Hinson v. Adrian*, 86 N. C. 61, that militates against the views we have so far expressed, but the decision rather coincides with them. The court says: "While there is some diversity of opinion as to the practice in requiring the presence of prior and posterior mortgagees in a foreclosure suit, the *preponderance* of authority favors the propriety, if not the necessity, of their being parties, in order to a full and final adjustment of all the equities involved." It is true that, when referring to certain authorities upon the subject, it is casually said that, if not made a party, the second incumbrancer would be concluded without an opportunity to assert his rights or protect them; but this was an inadvertence, we think, and not justified by the cases, and directly opposed to the overwhelming weight of authority, and it was not at all necessary to the decision of the case. Nor do we think it is sustained by the authorities cited. It was merely stated for the purpose of showing how unjust it would be to bind without a hearing. The court, in that case, ordered the junior incumbrancer to be made a party. We think there is nothing decided in those cases in conflict with our present ruling: but, if anything had been so decided, we would unhesitatingly refuse to follow it, in view of the great weight of authority the other way, unless compelled to do so, because it may involve a question of title. But we are not confronted by any such situation. If we have decided in any case the very question now presented contrary to what we now decide, the precedent will be controlling, so far as to protect any titles or vested interests which have been acquired upon the faith of it.

[4] Parties have the right to act upon the decisions of this court in acquiring titles, and such titles will not be disturbed, or the parties prejudiced, by a subsequent reversal of the decision. We have so held in two recent cases: *Hill v. Railroad*, 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606; *Hill v. Brown*, 144 N. C. 117, 56 S. E. 693. Such a rule is based upon an ancient maxim of the law, is a just one, and should be perpetuated. *Broom's Legal Maxims* (8th Ed.) pp. 34, 35. Further, we will say that the principle of this decision will not apply to a subsequent mortgagee whose mortgage is not registered. This application of the rule to such a case would be intolerable. If parties withhold their deeds from registration, they must take the consequences of their own neglect. The law abhors secret liens, and it is now the firmly established policy of this state, and has been since 1885, to require the registration of deeds and other instruments, and to protect innocent purchasers against the claims of those who have not complied with the law. *Pell's Revisal*, §§ 979-981, and notes; *Acts of 1885*, c. 147.

It is suggested that the rule applied in this case does not obtain in states where the legal title is held to pass by the conveyance to the mortgagee, as in this state, but only in those where a mortgage is considered merely as a lien, or a security for the payment of the debt. But an examination of the authorities will disclose that they recognize no such distinction. In the states of New Jersey, Connecticut, Maryland, Illinois, Ohio, and others, from the reports of which we have cited cases, it has been held that the legal title passes to the mortgagee. 20 Am. & Eng. Enc. (2d Ed.) p. 900, and note 5. The rule rests upon the reasonable assumption that the junior incumbrancer has an interest which should be protected by the courts, and which cannot be taken from him or impaired without notice and an opportunity to be heard. "It has long been the received rule (expressed in the maxim, '*Audi alteram partem*') that no one is to be condemned, punished, or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard." *Broom, Legal Maxims* (8th Ed.) p. 112.

[5] The defendant Williams further contends that he had as good a title as if he had foreclosed under the power of sale, as the court in the foreclosure suit was merely selling in accordance with the power, by substituting a commissioner in the place of the mortgagee, and that therefore the case of *Dunn v. Oettinger*, 148 N. C. 276, 61 S. E. 679, where the trustee sold under the power, applies. But this contention is squarely met by our recent decision in *McLarty v. Urquhart*, 153 N. C. 339, 69 S. E. 245, in which Justice Brown says: "Notwithstanding the power, the mortgagee may invoke the aid of the court in foreclosing the equity of redemption, instead of resorting to the power. Likewise, in case of complications, the mortgagor has frequently resorted to the courts for protection and compelled foreclosure under their protection. *Capehart v. Riggs*, 77 N. C. 261; *Kornegay v. Spicer*, 76 N. C. 96; *Whitehead v. Hellen*, 76 N. C. 99; *Kidder v. McIlhenny*, 81 N. C. 131; *Manning v. Elliott*, 92 N. C. 51, are precedents in point. This plaintiff preferred to seek aid of the court to foreclose, instead of pursuing the power contained in the instrument. Had he pursued the latter, he must follow its provisions substantially; but the court is not bound to follow them. Its power to foreclose is not derived from the power of sale in the mortgage. It could decree foreclosure, if the instrument contained no such power." The court acts under its general equity jurisdiction, and proceeds to grant relief, irrespective of the stipulations contained in the power of sale. It pursues its own course and practice without any restraint by reason of the power of sale contained in the deed, so as to administer the rights of the parties according to law and its own equitable procedure, acting under its own powers and jurisdiction, and not by virtue of any contractual

power given in the mortgage or deed of trust.

[6] But it must not be overlooked that the defendant Williams did not acquire the legal title to the land by the assignment of the notes and mortgages to him. The notes were transferred, and the mortgage, but without any conveyance sufficient to transfer the legal title of the mortgagee. *Williams v. Teachey*, 85 N. C. 402; *Dameron v. Eskridge*, 104 N. C. 621, 10 S. E. 700; *Hussey v. Hill*, 120 N. C. 312, 26 S. E. 919, 58 Am. St. Rep. 789; *Morton v. Lumber Co.*, 144 N. C. 31, 56 S. E. 551; *a. c.* 152 N. C. 54, 67 S. E. 67; *Modlin v. Insurance Co.*, 151 N. C. 35, 65 S. E. 605. "In some of the states a mortgage is held by statutory regulation or judicial construction to be simply a lien, leaving the legal estate in the mortgagor. In North Carolina and many other states, the common law prevails, and the mortgage deed passes the legal title at once, defeasible by subsequent performance of its conditions." *Lumber Co. v. Hudson*, 153 N. C. 96, 68 S. E. 1065. This being so, and it is conceded in the defendant's brief that it is so, the assignment of the note and mortgage did not vest the legal title to the land in Williams, nor the power of sale as an incident of it. *Norman v. Hallsey*, 132 N. C. 6, 43 S. E. 473; *Williams v. Teachey*, *supra*. The legal title and power, therefore, remained in Fred Martin, the mortgagee, and he was not a party to the foreclosure suit. It follows that the court was not proceeding under the power contained in the deed when it ordered a sale of the land. The person having the legal title and power is a party to this suit, and was at the time that Williams took the assignment, and Williams himself was made a party by the service of process, before his bid at the sale had been accepted by the court, and the sale confirmed.

[7] He was a mere proposer, until it was accepted, and confirmation took place. *Joynner v. Futrell*, 136 N. C. 301, 48 S. E. 649, and cases cited. The sale and deed of the commissioner had no more than the effect of foreclosing the equity of redemption, leaving the legal title outstanding in Fred Martin, the mortgagee. Under all these circumstances, Williams must be adjudged to be bound by the orders and decrees in this suit, so far, at least, as may be necessary to a satisfaction of the plaintiff's claim by foreclosure of his mortgage, or otherwise. In other words, whatever rights or interest Williams has, he acquired subject to the plaintiff's lien, and the latter may redeem as against him, if his debt has not already been paid or satisfied; and in order to ascertain the status of the several claims an account may be taken, if necessary.

[8] We will not even suggest upon what principle the account should be taken, as that must be decided. first, by the court below, and besides we cannot anticipate what the evidence will be. But we may safely say that the plaintiff is not entitled to recover

any more than the amount of his debt, or such portion of the original debt as remains unsatisfied.

There is no analogy between this case and those where sales are made under a power contained in a mortgage or deed of trust, or under an execution issued upon a judgment, for in the former case, when the party acts under a power, he is proceeding out of court, and in the case of an execution sale he is proceeding under a statutory power or mandate, and the court is not called upon to exercise its equitable jurisdiction and do what is manifest justice as between all parties interested. The plaintiff is merely enforcing a right acquired at law by legal process, in accordance with the statute, and that is all. In such cases third parties must be vigilant and take care of their interests.

[9] But when a court of equity, or a court having equitable jurisdiction, is invoked to grant relief, quite a different case is presented. It strives to do justice, and will not deprive a party of his property without a hearing. The distinction is too familiar and manifest to require further elucidation. *Menzel v. Hinton*, 132 N. C. 660, 44 S. E. 385, 95 Am. St. Rep. 647; *Cone v. Hyatt*, 132 N. C. 810, 44 S. E. 678.

Our conclusion is that the court erred in its rulings. The verdict will be set aside and a new trial granted, the case to proceed further in the court below, in accordance with the law as herein declared.

New trial.

CLARK, C. J. (dissenting). It has always been held for law in this state that a purchaser at a sale under a second mortgage acquires the property, subject to the lien of the first mortgage; but that the purchaser at a sale under the first mortgage acquires the property absolutely free from the liens of subsequent mortgages. Purchasers at such sales are required therefore to examine only for prior incumbrances, not as to subsequent ones.

In *Gambrill v. Wilcox*, 111 N. C. 43, 15 S. E. 885, it was held that the purchaser at an execution sale under a junior docketed judgment acquires the property, subject to the lien of prior docketed judgments, but that the purchaser at an execution sale under a senior docketed judgment acquires the property free from the liens of all junior judgments. This is put upon the express ground therein stated that "the lien of a docketed judgment is in the nature of a statutory mortgage." This case has been cited since in *Baruch v. Long*, 117 N. C. 511, 23 S. E. 447; *Bernhardt v. Brown*, 118 N. C. 710, 24 S. E. 527, 715, 86 L. R. A. 402, and other cases.

When the sale is made under a power of sale contained in the mortgage, there is no opportunity to make subsequent mortgagees parties, nor has it ever been required that notice be given to them. The second mort-

gagees are fixed with notice of the prior recorded mortgage by statute, and they take only the equity of redemption. When the sale is made under foreclosure proceedings, the purchaser is not required to examine for subsequent incumbrances. He takes with notice only of the judgment which adjudges the validity of the mortgage and decrees the sale thereunder. He is not required to examine for subsequent incumbrances, any more than a purchaser at a sale under a docketed judgment, or a purchaser at a sale under a mortgage with power of sale.

It has been repeatedly and most explicitly declared by this court (*Kornegay v. Steamboat Co.*, 107 N. C. 117, 12 S. E. 123; *Lumber Co. v. Hotel Co.*, 109 N. C. 663, 14 S. E. 85; *Williams v. Kerr*, 113 N. C. 311, 18 S. E. 501; *Gammon v. Johnson*, 126 N. C. 66, 35 S. E. 185) that in a proceeding for foreclosure it is not necessary that the holders of junior mortgages be made parties. But if the purchaser could not get a good title at such sale, unless subsequent mortgagees are made parties, then they would be necessary parties beyond question. Those decisions hold that it is advisable to make such junior mortgagees parties, and even that the court may add them *ex mero motu*. The reason given is that thereby they may have opportunity to participate in the surplus, if any, derived from the sale over and above the payment of the first mortgagee and the cost of proceedings, which surplus the mortgagor might otherwise dissipate. This reason looks to the convenience and advantage of the second mortgagees, but does not affect the title acquired by the purchaser.

It has been held in many cases that a docketed judgment, though a lien upon the land, does not divest the estate out of the debtor, nor transfer his title, and does not even make the land primarily liable for the debt. *Dysart v. Brandreth*, 118 N. C. 968, 23 S. E. 966, and cases cited; *Clark's Code* (3d Ed.) p. 592. If, therefore, in such case, where the title and the estate still remain in the judgment debtor, the purchaser at the execution sale under a senior judgment takes the property, divested of the lien of subsequent docketed judgments, without any notice being given to them of the sale, for a stronger reason, when the land is sold under a decree of foreclosure, the purchaser must take without notice of any subsequent incumbrances which are not recited in the judgment, because by the first mortgage the title and the estate is transferred to the mortgagee, subject only to the sale and return of the surplus, if any, to the mortgagor.

The subsequent mortgagees take only a mortgage upon the equity of redemption. The legal title and the estate are in the first mortgagee, and the purchaser at the sale under the first mortgage can be no more affected by any subsequent liens than the first mortgagee himself. Indeed, the purchaser

at such sale is in a better condition than the mortgagee, for he takes the legal title, which was vested in the mortgagee, discharged of the trusts thereto attached. The purchaser is not required to see to the application of the purchase money. He has discharged his duty when he has paid the money into court at a sale under a decree of foreclosure, or has paid it to the mortgagee at a sale under power of sale, and has taken his deed.

In foreclosure proceedings, as the court has always held (*Gammon v. Johnson*, 126 N. C. 66, 35 S. E. 185, and other cases above cited), it is advisable to make subsequent mortgagees parties, that they may look to their liens upon the surplus. If not so made parties in the summons, they can ask to be joined, or the court *ex mero motu* can make them parties. But their not being parties cannot impair the title of the first mortgagee who, by virtue of his prior contract, holds the legal estate, nor can it affect the purchaser who acquires the estate and title of the first mortgagee.

For the above reasons this court has always held that junior mortgagees are advisable parties to foreclosure proceedings upon a prior mortgage, but not necessary parties. Hence, if they are not made parties, the purchaser at the sale acquires, nevertheless, a good title. It will place a new burden upon purchasers at such sales to impair their title by a constructive notice of junior incumbrancers, whom the court, ordering the sale has not seen fit to make parties.

The purchaser at the foreclosure sale under the first mortgage in this case had a right to rely upon the uniform decisions of this court that it was not necessary to make subsequent incumbrancers parties. But if, notwithstanding, his title is held defective, and that, too, not by setting aside the sale by motion in that cause, but in a collateral proceeding to foreclose under the junior recorded mortgage, certainly in this proceeding it is necessary to make the senior mortgagee a party. At such sale under the junior mortgage, the first proceeds must be applied to the payment of the lien of the first recorded mortgage, after payment of costs.

If, as is suggested, the assignment by the first mortgagee is defective, the assignee (who was also purchaser at the foreclosure sale) must be made a party, and the decree should direct a repayment to him of the purchase money out of so much of the proceeds of the sale, now to be made, which are to be applied to the discharge of the lien of the first mortgage.

The foreclosure sale under the first mortgage was either valid or invalid. If valid, the purchaser got a good title. If invalid, then at the foreclosure sale under the second mortgage the lien of the first mortgage must first be paid off out of the proceeds of the sale. The first registered mortgage cannot be deprived of its priority given by statute.

(156 N. C. 213)

SHELL & SOUTHERLAND v. AIKEN et al.
(Supreme Court of North Carolina. May 11, 1911.)

1. SET-OFF AND COUNTERCLAIM (§ 44*)—MUTUALITY OF DEMANDS.

A maker of a joint and several note payable to a firm may, in an action by the firm against him and the co-maker, set up a counterclaim due him from the firm.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 82-99; Dec. Dig. § 44.*]

2. SALES (§ 428*)—COUNTERCLAIM—DAMAGES FOR BREACH OF WARRANTY.

A claim for damages for breach of warranty in a contract of sale arises out of contract, and is available as a counterclaim under Revisal 1906, § 481, authorizing a counterclaim based on a cause of action arising on contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214-1223; Dec. Dig. § 428.*]

Appeal from Superior Court, Catawba County; Long, Judge.

Action by Shell & Southerland against J. H. Aiken and another. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

A. A. Whitener, for appellant. W. A. Self and C. L. Whitener, for appellees.

OLARK, C. J. The plaintiffs Shell & Southerland, a partnership, sold their livery business to the defendants, who were husband and wife, taking a note signed by them both in the sum of \$600, upon which this action is brought. The husband pleaded as a counterclaim that subsequently to the above sale the plaintiffs sold him a surrey for \$142 and warranted the same, that the surrey proved to be worthless, and he sets up damages for the breach of warranty as a counterclaim. The jury assessed the counterclaim at \$100 which was deducted from the amount which was admitted to be due upon the note.

The plaintiffs present several exceptions, but in their brief they are practically reduced to two propositions.

[1] They contend that the counterclaim was due to the husband only, and therefore judgment should have been rendered against the wife for the full amount of the note. But, as the note was joint and several, any credit allowed thereon in the judgment rendered against one of the obligors will, of course, be a payment as to the other. The note sued on was due to the partnership, and the counterclaim was owing by the partnership, and was therefore properly allowed as a counterclaim.

[2] The second contention of the plaintiffs is that the counterclaim was for a tort, and, inasmuch as it did not arise out of the same transaction, it could not be set up as a counterclaim. Revisal 1906, § 481. The answer to this is that the damage for breach of warranty arises out of contract, and is therefore a proper counterclaim. Even if the counter-

claim had been for fraud and deceit, and therefore an action ex delicto under the old procedure, the defendant could waive the tort and sue in contract. *Bullinger v. Marshall*, 70 N. C. 526.

No error.

(33 S. C. 26)

BARTOLI v. GRANDY et al.
(Supreme Court of South Carolina. May 11, 1911.)

1. TRIAL (§ 178*)—MOTION FOR DIRECTED VERDICT—EVIDENCE CONSIDERED.

Until a ruling admitting evidence was reversed by the trial court, or until the objection to it was sustained on appeal, such evidence should be considered on a motion for directed verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

2. TRIAL (§ 142*)—DIRECTION OF VERDICT.

Where the evidence is susceptible of more than one inference, it is error to direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

Appeal from Common Pleas Circuit Court of Greenville County; Ernest Gary, Judge.

"To be officially reported."

Action by L. Bartoli, doing business as the Bartoli Mosaic & Tile Company, against John F. Grandy and another, copartners as John F. Grandy & Son, and another. From a judgment upon a directed verdict, plaintiff appeals. Reversed and remanded for new trial.

Wm. G. Sirrine, for appellant. Haynsworth & Haynsworth, for respondents.

GARY, A. J. This is an action against John F. Grandy & Son and Greenville Hotel Company, to recover the sum of \$248.62 for work done by L. Bartoli on the Ottaray Hotel, Greenville, S. C. The Greenville Hotel Company awarded the contract, for the erection of said hotel, to John F. Grandy & Son, who in turn awarded to Bartoli, the contract for all tiling work in the hotel, specified in the original contract, between John F. Grandy & Son and the hotel company. This original contract did not call for tile floors and bases in the bathrooms, but subsequently it was decided to have such work done by contract. At a meeting for this purpose, the following persons were present: Bartoli, one of the Grandys, A. A. Bristow, and D. W. Ebaugh—the two last mentioned representing a majority of the building committee of the hotel company—and they entered into a contract, the provisions of which are in dispute. After the completion of the hotel, and the settlement between the hotel company and Grandy & Son, there remained due from Grandy to Bartoli, on account of work done under the original contract, the sum of \$44. This sum John F. Grandy & Son tendered to Bartoli; but the latter refused to accept it, claiming that

there was an additional sum due him, amounting in all to \$248.62, and, upon the defendant's refusing to pay the latter sum, this action was begun. On the trial of the case, it was contended, on behalf of plaintiff, that the work done on the base of the walls should be paid for at the price of 26 cents per lineal foot, which contention, if correct, would entitle plaintiff to a judgment for the full amount asked for. On the other hand, it was contended on the part of the defendants that this work was to have been paid for on the basis of 26 cents per square foot. If the latter contention is correct, it appears that the plaintiff has been paid in full, with the exception of the item of \$44, for work done under the original contract. The record contains the following statement: "The jury, after retiring to consider the case, returned and announced to the court that they had been unable to arrive at a verdict. By Mr. Haynsworth: I move the court to direct a verdict in this case, except for \$44. By the Court: I think that is what you are entitled to, so I will direct the verdict for you. Write out the verdict, Mr. Haynsworth." This amount was for other work than the tiling and was not disputed. The plaintiff appealed upon exceptions, which raise, practically, the single question whether there was any testimony whatever tending to show that the work done on the base of the walls was to be paid for at a higher price than 26 cents per square foot.

P. M. Feltham, a civil engineer, thus testified as a witness for the plaintiff: "Q. What is the usual method of computation to measure the base, as distinguished from the method of measuring the floor? A. You measure the base by the lineal foot, and the floor by the square foot. Objected to by Mr. Haynsworth: He is measuring under a contract, and the terms of the contract would determine that question. By Court: He can prove what this base terrazzo was, and estimate the value of it." Cross-examination: "Q. You mean to say that, according to Bartoli's claim, it was 240 odd dollars? A. No, sir; Grandy and I figured this together, and by our figures made the calculation. Q. Didn't the whole difference arise between Bartoli and the Greenville Hotel Company with reference to the measurements of the bases? A. My understanding, of course, I was not present, my understanding was that the dispute arose in the difference of the height of the bases. Q. If the hotel company was right about this claim, there would be nothing—there is where the difference arose, the difference in the measurement? A. Yes, sir. There being no written contract, I understood it."

D. W. Ebaugh, vice president of the Greenville Hotel Company, thus testified in behalf of the defendants: "Mr. Bartoli came over, and we had a meeting with him at the old Board of Trade rooms. We asked

him what the work would be worth, and, as near as I remember it, the work was 26 cents a square foot. Q. As I understand, you asked him specially with reference to the bases? A. Yes, sir. Q. What did he say? A. He said it was all the same price. Q. What was that? A. Twenty-six cents a square foot." Cross-examination: "Q. You asked how much the work was a square foot? A. Yes, sir. Q. It was 26 cents? A. Yes, sir. Q. The floor? A. Yes, sir. Q. Then you afterwards asked him (Bartoli) how much the base was? A. Asked him how much the washboard was. Q. And didn't he say 26 cents, the same? A. I can't remember that distinctly. I understood it to be the same price. Q. I am asking you, didn't he say 26 cents? A. I can't recollect that just now. Q. You didn't give it any particular significance, did you? A. No, sir."

A. A. Bristow, president of the Greenville Hotel Company, thus testified as a witness for the defendants: "Q. Were you present when the arrangement was made with Mr. Bartoli to do this mosaic work? A. Yes, sir. Q. Just tell what took place at that meeting. A. Well, we had a meeting, and I think considered it. Mr. Ebaugh, myself, and Mr. Grandy, and Mr. Bartoli, I guess it was, I can't say positive, he or his representative, in regard to putting the terrazzo tiles in the bathroom at the hotel. The price agreed on was 26 cents to my recollection, a square foot. That was about all there is to it. Q. Didn't you ask him something about the floor? State whether or not the question was asked him, what would be the charge for the bases? A. Mr. Ebaugh asked him if it made any difference whether it was four or eight inches. He said, no, it was all the same price. Q. What was that price? A. Twenty-six cents a square foot. Q. What was the height of the base? A. I can't tell you what the height of it is. Q. According to the contention of the hotel company as to the price to be paid, has the hotel company paid in full? A. I can't answer that." Cross-examination: "Q. The conversation you refer to is the one that took place between Mr. Ebaugh and Mr. Bartoli? A. Yes, sir. Q. Mr. Ebaugh is the man who asked him about the bases, how much for the base? A. Yes, sir. Q. He said 26 cents a square foot, or something like that? A. The same price."

Let us first consider the status of the case at the close of the plaintiff's testimony. It shows that the work was done by the plaintiff; that the usual method of computation is to measure the base by lineal measure, and the floor by the square foot; that the calculation made by Bartoli and the witness Feltham showed that the work was worth more than \$240. It is true the defendants' attorneys made objection to the testimony, as to the usual method of measuring the base and the floor; but the objection was not sustained. In overruling

the objection, his honor the presiding judge said: "He can prove what this base terrazzo was, and estimate the value of it."

[1] If the defendants had then made a motion for a nonsuit, it could not properly have been sustained. Until the presiding judge reversed his ruling as to the admissibility of the testimony, or until the objection to it was sustained on appeal, it was necessary to consider such testimony.

[2] The defendants undertook to destroy the effect of the plaintiff's testimony, by examining as witnesses the president and vice president of the hotel company. Neither of them, however, seems to have been able to state, positively, the terms of the verbal contract that was made with Bartoli; and when their testimony is considered, in connection with the testimony in behalf of the plaintiff, it is susceptible of more than one inference.

It was therefore error to direct the verdict herein.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(88 S. C. 4)

HASELDEN v. HASELDEN et al.

(Supreme Court of South Carolina. May 9, 1911.)

APPEAL AND ERROR (§ 1170*)—REVIEW—CLERICAL ERRORS.

A decree will not be disturbed on account of an obvious clerical error; the judge's intention clearly appearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

Appeal from Common Pleas Circuit Court of Berkeley County; George W. Gage, Judge.

Action by Rebecca Haselden against Herbert D. Haselden and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. St. Julien Jervey, for appellant. Willcox & Willcox and Octavus Cohen, for respondents.

GARY, A. J. This is an action for the admeasurement of dower. The facts are fully stated in the decree of his honor the circuit judge.

The third assignment of error is as follows: "Because his honor showed a misapprehension of the evidence in this: He says the deed from the children to the mother 'does not (sic) declare, that the land so conveyed is the dower of the said Rebecca from the landed estate of her late husband, James H. Haselden'; whereas, by an inspection of the deed, before court, it appears expressly

stated in the deed that this property is set off as dower in the lands of her husband. Therein he erred." It appears that the error was merely clerical, and that the circuit judge intended that the word "only" should be inserted between the words "not" and "declare."

We do not deem it necessary to consider any other exception specifically.

For the reasons assigned by the circuit judge, the said decree is affirmed.

(88 S. C. 561)

WITHERSPOON v. HURST.

(Supreme Court of South Carolina. May 5, 1911.)

DEEDS (§ 175*)—RESTRICTIONS—WAIVER—EVIDENCE.

Where a grant of land was made subject to the condition that it should never be built upon, but always remain an open space in front of the respective houses of the grantor and grantee, without any restriction upon the character of the buildings upon the lots mentioned, no abandonment of the right of the dominant tenement arose, because grantees of that tenement for a time maintained a fence around the property abutting on the locus in quo, or because the character of the buildings on both lots was changed, or because at an annual fair lunch tables were allowed on that land.

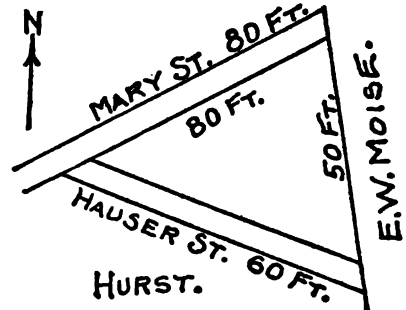
[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 545, 548; Dec. Dig. § 175.*]

Appeal from Common Pleas Circuit Court of Sumter County; Geo. W. Gage, Judge.

"To be officially reported."

Action by E. D. Witherspoon against E. W. Hurst. From a decree for plaintiff, defendant appeals. Affirmed.

The following is the diagram referred to in the opinion:



L. D. Jennings, for appellant. Lee & Moise, for respondent.

JONES, C. J. On March 14, 1884, E. W. Moise, in consideration of \$15, conveyed to C. M. Hurst a small triangular lot of land situate in the city of Sumter, in the angle between Mary street on the north and northwest and Hauser street on the south and southwest, measuring 80 feet on Mary street and 60 feet on Hauser street; the eastern

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

line being 50 feet along the lot of E. W. Moise. At the time of the conveyance the residence of C. M. Hurst was on Hauser street, fronting on this triangle, and also fronting thereon was a tenant house on the remaining premises of E. W. Moise. The habendum clause of the conveyance was: "To have and to hold the said small triangular piece of land to C. M. Hurst, and his heirs and assigns, forever, subject to a condition: That it shall never be built upon, but always remain an open space in front of my house, and also of his house, as per diagram hereto attached." The diagram attached represented the triangle as has been described.

The plaintiff became the owner of the remainder of the lot of E. W. Moise, east of the triangle, through successive conveyances, and the defendant became owner of the property on Hauser street fronting the triangle, and also owner of the triangle. On May 23, 1906, the defendant rolled a small wooden building upon the triangle over the protest of plaintiff, and this action was immediately brought for injunction to remove the building and restrain any interference with the triangle by obstructions contrary to the conditions of the above deed, with demand, also, for damages. Defendant contended that, if any easement ever existed in favor of the lot of plaintiff, it had been abandoned and extinguished by the acts of plaintiff and his grantors. The case was heard before Judge Memminger and a jury, and the court directed a verdict for plaintiff but without damages. This was followed by a decree holding that the condition of the deed was binding on the defendant and enforceable by plaintiff, and that there had been no extinguishment or abandonment of plaintiff's right, requiring removal of the structure, and enjoining interference with the premises as an open space.

The exceptions of appellant depend substantially on the question whether there was any evidence of an abandonment or extinguishment of the alleged easement or condition which should have been submitted to the jury, and whether the court was in error in holding as matter of fact that there had been no such abandonment or extinguishment. As the circuit court held, there was no claim or evidence of adverse possession. There was testimony that, for several years during the time the Sumter Colored Industrial Fair Association, grantor of plaintiff, owned the Moise lot adjoining the triangle, the association maintained a high, close fence near the eastern line of the triangle and around its property, so as to prevent those outside from seeing into the fair ground, with a gate of entrance and exit on

the line next to the triangle; that the association converted the tenant house on its lot into an exhibition building, with additions thereto; that plaintiff, after acquiring the property from the association in 1904, removed this building, and erected a bottling plant, some feet from the eastern line of the triangle and across plaintiff's lot, with an office door on the side next to the triangle, but fronting on Hauser street.

It is very clear that such facts are not evidence of any abandonment or extinguishment of the condition for an open space on the triangle, but are entirely consistent with such condition. The provision for an open space in front of Hurst's house and in front of Moise's house, "*as per diagram*," appertained to the adjoining lots of Hurst and Moise, and not merely to the houses thereon as places of residence. There being no condition restricting the character of the buildings to be erected on the lots of Hurst and Moise, such structures could not affect the continued validity of the condition in question. Hence, also, the fact that the house on the Hurst lot adjoining was burned, and other houses for residence and stores were erected on that lot, has no bearing on the question of extinguishing the condition for an open space over the triangle. There was also testimony that, while the fair association was holding its annual fair, defendant permitted lunch tables to be erected and used on the triangle, and that after the association sold to plaintiff the defendant permitted a long billboard to be erected on the triangle, which remained there about two years, and was removed, so defendant testified, because some of his tenants on the lot adjoining had complained about it, although plaintiff testified that the removal was at his request.

But such facts have no tendency to show extinguishment or abandonment of plaintiff's right to have the space kept open. This is not a case in which an easement or servitude was granted for a particular purpose, which no longer exists, or which has been obstructed by the owner of the dominant estate, in a manner inconsistent with its further enjoyment; hence the principle declared in *Taylor v. Hampton*, 4 McCord, 96, 17 Am. Dec. 710, does not apply. Whether the condition stated be considered as creating an easement, or as being a covenant running with the land, in either case there is nothing in the record tending to show any intention on the part of plaintiff to abandon, extinguish, or annul the same.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(89 S. C. 30)

ROBINSON v. TOWN OF ST. MATTHEWS.
(Supreme Court of South Carolina. May 11, 1911.)

1. MUNICIPAL CORPORATIONS (§ 822*)—DAMAGES—PERSONAL INJURIES.

Under Civ. Code 1902, § 2023, a municipality is liable for injuries through a defect in a street occasioned by its neglect or mismanagement. The neglect alleged was in digging a ditch in a street to a depth dangerous to ordinary travel and leaving same uncovered and unlighted. *Held*, it was not error to fail to instruct that it is discretionary with a municipality to place permanent lights in a street, as the case presented not merely a failure so to do, but a defect in the street as a result of neglect in leaving an uncovered and unlighted ditch in a street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1762; Dec. Dig. § 822.*]

2. DAMAGES (§ 50*)—MENTAL SUFFERING.

Mental pain and suffering connected directly with physical injury constitute a part of the physical injury, for which compensatory damages may be allowed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 100; Dec. Dig. § 50.*]

Appeal from Common Pleas Circuit Court of Calhoun County; Thos. S. Sease, Judge.
"To be officially reported."

Action by Wesley Robinson against the Town of St. Matthews. From a judgment for plaintiff, defendant appeals. Affirmed.

M. M. Mann, for appellant. J. M. Walker and J. C. Elliott, for respondent.

JONES, C. J. This action was brought under section 2023, 1 Code of Laws, for damages for personal injuries alleged to have been sustained by plaintiff as the result of the neglect and mismanagement of the defendant in not keeping the streets of the town in good repair, and in not providing lights at a certain church within the corporate limits. The jury awarded a verdict to the plaintiff in the sum of \$100.

Appellant's exceptions to the judgment rendered are upon two grounds:

[1] First. Error in failing to charge defendant's fourth request as follows: "It is discretionary with a municipality as to the erection and placing of permanent lights, hydrants and like structures, and it is no negligence on the part of a municipality to place lights in some parts of a town and not place them in others, if in the discretion of the municipality they do not deem it wise or expedient to erect or establish such lights." It appears that the court overlooked the request to charge as it was handed to him on a sheet of paper detached from other sheets containing requests which were considered. But the request did not contain a sound proposition of law applicable to the case, and hence there was no error or harm in overlooking it. Un-

der section 2023, a municipality is liable for an injury through a defect in any street occasioned by its neglect or mismanagement. The delict alleged was in digging a ditch along one of the principal streets of the town to a depth dangerous to ordinary travel and leaving the same uncovered and unlighted, which caused plaintiff on a dark night to drive therein to his injury, although he was exercising due care. The case as presented was not a mere failure to establish a permanent light for the benefit of the citizens, but a defect in the street, as a result of neglect or mismanagement under the peculiar circumstances. Hence the test of liability could not depend upon whether the municipal authorities deemed it wise or expedient to guard the exposed ditch with a light; but the test was whether the uncovered and unlighted ditch was a defect in the street resulting from defendant's neglect or mismanagement.

Second. The court charged the jury: "If you find that the plaintiff is entitled to recover, you have the right to take into consideration his loss of time, his physical and mental pain and suffering, and that which he is reasonably certain to endure in the future, if any, his expenditures as a result of the injury sustained, if any, the injury to his health if you find those things to exist as a matter of fact."

[2] Appellant contends that it was error to allow the jury to take mental pain and suffering into consideration in estimating damages. Mental pain and suffering connected directly with physical injury constitute a part of the physical injury for which compensatory damages may be allowed. *Mack v. South Bound R. R. Co.*, 52 S. C. 332, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

STATE v. JACKSON.

(Supreme Court of South Carolina. May 17, 1911.)

On petition for rehearing. Petition dismissed.

For former opinion, see 87 S. C. 407, 69 S. E. 883.

PER CURIAM. After careful consideration, we find no ground for rehearing. It is therefore ordered that the petition be dismissed, and the stay of remittitur be revoked.

(88 S. C. 9)

PATTERSON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. May 9, 1911.)

1. APPEAL AND ERROR (§ 690*)—REVIEW—RECORD—EXHIBITS.

An exhibit admitted in evidence, not being printed in the "case," so that its contents cannot be known, it cannot be said that its admission was error, or, if so, was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2908; Dec. Dig. § 690.*]

2. APPEAL AND ERROR (§ 695*)—RECORD—EVIDENCE.

It appearing that all the evidence is not before the court on appeal, it cannot say there was no evidence of negligence or damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915; Dec. Dig. § 695.*]

Appeal from Common Pleas Circuit Court of Hampton County; R. C. Watts, Judge.

"To be officially reported."

Action by James M. Patterson against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Dismissed.

E. F. Warren, for appellant. James M. Patterson, for respondent.

HYDRICK, J. Plaintiff recovered judgment against defendant in the court of a magistrate for \$35 damages, caused by negligent delay in the transmission and delivery of a telegram. On appeal to the circuit court, the judgment was affirmed.

The first two exceptions assign error in the admission of a letter and two service messages, and the last two on the ground that there was no evidence of negligence or of damages.

[1, 2] The record is very defective. It shows that a number of letters and telegrams were admitted in evidence and considered by the magistrate and circuit court; but not one of them is printed in the "case." Without knowing the contents of an exhibit, we cannot say whether there was error in admitting it, or, if so, whether it was prejudicial. And, as it appears that all the evidence is not before us, we cannot say there was no evidence of negligence or of damages.

Appeal dismissed.

JONES, C. J., and GARY, A. J., and WOODS, J., concur.

(88 S. C. 1)

GRAHAM v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. May 9, 1911.)

1. NEW TRIAL (§ 77*)—EXCESSIVE RECOVERY—WRONGFUL CONDUCT OF EMPLOYE.

One thousand dollars recovery against a railroad company by a freight patron, grossly

insulted and maliciously assaulted by a station agent, was not so excessive as to show passion or prejudice, entitling the railroad company to a new trial as a matter of right.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 157-161; Dec. Dig. § 77.*]

2. NEW TRIAL (§ 97*)—GROUNDS—ABSENT WITNESSES—JUDICIAL DISCRETION.

It was not an abuse of discretion to refuse defendant a new trial, asked on account of absent testimony, where there was no motion for continuance on that ground.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 197; Dec. Dig. § 97.*]

Appeal from Common Pleas Circuit Court of Florence County; Thos. S. Sease, Judge.

Action by O. O. Graham against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lucian W. McLemore, for appellant. J. W. Ragsdale, for respondent.

JONES, C. J. The complaint in this case was based on the allegation that, on November 5, 1909, in Florence county, at Coward's Station, on defendant's line, defendant, by its station agent, E. L. Smith, grossly insulted and abused plaintiff, and maliciously assaulted him with a pistol, while he was lawfully upon defendant's premises, for the purpose of obtaining freight and paying the charge due thereon. Verdict and judgment were rendered in favor of plaintiff for \$1,000.

Motion for a new trial was made on two grounds: (1) "That the verdict is so excessive as to show on its face that the jury were influenced by passion, or whim, or prejudice; (2) that the failure of defendant to have the benefit of the testimony of the witness S. C. Smith could not have been foreseen and guarded against, and without this testimony the defendant has not had a fair and impartial submission of its case to the jury." These grounds are renewed here by exceptions; all other exceptions being abandoned.

[1] We cannot say that the verdict was the result of passion, whim, or prejudice upon anything appearing in the record, or that there was abuse of discretion in refusing a new trial for excessive verdict. There was evidence tending to show that defendant's agent assaulted plaintiff with a deadly weapon, upon the station premises, while plaintiff was there dealing with the agent in reference to business within the scope of the agent's employment. The verdict may be regarded as large; but, not being without support in the evidence, this court cannot interfere. *Bing v. Atlantic C. L. R. R. Co.*, 86 S. C. 529, 68 S. E. 645.

[2] It may have been unfortunate for the defendant that it went to trial without the testimony of the witness Smith, but that affords no ground for relief in this court. There was not even a motion for continu-

ance, on the ground of the absence of the witness. There was certainly no abuse of discretion in refusing a new trial on this ground.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(39 S. C. 32)

MARTIN v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. May 11, 1911.)

1. CARRIERS (§ 275*)—FAILURE TO STOP TRAIN AT PASSENGER'S DESTINATION — SPECIAL DAMAGES—PLEADING.

A complaint in an action by a passenger for the failure of the carrier to stop the train at the station of his destination, which alleges that the passenger gave the ticket collector money and told him to stop the train at the station, and permit him to alight to attend to his business there, is sufficient to permit testimony of notice to the carrier of the passenger's business engagement.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1076, 1077; Dec. Dig. § 275.*]

2. CARRIERS (§ 277*)—BREACH OF CONTRACT—SPECIAL DAMAGES.

In the absence of proof of such notice, proof of loss arising from the passenger's failure to meet the business engagement is inadmissible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.*]

3. CARRIERS (§ 277*)—BREACH OF CONTRACT OF CARRIAGE — SPECIAL DAMAGES — EVIDENCE.

In an action against a carrier for failing to stop its train at a passenger's destination, the testimony of the passenger that, when he paid the fare to the ticket collector, he stated that he wanted to go to the station of his destination, did not alone show that the carrier had notice of the passenger's special business engagement there, and evidence of loss arising from his failure to meet the business engagement was properly excluded under the rule that special damages are recoverable only on allegation and proof that the carrier had notice of the special circumstances at the time of the contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.*]

4. CARRIERS (§ 278*)—CARRIAGE OF PASSENGERS—DAMAGES—INSTRUCTIONS.

Instructions in an action against a carrier for its willful failure to stop its train at a passenger's destination to enable him to alight held not to preclude a recovery of actual damages alleged and proved, but merely to leave to the jury to determine what damages, whether actual or punitive, should be awarded.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1080, 1081; Dec. Dig. § 278.*]

5. CARRIERS (§ 275*)—DAMAGES — COMPENSATORY AND PUNITIVE DAMAGES.

A complaint in an action against a carrier, which is based on a willful breach of the carrier's duty to stop its train at a station to permit a passenger to alight, does not prevent recovery for the actual damages alleged and proved as a result thereof, but authorizes a recovery of both actual and punitive damages on proof of willfulness.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1076, 1077; Dec. Dig. § 275.*]

6. CARRIERS (§ 275*)—FAILURE TO STOP TO PERMIT PASSENGER TO ALIGHT—ISSUES.

Where the complaint in an action against a carrier was based on its failure to stop its train to permit a passenger to alight at his destination, and not on any abusive and humiliating language of the conductor, the exclusion of the language of the conductor as an independent act of damage was proper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1076, 1077; Dec. Dig. § 275.*]

Appeal from Common Pleas Circuit Court of Greenville County; John S. Wilson, Judge.

"To be officially reported."

Action by Ben P. Martin against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The following is the second paragraph of the complaint:

"That on the 10th day of December, 1908, the plaintiff became a passenger on one of defendant's trains at Easley, one of defendant's stations, in Pickens county in the state aforesaid, to go to Crosswell, about six miles from Easley in the direction of Greenville, for the purpose of attending to some business in the neighborhood of Crosswell. The plaintiff gave the ticket collector, the agent of the defendant, 50 cents, and told the said agent to stop the train at Crosswell, and let plaintiff off so that plaintiff could attend to plaintiff's business there. The said agent gave plaintiff 5 cents back, and passed on, the plaintiff thinking that the said agent would give the balance of the change back later, but said agent never did give back the balance of said change. The said agent failed to have the said train stopped at Crosswell, and plaintiff was, therefore, carried on to Greenville, one of defendant's stations, in the said city in state and county aforesaid, a distance of 12 miles from Easley; the regular fare from Easley to Greenville being only 30 cents."

The following is the charge of the court on the issue of damages:

"Now, what are damages in law? He sues for damages. It is a sum of money assessed by a jury on finding for the plaintiff or successful party in an action as compensation for the injury done him by the opposite party. Damages may be classed under two general heads, compensatory and vindictive, the former—that is, compensatory damages—when they are allowed as measuring the actual loss, and are allowed as amends therefor. Vindictive damages exceed the loss sustained and given as a kind of punishment to the defendant, with a view of preventing a similar wrong in the future. That is the latter kind of damages, and they are also called exemplary or punitive damages.

"Now, in this case, the principal allegation is for vindictive, punitive, or exemplary damages, claiming that the plaintiff's rights

have been invaded and invaded willfully—not only negligently, but willfully, intentionally, and hence the plaintiff says that he is entitled not only to his actual damages, whatever he lost, but is entitled to exemplary, vindictive, or punitive damages as I have defined it to you, as a kind of punishment to the defendant, to deter the defendant from committing similar acts in the future against others. That is the meaning of vindictive, exemplary, or punitive damages.

"Now, in this case, the complaint is based on alleged willfulness and wantonness. The complaint says that the damage done to the plaintiff was done willfully, wantonly, and negligently, with a reckless disregard of the plaintiff's rights. Now, I charge you that must be proven by the greater weight of the evidence before you can find anything for the plaintiff, and you must find by the greater weight, or preponderance of the evidence, that the injury, if any at all, was as alleged in the complaint. Let me read that to you again, because, if there were any other injuries, any other words, or any other acts took place other than are embraced in the allegations of the complaint, you cannot find damages on that account. You are confined to the allegations of the complaint. I will repeat that to you—what the complaint says. [Court read complaint.]

"So, that is the allegation now, and you must find before you can find for the plaintiff from the greater weight of the evidence that that took place—anything else—you heard some discussion here as to what was said. That is not alleged in the complaint, and you have got nothing to do with that. Any abusive language he has not sued for, that, if there was any damage done at all, it must be done as alleged in the complaint. And parties when they come into court, they must go by the pleadings. I charge you another thing, that every one in a case of negligence, where the negligence occurs in any case—if a party is injured by the negligence of a railroad company, and he is damaged in any way, the law says if he can in a reasonable way minimize the injury in any way. * * *

"Now, you heard a lot said about punitive damages. This suit is based principally on that, and allege punitive, vindictive, or exemplary damages. When are punitive allowed? When the act is intentional, willful. It is the intentional, willful invasion of the personal rights of another. You see it goes a little further than mere negligence. Negligence is the want of due care. The doing of a thing in a way that a person of ordinary prudence and care would not have done under the circumstances, or the not doing of a thing which a person of ordinary prudence and care would have done under the circumstances. That is simple negligence.

"In this complaint it is alleged that alleged injury was caused by the willful, intentional act on the part of the defend-

ant. It meant the conscious violation of another's rights. That you violated another's rights, and that you are conscious at the time—that you know at the time, that you are violating the rights of another. That is the meaning of wantonness. It means a gross disregard of the rights of another."

Adam C. Welborn, for appellant. Cothran, Dean & Cothran, for respondent.

JONES, C. J. The plaintiff sought to recover of defendant actual and punitive damages for alleged grossly negligent and willful failure to stop its train at plaintiff's destination; he having boarded defendant's train at Easley, S. C., on December 10, 1908, as a passenger for Crosswell, S. C. Verdict and judgment were for the defendant.

[1,2] Appellant's first exception alleges error in the ruling that plaintiff could not prove what his business at Crosswell was, and what was his loss in his business on account of the failure to stop the train at his station. The court at first ruled that the testimony was incompetent because there was no allegation in the complaint that defendant had notice of the business engagement. This was a mistake, as the complaint alleges: "The plaintiff gave the ticket collector, the agent of defendant, 50 cents, and told the said agent to stop the train at Crosswell and let plaintiff off, so that plaintiff could attend to plaintiff's business there." This was sufficient to permit testimony as to notice of special loss arising from failure to meet the business engagement. But later the plaintiff renewed his effort to introduce testimony as to the loss from failure to meet the business engagement, and the court excluded the testimony on the ground that there had been no notice to the defendant, and, unless defendant had notice, proof as to such loss was inadmissible. The last ruling was upon the proper ground.

[3] We find nothing in the testimony to support the allegation that defendant had notice of the special engagement, and no assurance was given the trial court that proof of such notice would be made. Plaintiff testified that, when he paid the fare to the ticket collector, he, plaintiff, said, "I want to go to Crosswell," but that he said nothing more then. No further testimony on this point was given. The general rule is that special damages cannot be recovered except upon allegation and proof that defendant had notice of the special circumstances at the time of the contract. *Kolb v. Southern Railway*, 81 S. C. 536, 62 S. E. 672; *Berley v. Seaboard A. L. Ry.*, 83 S. C. 411, 65 S. E. 456.

[4] The second exception alleges that the court committed error in charging practically that plaintiff was not entitled to recover actual damages. This is a misconception of

the charge, as it clearly appears therein that it was left to the jury to determine what damages, if any, whether compensatory or punitive, should be given to the plaintiff. The court read the complaint to the jury, and confined them to its allegations. The court correctly construed the complaint as based upon alleged willfulness and wantonness, the allegation being "that the conduct of the defendant through its agent as set forth in paragraph 2 of this complaint was willful, grossly negligent, and in total disregard of plaintiff's rights."

[5] The fact that a complaint is based upon a willful breach of duty does not prevent recovery for the actual damages alleged and shown as a result of the willful tort. The cause of action is not to be tested by the kind of damages sought, which appertain rather to the remedy, but by the nature of the delict alleged. If the breach of duty is merely negligent, only compensatory damages may be recovered, but, if the breach of duty is willful, recovery may be had for both compensatory and punitive damages upon proof of the willful tort. *Wilson Co. v. Alderman Co.*, 75 S. C. 301, 55 S. E. 447.

The third and fourth exceptions allege that the court charged the jury with respect to matters of fact; but a fair reading of the charge shows no foundation for the exceptions.

[6] The complaint being based upon the failure of defendant to stop its train at plaintiff's destination, and not upon any abusive and humiliating language of the ticket collector or conductor, as the cause of action, it was not a charge upon the facts, or error to exclude from the consideration of the jury the language of the ticket collector or conductor as an independent act of damage. Plaintiff had full latitude to show that the failure to stop at the station was willful, and nothing was withdrawn from the jury on that issue.

The exceptions are overruled, and the judgment of the circuit court affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(89 S. C. 24)

TOWN OF GREENWOOD v. YOE.

(Supreme Court of South Carolina. May 11, 1911.)

1. EMINENT DOMAIN (§ 193*)—PROCEEDINGS TO TAKE PROPERTY TO ASSESS COMPENSATION—STATUTORY PROVISIONS.

Civ. Code 1902, § 2012, amended by Act March 2, 1909 (26 St. at Large, p. 42), which confers upon cities and towns the power to condemn lands for water supply, and provides that compensation is to be determined as provided by law for the condemnation of land and rights of way of railroad corporations, does not provide any method for determining the right to institute such proceedings, and the only mat-

ter to be determined thereunder is the amount of compensation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 528; Dec. Dig. § 193.*]

2. EMINENT DOMAIN (§ 274*)—REMEDIES OF OWNER—INJUNCTION—GROUNDS OF RELIEF.

Questions as to the right of a city or town to condemn lands for water supply purposes cannot be determined in condemnation proceedings begun by the city or town, but can only be determined by a proceeding by the owner, instituted before the verdict in condemnation to test the right to condemn, and to enjoin the condemnation proceedings.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 753, 756-768; Dec. Dig. § 274.*]

3. EMINENT DOMAIN (§ 262*)—REVIEW—DISCRETION—DENIAL OF NEW TRIAL.

Since, in condemnation proceedings, the appellant is not entitled to a trial de novo in the circuit court, unless the court shall be satisfied, of the reasonable sufficiency of the grounds, where an order dismissing an appeal recites that the circuit judge was not satisfied, the Supreme Court cannot question such view of the circuit court on appeal therefrom.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 262.*]

4. EMINENT DOMAIN (§ 262*)—REVIEW—DISCRETION OF LOWER COURT—DAMAGES.

Where the circuit court denies a new trial in condemnation proceedings, in which the verdict was not so inadequate as to suggest caprice, partiality, or corrupt motive, and where the evidence admitted could not have been prejudicial, and was not regarded by the circuit court as sufficient to warrant a trial de novo, the Supreme Court will not review a dismissal on the ground of an abuse of discretion.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 262.*]

5. EMINENT DOMAIN (§ 261*)—REVIEW—TRIAL DE NOVO—RECORD.

In determining the sufficiency of the grounds on appeal in condemnation proceedings to warrant a trial de novo, it is proper for the circuit court to consider the record in connection with the grounds of appeal.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 261.*]

Appeal from Common Pleas Circuit Court of Greenwood County; John S. Wilson, Judge.

"To be officially reported."

Action by the Town of Greenwood against Belle Yoe to condemn and assess land taken for public use. Judgment for damages for defendant, and, being dissatisfied, she appealed to the circuit court, where her appeal was dismissed, and she again appealed. Affirmed.

The following are the exceptions.

"I. It is respectfully submitted that his honor, Judge Wilson, erred in refusing to allow the appeal and grant the new trial asked for in this matter because it is submitted that the grounds of appeal were reasonably sufficient as is laid down by statute for the granting of new trials in matters of this kind. The following grounds relied upon are all reasonably sufficient to cause the granting of a new trial in this matter.

"Ground 1: (a) Because the verdict of the

said jury is not sustained by the evidence, in that the valuation fixed is too little.

"Ground 2: (b) Because the verdict of the jury is contrary to the evidence, in that the value of the land is more than the amount fixed by the jury."

"Ground 4: (c) Because it is error to allow the contract between B. F. Yoe and the town of Greenwood by its commissioners of public works to be introduced in evidence for the purpose of showing that the said lands were already burdened by an easement in the said lands for the reason that this said fact is a matter of construction, and, since there was no judicial officer present to give the said paper its judicial construction, it was prejudicial to the value of lands in the eyes of the said jury. It was argued that the said contract burdened the greater portion of the said lands with an easement, when as a matter of law it is submitted that only a very small part of the lands, if any, is affected by the terms thereof.

"Ground 5: (d) Because the introduction of the said contract in evidence was prejudicial to the appellant, in that the said jury was led to believe therefrom that the part of the said lands on the public road was burdened with an easement which would prevent its use for any purpose whatsoever, whereas it is submitted that the effect of the said contract should enter in no way into a proper valuation of the said lands for the following reasons: (a) The easement, if any exists, is based upon a continuing consideration, a part of which the town of Greenwood would be unable to perform after the taking of the lands in question, and, where consideration for an easement is destroyed by an act of law, it is submitted that the easement for which this consideration was given is also destroyed, and in a case like the present, where a corporation takes lands upon which they are bound to furnish water by a previous contract, and the said furnishing formed a part of the consideration for which an easement over the said lands is given, the consideration will be destroyed by the act of law and the valuation to be put on the said lands should be fixed as though the lands were free from the said easement.

"Ground 6: (e) Because no testimony was taken to establish the allegations of the petition in the said condemnation proceedings.

"Ground 7: (f) Because no testimony was taken to establish the necessity of taking the said lands for the purpose set forth in the said petition.

"Ground 8: (g) Because no testimony was taken or offered by the town of Greenwood in reference to the construction of the proposed improvement to be made by the town of Greenwood and the quantity of land which shall be required therefor.

"Ground 9: (h) Because no testimony was taken or offered as to how much of the said land was required by the town of Green-

wood for the purpose of protecting its said watershed.

"Ground 10: (i) Because no testimony was offered or taken to prove that the town of Greenwood needed any of the said lands for the purpose of increasing its said water supply, since no testimony was offered or taken to prove that the present supply of water was insufficient to the needs of the said town. * * *

"Ground 12: (j) Because the order upon which the said jury assessed the value of the said property was not signed by the judge of the circuit wherein the said lands lay, in that the order as signed by his honor, Judge Robert Aldrich, whereas his honor, Judge Klugh, is the judge of the Eighth judicial circuit, in which circuit the said lands lay.

"Ground 13: (k) Because the taking of the said lands would be unlawful, in that the town of Greenwood is attempting to take more land than is necessary for its said purposes.

"Ground 14: (l) Because the taking of the said lands would be unlawful, in that the said lands lie entirely without the corporate limits of the said town of Greenwood, and under no statute has the said town of Greenwood the right to take property outside its corporate limits by condemnation or otherwise.

"Ground 15: (m) Because the charter of the said town of Greenwood does not empower it to take lands without its corporate limits, and such taking would be unlawful.

"Ground 16: (n) Because such taking would be in violation of article 8, § 5, of the Constitution of 1895, in that said section requires that 'no construction or purchase of waterworks plants' shall be made except upon a majority vote of the electors in said cities or towns who are qualified to vote on the bonded indebtedness of said cities and towns, and it is submitted that no election has ever been held by the town of Greenwood to determine whether or not the lands herein shall be purchased.

"II. It is respectfully submitted the presiding judge erred in not allowing the appeal and in not ordering a new trial in this matter because to deny to Miss Yoe the right of a trial of the issues raised in this proceeding before a jury of 12 men in a court of record was in effect denying to her the constitutional right given her by the Constitution of 1895, art. 20 [article 1, § 25].

"III. It is submitted that it was error for his honor to uphold the verdict in this case, because it is submitted that these whole proceedings are null and void, in that the statute of 1909, under which these proceedings were had, is null and void because it is unconstitutional, in that the body of the act does not conform to the title. This act is found in 26 Stat. p. 42.

"IV. The presiding judge erred in not holding that the question for him to decide

upon the issue of allowing or disallowing the appeal was the sufficiency of the grounds of appeal; that this question must be decided by an inspection of said grounds, and not by a review of the facts."

Tillman & Watson and Cothran, Dean & Cothran, for appellant. E. L. Richardson and Grier & Park, for respondent.

JONES, C. J. The town of Greenwood instituted proceedings to condemn about 71 acres of land belonging to the defendant, adjoining the water power station of plaintiff, outside its corporate limits, for the purpose of increasing and protecting the water supply of the town. The jury assessed the sum of \$7,125 as damages, and the defendant appealed to the circuit court upon certain grounds. Judge Willson, who was presiding, dismissed the appeal upon the ground that he was not satisfied with the reasonable sufficiency of the exceptions taken, and did not consider that defendant had an inherent right to a trial by a jury in the circuit court. The exceptions herewith reported will show the grounds presented to the circuit court and sought to be renewed in this court.

[1] The power of cities and towns to condemn lands for water supply, including lands the drainage of which would contaminate the water supply, is conferred by section 2012, 1 Code of Laws 1902, amended March 2, 1909 (26 Stat. p. 42). The statute provides that the compensation is to be determined in the manner now provided by law for the condemnation of lands and rights of way of railroad corporations. It has been determined by many decisions following Railroad Co. v. Riddlehuber, 38 S. C. 308, 17 S. E. 24, that the condemnation statutes provide no machinery for determining the right to institute such proceedings, and that the only matter to be determined thereby is the amount of the compensation.

[2] Questions as to the constitutionality of the statute, the power of the town of Greenwood to condemn lands for water supply within or without its corporate limits, the jurisdiction of Judge Aldrich to grant the order directing the clerk to impanel a jury

in condemnation, the necessity requiring condemnation of the land desired, all relate to the right to condemn, and were not proper to be considered in these proceedings. If defendant desired to make questions of this character, she should have instituted proceedings before the verdict in condemnation to test the right to condemn and to enjoin the condemnation proceedings, as was done in the case of Riley v. Union Station, 71 S. C. 457, 51 S. E. 485, 110 Am. St. Rep. 579; and other cases.

[3] The exception that the verdict was far too small in amount cannot avail in this court. The appellant was not entitled to a trial de novo in the court of common pleas, unless that court was satisfied of the reasonable sufficiency of the grounds, and the determination of the circuit court that it has or has not been so satisfied will not ordinarily be reviewed. Chesterfield & K. R. R. Co. v. Johnson, 58 S. C. 561, 36 S. E. 919; Southern Power Co. v. Williams, 85 S. C. 172, 67 S. E. 136.

[4] There is nothing to show abuse of discretion. The verdict was not so inadequate as to suggest that it was the result of caprice, partiality, or corrupt motive; on the contrary, there was much testimony in support of the verdict as a fair one. The introduction in evidence of the contract between B. F. Yoe and the town of Greenwood for the three acres adjoining the land sought to be condemned was not regarded by the circuit court as sufficient to warrant a trial de novo, and we see no reason to justify our interference on that ground. The contract was not wholly irrelevant to the issue of value, and could not have prejudicially affected the result against appellant.

[5] In determining the sufficiency of the grounds on appeal in condemnation proceedings to warrant a trial de novo, it is, of course, proper for the circuit court to consider the record in connection with the grounds of appeal.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(126 Ga. 300)

PIEDMONT CANDY CO. v. JOHN NEWTON PORTER CO.

(Supreme Court of Georgia. May 11, 1911.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

All reasonable deductions and inferences from the evidence demanded the verdict directed by the court.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between the Piedmont Candy Company and the John Newton Porter Company. From the judgment, the Piedmont Candy Company brings error. Affirmed.

Walter R. Brown and R. B. Blackburn, for plaintiff in error. Geo. B. Rush, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(126 Ga. 272)

SOUTHERN RY. CO. v. MIKO.

(Supreme Court of Georgia. May 10, 1911.)

*(Syllabus by the Court.)***CARRIERS (§ 76*)—LOSS OF FREIGHT—ACTION BY CONSIGNEE.**

A consignee, having no special or general property in goods consigned to him, and incurring no risk from their transportation, cannot maintain against the carrier an action ex delicto for loss or damage to the goods in transit.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 256-271; Dec. Dig. § 76.*]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by H. Miko against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Lloyd Thomas, Griffith & Matthews, and Maddox, McCamy & Shumate, for plaintiff in error. J. M. & H. J. McBride for defendant in error.

HOLDEN J. The defendant in error (hereinafter called the plaintiff) brought suit against the plaintiff in error (hereinafter called the defendant) making substantially the following allegations: The defendant was a corporation doing the business of a common carrier of passengers and goods within the state, with officers and agents within the county in which the suit was brought, and on the "16th day of May, 1907, said Southern Railway Company received at its shipping office in Atlanta, Fulton county, Ga., one glazed door, * * * the property of petitioner, for shipment over its said line to Waco, Ga., and issued its receipt of bill of lading therefor, in which bill of lading petitioner was named as consignee." The door was injured and damaged to the extent of \$50. She afterwards filed with the agent of the defendant her claim for damages, duly

verified, in pursuance of the act of 1906 (Laws Ga. 1906, p. 102, § 2), and the defendant refused to pay and adjust the claim. She brought suit to recover \$50 "damage, with legal interest, as well as for the additional sum of \$50 as a penalty for its said failure to adjust and pay said claim within 60 days from the time said claim was filed with the agent of defendant as aforesaid." By amendment the plaintiff alleged that the door was injured and damaged, and rendered "almost entirely valueless," by the negligence of the defendant. The defendant filed exceptions pendente lite to the overruling of its general and special demurrer to the petition, and thereon assigned error in its bill of exceptions, wherein error was also assigned on the order of the court overruling its motion for a new trial.

The uncontradicted evidence of Theodore Miko, who was the husband of the plaintiff and testified in her behalf, and who was the only witness testifying with respect to the title or ownership of the door, shows that it belonged to him, and was shipped by him from Atlanta, Ga., to Waco, Ga., and in the bill of lading H. Miko & Co. were named as consignors and the plaintiff as consignee. He further testified that the door was badly damaged when it reached Waco, and was not taken from the custody of the defendant. The consignee never became a bailee in actual possession of the property. The carrier never delivered it to her, or to any one for her. This case does not come within that class of cases where a recovery can be had by a bailee for damages to property while in his possession as bailee. A right of action in assumpsit exists in favor of the consignor, who makes with a carrier a contract for the shipment of goods, for the failure of the carrier to deliver the shipment to the consignee, even though the consignor has no title or interest in the property. The common carrier, having made a contract with the consignor to carry and deliver the goods received by it for shipment, is liable to the consignor for a breach of the contract, and the carrier cannot defeat recovery for a breach of the contract by showing that the consignor had no title or interest in the property. *Carter v. So. Ry. Co.*, 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354; 3 *Hutchinson on Carriers*, §§ 1312, 1314, 1320; 4 *Elliott on Railroads*, § 1692. If the consignee owned the property shipped, the consignor would hold the amount recovered in trust for the consignee, and the latter could not afterwards recover of the carrier for its failure to carry and deliver the property to him, or for any injury to the property. The consignee of property delivered by another to a common carrier for shipment is presumed to be the owner, and presumptively a right of action exists in his favor for any injury or damage to the property in transit; but the presump-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexer

tion that the consignee is the owner may be rebutted, and where it appears that the consignee has no general or special property in the goods shipped, and incurs no risk in their being transported, he cannot maintain an action ex delicto for the loss of, or for any damage to, the property. 4 Elliott on Railroads, § 1692; 3 Hutchinson on Carriers, § 1320; 3 Am. & Eng. Enc. Pl. & Pr. 830 (2), 831 (5); 4 Dec. Dig. § 76; Grinnell v. Chicago, etc., Ry. Co., 109 Minn. 513, 124 N. W. 377, 26 L. R. A. (N. S.) 437.

Where the consignor makes a contract with a common carrier for shipment of goods which belong to the consignee, the former may recover in assumpsit for a breach of the contract, and the latter may recover for any loss or any damage to the property, and a recovery by either of the full amount of damage caused by the carrier would bar a recovery of such damage by the other. However, if the consignee incurs no risk in the transportation of the goods, and has no general or special property in them, he cannot recover in an action for a tort because of the loss of or injury to them. There are many cases holding that, though the consignee may not be the real owner, if he has a special interest in the property shipped, he may maintain an action for the loss, or for any damage to such property in transit, and in such action may have a recovery of the full value of the property where lost, or full amount of damages to the property where it is damaged. See Missouri Pac. Ry. Co. v. Peru-Van Zandt Implement Co., 73 Kan. 295, 85 Pac. 408, 6 L. R. A. (N. S.) 1058, 117 Am. St. Rep. 468, 9 Am. & Eng. Ann. Cas. 790, and authorities cited in the opinion. At 73 Kan. 299, 85 Pac. 410, 9 Am. & Eng. Ann. Cas. 791 (6 L. R. A. [N. S.] 1058, 117 Am. St. Rep. 468), the court says: "The ownership need not be extensive, and an agent, factor, broker, bailee, or other person having rights in the property to be protected may maintain an action, and recover both for himself and the general owner."

In the case we are considering the consignee had no interest whatever in the property damaged while being transported from Atlanta to Waco by the railroad company. Her husband testified he owned the property, and "the reason I shipped this door to Mrs. Miko was because she was my wife, and was running my house, and was home all the time. I could not send it to anybody else, except my wife. I sent the door to my wife, to my home. I could not send it to somebody else." The suit brought by the consignee was for a tort, and for the amount of damage to the property. Whether the consignee could recover in action ex contractu need not be considered. She had no general or special property in the door consigned to her, and incurred no risk in its transportation. She was not damaged, and a recovery

in her behalf for any damage to the door was unauthorized. A verdict in favor of the defendant was demanded, and the court committed error in refusing a new trial.

We deem it unnecessary to pass on the other questions made in the case, and they are left undecided, without prejudice to either party.

Judgment reversed. All the Justices concur.

(136 Ga. 247)

MAYOR AND COUNCIL OF CITY OF BRUNSWICK v. DEAVER.

(Supreme Court of Georgia. May 9, 1911.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)— SPECIAL TAXES—CITIES.

The act approved August 13, 1910 (Acts 1910, p. 26), was designed to supply the machinery to ascertain if two-thirds of the voters of a municipality approve the levy and collection of a tax for the support of public schools in those instances where the General Assembly had conferred on the municipality authority to establish and maintain a system of public schools by local taxation in whole or in part subject to the approval of the voters, but had omitted to provide machinery for the submission of the proposal to tax to the voters of the municipality.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 241; Dec. Dig. § 103.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 12*)— CITY SCHOOLS—SUPERVISION—SCHOOLS OF COUNTY.

The system of public schools in the city of Brunswick is supervised by the board of education of Glynn county, which also has control of the county schools; but inasmuch as the acts of the General Assembly (Acts 1873, p. 256; Acts 1900, p. 172) specifically provide that the city schools shall be operated separately from the county schools, and that all municipal revenues are exclusively applied for the support of the city schools, such city schools are none the less the public schools of the city.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 14; Dec. Dig. § 12.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)— CITY SCHOOLS—STATUTES.

Section 10 of the act amendatory of the charter of the city of Brunswick, approved August 6, 1904 (Acts 1904, p. 387), confers upon that municipality the power to maintain a system of public schools in part by local taxation. The machinery provided for in the act of 1910 (Acts 1910, p. 26) supplements the act of 1904 with reference to the submission to the qualified voters of the city for their approval the proposal to levy and collect a tax not to exceed one-tenth of 1 per cent, for the support of the public schools of that city.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 241; Dec. Dig. § 103.*]

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Suit by A. S. Deaver against the Mayor and Council of the City of Brunswick to restrain the levy and collection of a special school tax of one-tenth of 1 per cent. for the

support of the schools of the city. From a decree granting the injunction as prayed, defendant brings error. Reversed.

J. T. Colson, for plaintiff in error. R. D. Meader, for defendant in error.

EVANS, P. J. A. S. Deavers, a citizen and taxpayer of the city of Brunswick, filed his petition to enjoin the mayor and council of the city of Brunswick from levying and collecting a special tax of one-tenth of 1 per cent. for the support and maintenance of the public schools of the city. It appears that upon the petition of more than one-fourth of the qualified voters of the city of Brunswick the mayor and council of the municipality ordered an election to be held pursuant to the act approved August 13, 1910 (Acts 1910, p. 26), for the purpose of submitting the question of levying a local tax for the support of the public schools of the city of Brunswick. More than two-thirds of the voters in such election voted in favor of the levy of the special tax. The mayor and council of the city of Brunswick were proceeding to levy and collect the special tax claimed to have been authorized by the election, when the plaintiff filed his petition to enjoin the same.

[1] The sole question to be determined from the record is the applicability of the act approved August 13, 1910, to the municipality of Brunswick. That act provides that "any municipality authorized by law to establish and maintain a system of public schools by local taxation in whole or in part, and which is not now specifically authorized to hold an election on the question of local taxation for school purposes, shall have the right to submit the question of local taxation for public schools to the qualified voters of the municipality." This act was passed shortly after the decision of this court in the case of *Brooks v. Town of Loganville*, 134 Ga. 358, 67 S. E. 940. In that case it was held that the constitutional provision that authority may be granted by the Legislature to municipal corporations to establish and maintain public schools by local taxation, but that no such law shall take effect unless it has been submitted to a vote of the qualified voters of the municipal corporation and approved by a two-thirds majority of the persons voting at such election was not self-executive; that unless machinery was devised by the Legislature for submitting the proposal to a plebiscite vote no election could be held, although the Legislature had conferred upon the municipality the power to maintain a system of public schools by local taxation. The clear meaning of the act is that, where the Legislature has conferred upon a municipality power to maintain public schools by local taxation and has omitted to provide machinery for submitting the question to the qualified voters of the municipality so as to ascertain whether two-thirds of them favor the proposed tax, the act was

designed to supply this omission. It did not confer upon municipalities the power to establish and maintain a system of public schools by local taxation, but only provided a method of holding an election.

[2] The city of Brunswick has a system of public schools administered and supervised by the board of education of Glynn county. This board is a corporate entity, and to it is given the direct supervision and management of the public schools of the city of Brunswick and the county of Glynn. The board is composed of ten members, five of whom are residents of the city of Brunswick and selected by the mayor and council, and the remaining five members are selected by the grand jury. The funds of the board are kept separate, and the money received from the city, such as revenue from the town commons and special appropriations, is devoted to the exclusive use of the city schools. The money received from the county is devoted to the county schools. The public school fund is prorated on the basis of school population. The board of education makes annual reports of the expenditure of the money received from the city to the mayor and council, and of the money expended in the county outside of the city to the grand jury. Teachers in the city schools are nominated by the city members, subject to the approval of the entire board. The office of superintendent of city schools is created, and this officer is selected by the city members. The county school commissioner is given supervision of the schools of the county outside of the city.

[3] For many years, as reflected from the various acts amendatory of its charter, the municipality of Brunswick has maintained a system of city schools under the same management that had control of the county schools. The educational plan comprehended unity in the management of both city and county schools, but complete separation of city from county schools in the expenditure of revenues appropriated by the city to the city schools. It is not the manner of administering the school system of a city which alone makes a system of city public schools. Frequently the Legislature has incorporated city boards of education and invested them with exclusive dominion over the city public schools, devolving on the municipality only the duty of supplying the necessary funds for their maintenance. It is a mere matter of policy whether the school is conducted by a city board of education or according to the Glynn county plan. Until 1904 the General Assembly had provided that the city schools of Brunswick were to be supported from the rents of the public commons and other municipal resources, but in that year the charter of the city was amended, so as to provide a supplementary revenue from local taxation. The tenth section of the act of 1904 is as follows: "That for each and ev-

ery year, commencing with the year 1905, there shall be appropriated by this act for expenditure for public schools in said city, under the direction of the board of education of Glynn county, one-tenth of 1 per cent. on the taxable values assessed and collected for such year, separate from and exclusive of taxes and revenues collected from town commons. This section to take effect only after a vote of the lawful voters of Brunswick, at an election at which such question shall be voted upon under the Constitution and laws of Georgia." This provision not only recognizes that the city of Brunswick maintained a system of public schools under the direction of the board of education of Glynn county, but directly confers upon the municipality of Brunswick the power to supplement the revenues for the support of the schools by the levy and collection of a tax not to exceed one-tenth of 1 per cent. This section provides that the tax is not to be assessed and collected until it has been voted upon by the qualified voters of the city agreeably to the Constitution and laws of the state. By this act the General Assembly did confer upon the municipality of Brunswick the power to support its public schools in part by local taxation, but made no provision for any machinery for the submission of the question of maintaining the public schools by the levy of the tax provided for in the act. It is to supply such a deficiency as this that the act of 1910 was passed; and we think that the court erred in holding that the act was inapplicable to the city of Brunswick.

There being no complaint as to the regularity of the election or the levy and assessment of the taxes, it follows that the judgment granting an injunction must be reversed. All the Justices concur.

(136 Ga. 202)

JENNISON v. JENNISON.

(Supreme Court of Georgia. April 14, 1911.)

(Syllabus by the Court.)

1. DIVORCE (§ 286*)—REVIEW—REVISION OF ORDER GRANTING TEMPORARY ALIMONY.

Where, two days before an order revising a previous order granting temporary alimony was signed, the court, at the conclusion of the evidence introduced upon the hearing, orally announced an opinion wherein he stated that the previous order would be revised because of the existence of specified facts, and the bill of exceptions recites that the second order excepted to was granted "in accordance with said opinion," and the order revising the previous order granting temporary alimony recites that, "after hearing and considering the testimony submitted and the argument of counsel for plaintiff and defendant, it is considered, ordered, adjudged, and decreed" that the previous order be revised in specified particulars, and there is nothing in the second order indicating that it was granted on any special ground, it will not be disturbed, if any facts other than those referred to above appear from the testimony sub-

mitted to the court upon the hearing which were sufficient to authorize the court to grant the same.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 286.*]

2. DIVORCE (§§ 217, 218*)—ORDER GRANTING TEMPORARY ALIMONY—MODIFICATION.

The court has authority to modify or revoke an order granting temporary alimony to a wife, though such order was passed by consent of the husband and wife and in accordance with an agreement between them, providing for a certain amount to be paid to the wife by the husband, and providing that the agreement might be made the judgment of the court and enforced by contempt proceedings, or otherwise, "as is usual in the enforcement of decrees for alimony."

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 637-639; Dec. Dig. §§ 217, 218.*]

3. DIVORCE (§§ 217, 218*)—APPEAL AND ERROR (§ 671*)—ASSIGNMENTS OF ERROR—SUFFICIENCY—POWER TO REVOKE OR MODIFY ORDER FOR TEMPORARY ALIMONY.

The authority of the court to revoke or modify an order granting temporary alimony is not confined to cases in which there has been a change in the condition or circumstances of the parties since the granting of the order.

(a) Prior to the grant of a total divorce, adultery on the part of the wife subsequent to the grant of temporary alimony, or prior thereto, but unknown to the husband until after the granting of the order for temporary alimony, is a sufficient cause to warrant the court in modifying or revoking the order.

(b) Where the evidence material to an understanding of an alleged error complained of is not brought to this court, an assignment of error necessarily involving a consideration of such evidence cannot be considered.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 637-639; Dec. Dig. §§ 217, 218.* Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by I. H. Jennison against W. R. Jennison. From an order revoking a provision in a previous order granting plaintiff temporary alimony, she brings error. Affirmed.

On August 13, 1909, the plaintiff in error and her husband, the defendant in error, entered into an agreement reciting that they had permanently separated and were living apart, and the wife was about to institute an action for total divorce from the husband and for temporary and permanent alimony; that the husband desired to make permanent provision for the support and maintenance of the wife, and incidentally for the support, education, and maintenance of an adopted daughter, "all in lieu of temporary and permanent alimony." In full settlement of all such claims, the husband conveyed to the wife certain real and personal property, and agreed to pay her, so long as she remained single, \$150 per month for the support and maintenance of herself and adopted daughter. It was agreed that the provisions relating to temporary and permanent alimony "shall be made part of the order or decree of court to be entered in the divorce and alimony suit, the provision herein made by party of the

first part to be taken by party of the second part as full and complete settlement," and that, if the husband failed to make the payments voluntarily, they might be enforced by the court "by contempt proceedings, or otherwise, as is usual in the enforcement of decrees for alimony." Three days after this agreement was entered into, the wife instituted proceedings for divorce, and for temporary and permanent alimony. On September 25, 1909, a consent decree was entered in the cause with respect to temporary, wherein the court recited the existence of the agreement between the husband and wife respecting alimony, and that it was made subject to the approval of the court, and fixed the amount of temporary alimony to be allowed the wife as \$150 per month, the amount which the husband had agreed to pay by the terms of the separation agreement. On February 18, 1910, by leave of the court, the husband filed an answer in the nature of a cross-bill. On May 12, 1910, he filed an answer to the rule nisi requiring him to show cause why he should not be punished for contempt for failure to pay temporary alimony. He alleged that his wife had been guilty of misconduct both prior and subsequent to the execution of the separation agreement (which facts had only recently been discovered by him), and asked that she be denied a divorce and that he be granted one, and that the decree awarding the plaintiff temporary alimony be rescinded, and the agreement of August 13, 1909, above referred to, be annulled, except in so far as it had been executed. The defendant having failed and refused to continue the payment of the monthly installments of alimony awarded under the decree, the plaintiff sought an attachment against him for contempt. Upon the hearing of the contempt proceeding, the court passed an order providing that the defendant at once pay \$250 to the wife by way of compensation for having supported the adopted child since the last payment of alimony by the defendant, and that he pay monthly thereafter \$50 for the support of such child, but revoked the provision in the decree for temporary alimony directing the payment of \$150 per month by the defendant for the support of the plaintiff and the adopted child. To this order the plaintiff excepted.

Anderson, Felder, Rountree & Wilson, for plaintiff in error. Van Astor Batchelor and Reuben R. Arnold, for defendant in error.

HOLDEN, J. (after stating the facts as above). [1] The wife excepted to the order of the court revoking so much of the previous order as granted her temporary alimony. One of the contentions of the plaintiff is that the court had no right to modify or revoke its previous order granting her temporary alimony, unless there was some change in the circumstances or conditions of the parties since the order was granted. She contends that the record shows that the court did not

pass the order excepted to because of any change in the condition or circumstances of the parties occurring since the order for temporary alimony was rendered, but that the court revoked its previous order granting her temporary alimony on the ground that he had a right to do so, whether or not any such change existed. The bill of exceptions has in it the following recitals: "The court, upon hearing the contempt rule, by consent, considered the answer by way of cross-bill aforesaid and the response thereto, both of which were verified, and so far as pertinent were considered by the court as evidence upon the contempt rule, and the response as verified to the said answer and cross-bill was considered by the court as a traverse of the allegations as to drunkenness and adultery, made by the said W. R. Jennison in his response to the contempt rule. The hearing of said matter proceeded from day to day and was concluded upon the 21st day of May, 1910, the court then and there announcing its opinion, in substance, as follows: 'The evidence in this case has covered a somewhat wider field than I anticipated it would when the investigation began. After hearing the evidence I have determined not to pass upon the merits of the several claims of the parties as to right to divorce. I do not agree with Mr. Anderson, representing Mrs. Jennison, that the contract between the parties relative to the alimony is binding upon the court as to temporary alimony. In the court's opinion, the question of temporary alimony is always, pending the divorce suit, in the breast of the court, and notwithstanding the previous order of the court in this case, confirming and adopting the contract aforesaid as to temporary alimony, the court may at this time modify or entirely abrogate said order in its discretion. It appears from the evidence that, shortly after the separation between the parties, defendant, W. R. Jennison, conveyed and turned over to the plaintiff, Irene H. Jennison, all of his tangible assets, consisting of the equity of redemption in the home place at Ansley Park, in the city of Atlanta, which the plaintiff testifies she sold for about \$2,200; also the household furniture, furnishings, etc., contained in said home place, which he testified cost him something like \$6,900, and was accumulated during the married life of the parties, extending over some years, and which the said Irene H. Jennison testified might possibly be worth \$2,000 to \$2,500 at the present time. Since the defendant thus gave to his wife, the plaintiff, all of his assets, and since it appears from his testimony that he is earning only \$350 per month, less than the income which he received several years ago, I will not make any allowance to the said Irene H. Jennison for temporary alimony for her own support, and the previous order or decree of the court granted on the 25th day of September, 1909, will be modified accordingly. I shall leave the custody of the adopted child, Naomi, with Mrs. Jennison,

and require the defendant, W. R. Jennison, to pay to plaintiff, said Irene H. Jennison, at once, the sum of \$250 by way of compensation to her for having supported the said Naomi during the past five months, and since January 13, 1910, the date of the last payment of alimony by the defendant, and shall require the defendant to pay to plaintiff, to be used for the support, maintenance, and education of the said Naomi, the sum of \$50, payable at once, to cover the month of May, 1910, and the further sum of \$50 on the 1st day of each month hereafter until the final hearing and disposition of the case. I shall revoke the provision in the order of 25th of September, 1909, directing the payment of \$150 per month by way of temporary alimony and for the support of the plaintiff and the child Naomi. The defendant shall have the right from time to time to visit Naomi.' In accordance with said opinion of the court, the court upon the 23d day of May, 1910, and during said May term, 1910, of the superior court of Fulton county, Ga., signed and entered up its order or decree in accordance with the opinion aforesaid. During the hearing of the matters aforesaid a great deal of evidence was introduced, both by plaintiff and defendant, relative to the cause and circumstances of the separation, the cruel and brutal treatment of plaintiff by the defendant, and relative to defendant's charges against the plaintiff of drunkenness and adultery. Each of the parties introduced much evidence with a view to substantiating her or his charges and contentions of fact, and with a view of rebutting and proving untrue the charges made by the opposing party. None of said evidence, except such as is herein specifically set out, is material to a clear understanding of the errors herein complained of."

The plaintiff contends that the court, in revoking its previous order granting her temporary alimony, was not passing upon any change in the condition or circumstances of the parties, especially in view of the following statements in the opinion announced by the court at the conclusion of the evidence: "The court may at this time modify or entirely abrogate said order in its discretion. * * * Since the defendant thus gave to his wife, the plaintiff, all of his assets, and since it appears from his testimony that he is earning only \$350 per month, less than the income which he received several years ago, I will not make any allowance to the said Irene H. Jennison for temporary alimony for her own support, and the previous order or decree of the court granted on the 25th day of September, 1909, will be modified accordingly." The conveyance by the husband to the wife of "all of his assets" occurred prior to the judgment granting temporary alimony, and the order of the court granting temporary alimony was passed only eight months (lacking two days) prior to the order modifying or revoking it, and therefore the fact that at the time of the last-named order the earn-

ings of the husband were less than "he received several years ago," does not show that there was any change in his income since the order for temporary alimony was granted. The plaintiff in error, therefore, contends that the court did not base its order on any change in the condition or circumstances of the parties since the previous order was granted, and that the reasons upon which the court based its order were not such as to authorize the court to grant it. The statements made by the court at the conclusion of the evidence were not incorporated in the order of the court subsequently passed. The reasons given by the court for any ruling he makes are not the subject-matter of exception. *Griffith v. Flinger*, 115 Ga. 592, 41 S. E. 993; *Central Railroad v. Smith*, 74 Ga. 112.

The statements made by the court at the conclusion of the evidence, as to what rulings he made in the case and what order he would make, did not bind the court to pass an order in accordance with such statements and rulings. After making these statements from the bench at the conclusion of the evidence, the court had a right to change his views in regard to the case, and to pass an order making rulings in conflict with the oral announcement of his views. It will be observed that the order revoking the previous order of the court, in so far as it granted alimony to the wife, was not passed by the court until two days after the announcement of his oral opinion from the bench at the conclusion of the evidence. At the outset of this order the court states: "Upon a hearing of the contempt rule heretofore filed by plaintiff against the defendant, after hearing and considering the testimony submitted and the argument of counsel for plaintiff and defendant, it is considered, ordered, adjudged, and decreed," etc. In no part of this order signed by the court did he give any special reasons why he granted the same, or made any of the rulings therein contained; but the court based its decision on "the testimony submitted," and, if the testimony submitted before him authorized his order, it should not be disturbed, regardless of whether the reasons appearing in the oral opinion announcing the views of the court at the close of the evidence were such as to authorize the order thus signed. The oral expression of the views entertained by the court at the conclusion of the evidence was not required to be recorded on the minutes of the court, or in any way to become a part of the record of the case; whereas the formal order entered by the court is a part of the record of the case and required to be recorded on the minutes. This order excepted to, which is a part of the record of the case in the court below and here, states that it was granted "after hearing and considering the testimony submitted," and this court would not be justified in treating the order as not having been granted "after hearing and considering the testimony submitted," be-

cause of the recitals in the bill of exceptions hereinbefore quoted, which include an oral statement of the court made two days before the order was signed. There is nothing in the order indicating that it was granted on any special grounds after considering only a part of the evidence, but the language is such that it should be treated as having been granted after considering all of the "testimony submitted"; and, if any of such testimony justifies the granting of the order, it should be allowed to stand. The question as to whether the court has authority to revise a former order granting temporary alimony as having been improvidently granted, and where there does not appear to have been any change in the condition or circumstances of the parties after the previous order granting alimony was passed, will be considered later in this opinion.

[2] 2. After the plaintiff and her husband had separated, they entered into an agreement whereby he, in lieu of temporary and permanent alimony, conveyed to her certain property and in addition thereto agreed to pay her as alimony \$150 per month for the support of herself and an adopted child as long as the wife should live and remained unmarried. It was provided that, if the wife should die before the marriage of the adopted daughter, he was to pay the adopted daughter \$50 per month. It was agreed that the provisions of the agreement relating to alimony might be made the judgment of the court and enforced by contempt proceedings, or otherwise, "as is usual in the enforcement of decrees for alimony." After the suit for divorce the court, on September 25, 1909, entered an order for temporary alimony. This order provided: "The application of the plaintiff in the above-stated cause for temporary alimony, including counsel fees, coming on at this time to be heard, and it appearing to the court that the parties to the cause have agreed that the defendant shall pay to the plaintiff during the pendency of the cause the sum of one hundred and fifty dollars (\$150) monthly, * * * it is considered, ordered, and decreed, after a full consideration of said cause and the facts thereof," that the husband should pay the plaintiff \$150 per month. Subsequently the court, upon the hearing of a rule for contempt, revoked so much of the order as provided for any monthly payments of temporary alimony for the wife, and made other provisions for the support of the adopted child, as set forth in the statement of facts.

The plaintiff in error contends that, in revoking the order granting her temporary alimony, the court acted without authority, because, her husband having agreed in writing to pay her \$150 per month alimony, and having consented upon the hearing for temporary alimony that the order be passed granting alimony in accordance with the agreement, the revocation of such order was equivalent to setting aside the contract, which the court

could not do without the consent of the wife. We cannot agree with this contention. Civil Code 1910, § 2978, provides: "The order allowing alimony shall be subject to revision by the court at any time, and may be enforced either by writ of fieri facias or by attachment for contempt against the person of the husband." Under this section, all orders for alimony are subject to revision by the court, and the fact that an order is based upon the agreement of the parties and granted by their consent does not make such order an exception from the ones referred to in the statute, and does not preclude the court from modifying or revoking it. *Wallace v. Wallace*, 74 N. H. 256, 67 Atl. 580, 13 Am. & Eng. Ann. Cas. 293; *Blake v. Blake*, 75 Wis. 339, 43 N. W. 144; 2 Nelson on Div. & Sep. § 915, pp. 865-6. Also see, in this connection, *McLaren v. McLaren*, 33 Ga. Supp. 99. Whether the wife could recover in an action on the contract is a different question from the one we are considering. While some of the states have statutes giving the power to revise decrees for permanent alimony, in this state no such power exists, when the right is not reserved in the decree. *Cureton v. Cureton*, 132 Ga. 745, 65 S. E. 65. But the right of the court to revise orders for temporary alimony is expressly given by statute, and this right is not abrogated and the effect of the statute nullified simply because the order is entered by consent and in accordance with a previous written agreement of the parties. The revision by the court of an order so entered does not abrogate the agreement between the parties, but is an exercise of a discretion of the court to revise its own order, to whom such discretion is reserved by the statute. The consent of the parties, expressed in the agreement itself, that its provisions respecting alimony might be made the decree of the court, and their consent to the entering of a decree pursuant to the agreement, will be presumed to have been made with the knowledge that the court had statutory power to revise decrees relating to temporary alimony and that the decree so entered was subject to after-revision should it appear to the court that justice so required.

[3] 3. In the answer of the husband to the contempt proceedings brought against him by the wife, he prayed that he be not required to pay her any further temporary alimony. In this answer he charged that his wife was addicted to the habit of excessive use of intoxicating liquors, and was guilty of acts of adultery before the agreement was entered into, and that he did not know these facts when the agreement was made and the order for temporary alimony passed, and that, subsequently to the time the agreement was made and the order for temporary alimony was passed, she was guilty of acts of adultery and addicted to the excessive use of intoxicating liquors. The evidence was not brought to this court, but the bill of exceptions recites that upon the hearing at which the court revis-

ed the previous order evidence was introduced by the husband to prove the charges of adultery and drunkenness, and by the wife to prove that these charges were untrue. The order excepted to states that it was granted "after hearing and considering the testimony submitted," and we cannot say that the evidence did not warrant the order granted. When this order was granted the divorce case had not been tried, and the relation of husband and wife existed between the parties. They could have resumed cohabitation without any new marriage ceremony. The court has the right to revise or revoke an order for alimony to be paid out of the future earnings of the husband because of acts of adultery on the part of the wife occurring thereafter, but before a final decree of divorce is granted. *Carlens v. Carlens*, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930; *Cole v. Cole*, 142 Ill. 19, 31 N. E. 109, 19 L. R. A. 811, 34 Am. St. Rep. 56; 2 *Bishop on Mar., Div. & Sep.* § 1230; 14 *Cyc.* 787. In the absence of the evidence adduced to the trial court, this court is, of course, unable to determine whether or not the charges of misconduct on the part of the wife, without the knowledge of the husband, prior to the execution of the agreement between the parties and the allowance by the court of temporary alimony were sufficiently substantiated on the hearing to warrant the court in revising his order for temporary alimony on that account. Acts of adultery on the part of the wife occurring previously to the agreement and order providing temporary alimony, unknown to the husband when the agreement was made and the order passed by consent, would authorize the court to modify or revoke such order.

Motions for new trials and for second injunctions are granted on newly discovered evidence, and we see no reason why orders for temporary alimony cannot be revised on the same ground. The court may modify or revoke an order granting temporary alimony, even though there has been no change in the condition or circumstances of the parties since the order was granted. Some of the language used in the decision *Sumner v. Sumner*, 123 Ga. 118, 50 S. E. 1013, is too broad. The statement made therein that, "after an order granting temporary alimony and attorney's fees has been duly passed, the court is without jurisdiction to revise the same or to set it aside on any ground, save one based on a change of circumstances occurring subsequently to the granting of the order," is incorrect. The criticism of the decision above referred to is equally applicable to the decision in the same case (118 Ga. 408, 45 S. E. 315) when it was previously before the court. Civil Code 1910, § 2978, which has reference to temporary alimony, provides: "The order allowing alimony shall be subject to revision by the court at any time." This section does not restrict the right to revise an order grant-

ing temporary alimony to instances where there has been a change in the condition or circumstances of the parties, and this court has no right to make any such restriction. The court is not precluded from revising or revoking a previous order granting temporary alimony, even though there be made to appear to the court no facts other than those which were before it when the previous order was passed. An order granting temporary alimony is always in the breast of the court, and may be revised as having been improvidently granted, just as an order or judgment may be revoked or modified during the term at which it was passed. *Pinchard v. Pinchard*, 23 Ga. 286; *Wester v. Martin*, 115 Ga. 776, 42 S. E. 81. However, the facts before the court might be such as not to warrant it in modifying or revoking a previous order for temporary alimony, and we do not mean to rule that a state of facts might not exist which would make the modification or revocation of the previous order error. The question as to whether or not the order for temporary alimony to the wife was rightly revoked was one depending on the evidence; and, the evidence not having been brought to this court, we cannot say that the trial judge committed error. *Roberts v. Cairo*, 133 Ga. 642, 66 S. E. 938.

Judgment affirmed. All the Justices concur.

(58 W. Va. 636)

MILLER v. JONES et al.

(Supreme Court of Appeals of West Virginia.
Jan. 24, 1911. Rehearing Denied
May 17, 1911.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 105*)—RIGHTS OF VENDEE—BREACH OF CONTRACT BY VENDOR.

Where the vendor sells land by written contract providing for the payment of the purchase money in future installments, and for the making of a deed when all the purchase money is paid, and afterwards breaks and wholly repudiates his contract, the vendee may have specific performance immediately, and without waiting until the time of complete performance.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 325-341; Dec. Dig. § 105.*]

2. SPECIFIC PERFORMANCE (§ 131*)—DECREE.

But he can only have performance according to the terms of the contract. The court cannot compel the vendor to receive the purchase money until it is due and payable according to the terms of the agreement.

[Ed. Note.—For other cases, see *Specific Performance*, Dec. Dig. § 131.*]

Miller and Robinson, JJ., dissenting.

Appeal from Circuit Court, Marshall County.

Bill by Wilson Miller against A. J. Jones and others. Decree for plaintiff, and defendant Jones appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Simpson & Showacre, for appellant. McCamic & Clarke, for appellee.

WILLIAMS, P. A. J. Jones sold to George Downs a lot of ground in the city of Moundsville by written contract dated April 5, 1906. The consideration recited is \$649.65, and is to be paid as follows: "Twenty-five dollars to be paid on the date of this agreement, and ten dollars on the last of each month until fully paid, with interest at the rate of 6 per cent. monthly. A. J. Jones to make a warranty deed when the lot is paid for with interest." The contract further provides that: "Said Downs is to pay A. J. Jones the amount of money equal to city, county, and state taxes in addition to above stated amount. Said Downs is also to pay said Jones an amount of money in addition to the above which equals the city, county, and state tax on \$610.00, for the year 1906, only." Downs did not make the cash payment, but he did make five payments of \$10 each on this purchase, the last one on June 18, 1906. On September 1, 1906, Downs assigned his contract to Wilson Miller, the plaintiff. Jones refused to recognize the rights of the assignee, and refused to carry out his contract, and Miller sued to have it specifically enforced. On the 9th of March, 1908, the circuit court of Marshall county decreed relief to plaintiff, and from that decree Jones has taken this appeal.

[1] Counsel for appellant contend that the suit was prematurely brought; that specific performance could not be had until the time arrived for the complete execution of the contract by the making of a deed by the vendor; that the time for appellee to demand his deed had not arrived. We do not so understand the law. A party to a contract enforceable in equity may sue to establish his rights thereunder as soon as the other contracting party has repudiated it, notwithstanding the time for full performance may not have arrived. In the present case, Jones is not required to make a deed for the land until all the payments are made; and the last payment is not due until about five years after the suit was brought. There was nothing for Jones to do in the meantime except to receive the payments as they became due. This he refused to do and declared that he would not carry out the agreement. Plaintiff, therefore, had a right to sue to compel defendant to maintain the contractual relation until the time for executing the deed should arrive. It is very probable that under such conditions his failure to sue promptly after knowledge of the breach would be construed by a court of equity as an acquiescence in the breach and as an abandonment of his right. The following cases support the proposition that suit may be brought as soon as the contract is wholly broken, even though the time for complete performance has not arrived. *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *White v. Dobson*, 17 Grat. (Va.) 262; *James v. Kibler's Adm'r*, 94 Va.

165, 26 S. E. 417; *Lee v. Mutual, etc., Ins. Ass'n*, 97 Va. 160, 33 S. E. 556; *James v. Adams*, 16 W. Va. 245; *Davis v. Grand Rapids, etc., Co.*, 41 W. Va. 717, 24 S. E. 630; *Pancake v. George Campbell Co.*, 44 W. Va. 82, 28 S. E. 719. Most of the above cases were actions at law for damages for breach of contract; but we do not perceive that any different rule applies in equity, provided the contract is such an one as equity can and will enforce specifically. In case of such a contract the injured party may elect his remedy, he may either sue at law for the breach, or he may sue in equity for specific performance. *Pomeroy's Spec. Per. of Con.* § 4; 36 Cyc. 747.

Hochster v. De La Tour, 6 Eng. Rul. Cases 576, is a leading English case on the question of the right to maintain an action for the anticipatory breach of a contract, and the principle announced in that case has been followed by our own court in *James v. Adams*, supra, and in *Pancake v. George Campbell Co.*, supra. In *Hochster v. De La Tour*, supra, plaintiff had employed defendant for three months beginning June 1, 1852, at a certain price per month to travel with him, as courier. He repudiated the contract of employment before the time had arrived for plaintiff's services to begin. Plaintiff immediately brought his action, and in his declaration alleged that defendant had wholly refused to employ him and wholly discharged him from the performance of the contract and from being ready and willing to perform it. Upon a motion in arrest of judgment, the court held that: "After the refusal by the defendant to employ, the plaintiff was entitled to bring an action immediately, and was not bound to wait until after the day agreed upon for the commencement of performance had arrived." In *Davis v. Grand Rapids, etc., Co.*, 41 W. Va. 717, 24 S. E. 630, the principle was announced as follows in point 1 of the syllabus: "Where a party to a contract notifies the other that he does not intend to abide by or perform it, the other may bring an immediate suit for such damages as he may thereby have sustained, without waiting for the time of performance to expire."

The contract in the present case being of that general class of contracts which equity will specifically enforce, we see no reason why plaintiff may not maintain his suit, notwithstanding the time has not arrived for complete performance of the contract. He had a right to a decree declaring the contract to be binding on Jones who had already wholly repudiated it, and also a right to have some means provided whereby he could perform his part of it, such as the designation by the court of some person to whom he could make payment, as Jones had refused the money when tendered to him. The right of a vendor to sue for specific performance of a contract for the sale of land providing for payment of the purchase money in the future by

installments whenever the vendee has broken the contract by failure to pay any one of the installments, and before the others are due, is not questioned. 29 A. & E. E. L. 720; Ayres v. Robins, 30 Grat. (Va.) 105; Smith v. Henkel, 81 Va. 524; Kane v. Mann, 93 Va. 248, 24 S. E. 938. Although such suits are usually spoken of by the law writers as suits for the enforcement of liens, nevertheless, strictly and technically, they are suits for specific performance. It is one of the fundamental principles applicable to such suits that the rights of the parties must be mutual—that is, capable of enforcement by either party in case of a breach by the other—else equity will not give relief. Now, if Jones had been willing to carry out the contract, and Downs or Miller, his assignee, had not, and Jones had sued for specific enforcement because of failure to pay the purchase money, he would have been entitled to a decree compelling performance. Why, therefore, may not the plaintiff, Miller, have a decree compelling performance by Jones upon Jones' positive denial of the contract and his refusal to accept the purchase money? We perceive no good reason in law why he should not have such right, and we therefore hold that his suit was not prematurely brought. In support of this view we cite the following authorities: White v. Dobson, 17 Grat. (Va.) 262; Balanewsky v. Gallaher, 55 Misc. Rep. 150, 105 N. Y. Supp. 77; Payne v. Melton, 67 S. C. 233, 45 S. E. 154; Brassell v. McLemore, 50 Ala. 476.

[2] In decreeing specific performance, however, the court has no power to decree performance in any other manner than according to the agreement. 36 Cyc. 789, and numerous cases cited in note 42; Rousmaniere's Adm'r, 1 Pet. 1, 7 L. Ed. 27; Rison v. Newberry, 90 Va. 513, 18 S. E. 916; Grey v. Tubbs, 43 Cal. 359. "Courts will not assume to make a contract for the parties which they did not choose to make for themselves." 1 Beach's Modern Law of Contract, § 707. In the present case the decree recites that Jones declined to receive the amount of money then due, whereupon the court decreed that Miller might pay the whole purchase price, with interest to that time, which it found to be \$640, to the general receiver of the court, and Jones should thereupon make to him a warranty deed for the land. This was not according to the terms of the contract, and is clearly erroneous. The decree should have provided for the payment into the hands of the receiver, at that time, only the amount of money then due, including interest and city, county, and state taxes for 1906, on \$610, as per the agreement; and should have decreed the payment of the future installments to the receiver as they respectively became due, with interest on each of said payments from the date of the contract, at the rate of 6 per cent. per annum. It should also have provided for

the payment of the annual city, county, and state taxes by Miller, as the contract clearly binds the purchaser to pay such taxes "in addition" to the purchase price named. Possession was delivered to Downs, but title was to remain in Jones until the purchase money is all paid; hence Jones would be assessed with taxes. The contract binds Miller to pay the taxes on the property, or their equivalent, from, and including, the year 1906. If it were possible for us to determine from the record the amount of money due at the date of the decree, this error might be corrected and the decree affirmed. But there is no proof whatever of the amount of taxes for city, county, and state, chargeable on \$610 for 1906. This should have been ascertained and included in the decree for the money then due.

We will therefore reverse the decree, and remand the cause for further proceedings.

MILLER and ROBINSON, JJ. (dissenting).
They would affirm the decree.

(68 W. Va. 594)

WESTERMAN et al. v. DINSMORE et al.
(Supreme Court of Appeals of West Virginia.
Feb. 7, 1911. Rehearing Denied
May 17, 1911.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 78*)—OIL AND GAS LEASE—PROVISIONS FOR FORFEITURE—TIME AS ESSENCE.

Time is of the essence of a condition in an oil and gas lease, making it forfeitable for failure to drill a well within a specified time or pay a certain periodical rental or commutation in advance.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205-207; Dec. Dig. § 78.*]

2. MINES AND MINERALS (§ 78*)—RELEASE FROM FORFEITURE OF AN OIL AND GAS LEASE.

Equity will relieve from a forfeiture of such a lease for nonperformance of the condition, occasioned by fraud, accident, mistake, or inequitable conduct of the lessor, provided its aid is sought with reasonable diligence.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205-207; Dec. Dig. § 78.*]

3. MINES AND MINERALS (§ 78*)—RELEASE FROM FORFEITURE—LACHES.

Unreasonable delay under the peculiar circumstances of any given case will bar such relief; the rule of laches applying with all its vigor and force.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 78.*]

4. MINES AND MINERALS (§ 78*)—RELEASE FROM FORFEITURE OF OIL AND GAS LEASE.

If the lessor, after such a forfeiture, not superinduced by his own inequitable conduct, materially alter his condition, relying in good faith upon the forfeiture, or if in any case of such forfeiture the rights of innocent third parties have intervened, equity will not relieve.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 78.*]

5. MINES AND MINERALS (§ 78*)—JURISDICTION—RELEASE FROM FORFEITURE OF OIL AND GAS LEASE—NECESSITY FOR DILIGENCE.

On the principle of estoppel, laches forbids delay in the assertion of a claim for relief from such a forfeiture with intent to claim or abandon the right according to the event. Equity will not tolerate a fast and loose policy.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 78.*]

6. MINES AND MINERALS (§ 77*)—MUTUAL RIGHTS OF COTENANTS.

A cotenant in a lease which has been forfeited does not become a trustee for his associates in the ownership of such lease by the taking of a new one on the same premises, since the subject-matter of the cotenancy has become nonexistent, the unrelieved forfeiture having put an end to the term created by the prior lease, and the subsequent one having brought into existence a new and independent estate in respect to which there never was any cotenancy.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 77.*]

7. MINES AND MINERALS (§ 77*)—MUTUAL RIGHTS OF COTENANTS.

Under such circumstances, the right of the cotenants is limited to the identical term in respect to which the cotenancy existed, enforceable by a timely application for relief from the forfeiture.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 77.*]

Appeal from Circuit Court, Pleasants County.

Bill by C. G. Westerman and others against L. D. Dinsmore and others. Decree for defendants, and plaintiffs appeal. Affirmed.

Thos. P. Jacobs, for appellants. J. F. Barron and Van Winkle & Ambler, for appellees.

POFFENBARGER, J. The appellants, C. G. Westerman and others, filed their bill in the circuit court of Pleasants county for relief against forfeiture of an oil and gas lease in which they were interested, and to enjoin the appellees from operating under a subsequent one on the same land. The preliminary injunction granted thereon was dissolved, and the bill dismissed.

The old lease for a term of two years, dated August 17, 1907, covering 77 acres, executed to L. J. Murphy, by Lloyd Bailey and wife, contained the following condition: "Provided that this lease shall become null and void unless operations shall be commenced on the premises and a well completed, unavoidable delay or accident excepted, within two months from the date hereof, or unless lessee shall pay at the rate of Fifteen Dollars per month payable monthly in advance thereafter for each additional month such completion of well is delayed." Murphy obtained from William Ruttencutter a similar lease, bearing the same date, on an adjacent tract of land, containing 225 acres. On November 4, 1907, he assigned three-fourths of each of these leases to Westerman for and in consideration of \$750, which was paid; Murphy agreeing, as part of his con-

tract with Westerman, to drill and complete a well on the Ruttencutter lease, and such additional wells as should be agreed upon were to be drilled at their joint expense. Four unproductive wells were drilled on the Ruttencutter land by March 4, 1908, but none on the Bailey tract. Such further dispositions of interests in the leaseholds were made that A. E. Brast became the owner of three-sixteenths, P. A. Schmuck of two-sixteenths, W. P. Simmons of three-sixteenths, Justus Eakin of two-sixteenths, L. J. Murphy of three-sixteenths, and Westerman of three-sixteenths. The expense incurred on account of these leases and the work done as aforesaid amounted to about \$3,000, and the casing and other materials and appliances on the Ruttencutter lease were worth several hundred dollars. Under the Bailey lease, rentals were paid, but no drilling done, while operations were in progress on the other property. These rentals were paid on the day named in the lease until July, 1908, when there was a delay of 10 days, which Westerman, who was attending to that branch of the business, explained by saying it had resulted from confusion in dates, rental under the other lease having been paid, when that under the Bailey lease should have been. This was accepted by Noland, executor of the will of Bailey, who had died. Instead of paying on August 17th for the month commencing on that date, Westerman delayed payment until about August 26th, and Noland returned his check, saying: "As you failed to pay last month's rental when due, the Baileys thought you did not want the lease longer, and notified me that they had leased the land to another, and for me not to receive the rent, if sent." To this Westerman made no reply, nor did he or any one else holding under the lease render or pay any further rentals.

On August 22, 1908, before the remittance of the rental that should have been paid on the 17th, the Bailey devisees had executed a new lease to L. J. Murphy, the same person who had taken the former lease. In the new lease the old one was recognized by the following clause: "This lease being upon the same land leased to L. J. Murphy by Lloyd Bailey during his lifetime." It was recorded on the 29th day of August, 1908. On the 24th day of November L. J. Murphy assigned seven-eighths of his interest in this lease to his son, R. O. Murphy, in consideration of \$130. On December 3d he assigned the remaining one-eighth to the same party in consideration of \$50. On November 28th R. O. Murphy assigned a five-eighths interest in the lease to John B. Murphy, of Washington, Pa., in consideration of \$400, the assignor agreeing to put down a well on the lease with reasonable diligence. On December 1, 1908, R. O. Murphy assigned to Elmer Edmonds a one-eighth interest in the lease,

and agreed to pay him \$350 in consideration of his completing a well on the lease. On the 29th day of December R. O. Murphy assigned to L. D. Dinsmore his remaining one-fourth interest, together with like interests in three other leases he had, one on other lands of the Baileys, another on lands of Mrs. S. P. Lamp, and another on lands of Mrs. Maggie Lamp, Dinsmore paying him \$3,650 cash and agreeing to pay, keep, and perform all the covenants contained in said leases, and pay all outstanding indebtedness against the interests so assigned. On December 18th John B. Murphy, in consideration of \$200, assigned to W. McK. Smith a one-fourth interest in the Bailey lease. Edmonds and the Murphys completed a producing well on the Bailey tract about the 22d day of December, 1908. On the question of notice, the following facts are material: Westerman was informed by Noland's letter of August 26th that a new lease had been executed, but the name of the lessee was withheld. The lease under which Westerman and his associates claimed was not admitted to record until December 29, 1908, at 12:50 p. m. The new lease and the assignments of interests therein were recorded very soon after the execution thereof, Dinsmore's on December 29 and W. McK. Smith's on December 30, 1908. As to when Westerman ascertained that L. J. Murphy was the new lessee the evidence is conflicting, but it leaves no doubt that he had sufficient information to put him upon inquiry as to the fact early in December, 1908. Murphy and others endeavored to charge him with notice in October, 1908. He claims not to have known of any entry upon the leased premises by the new lessees until December 29, 1908, a few days after the well had been completed. Nor did he ever give any notice to Murphy or any one else claiming under the new lease of his intention to try to hold the property under the old one. The institution of this suit on the 15th day of March, 1909, was the first act of the plaintiffs signifying intent to resist the claims asserted under the new lease.

[1] Time is of the essence of a condition to pay rental or commutation money to prevent forfeiture of an oil or gas lease for failure to drill a well within a stipulated time. For this universally recognized proposition, not denied or questioned in the argument, no authority need be cited. However, it may be possible that this quality can be extinguished by subsequent parol agreement or conduct, just as it can be imparted, in the same way, to an agreement in which it did not originally exist. This is rather suggested in *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151, and *Railroad Co. v. Triadelphia*, 58 W. Va. 487, 52 S. E. 499.

[2] Both of these cases, as well as many others, assert jurisdiction in equity based upon estoppel and waiver to relieve from the effect of noncompliance with a condition in which time is made essential on proof of

a course of conduct by the parties contrary to the terms of the stipulation as to time. Jurisdiction in equity to relieve against forfeitures of certain kinds and within certain limitations without proof of such previous conduct is also firmly established. Whether in the former class of cases essentially of time is eliminated from the contract by conduct or allowed to remain and relief from the forfeiture given is rather an academic question, since the result is the same in either event. But, if conduct may extinguish it, as suggested, it will most assuredly restore it, for it may be imparted by conduct to stipulations of which it was not originally a part. *Jackson v. Ligon*, 3 Leigh (Va.) 161.

This bill proceeds upon the theory of an established course of conduct, relating to the time of payment, at variance with the terms of the lease, under a claim of acceptance of rentals after the stipulated time of payment on three or four occasions, not sustained by the evidence. There was an express postponement of the rent due on October 17, 1907, until November 17, 1907. A check for rental bears date November 15, 1907, and a receipt for the same November 16, 1907. A receipt for the next month's rent bears date December 16, 1907. A check and a receipt for the next month's rent are each dated January 17, 1908. A check for the next month's rent is dated February 17, 1908, one for the next month, March 16, 1908; and one for the next April 17, 1908. While the brief does not say so, this payment is evidently one of the alleged departures from the contract. A registry return receipt says delivery of the letter was made April 18, 1908, but this fails to show it was not in the post office at St. Marys on the 17th, when it should have been. A check for the next month's rent bears date May 16, 1908, and the registry return receipt says the letter was delivered May 18, 1908. This is likely another alleged departure, but it is not proven. The check for the next month's rent bears date June 17, 1908. The payment that should have been made July 17th was not made until August 27th. The letter transmitting the check says: "Through an error Mr. Rutten cutter's rental was paid on July 16th instead of yours. Hoping this will be satisfactory, I am," etc. The next payment, tendered on August 26th or 27th and declined, as hereinbefore stated, seems to have been delayed through an error resulting from the former error. Westerman's bookkeeper says he was misled as to the date by the date of the July check, but this mistake is not shown to have been tendered to the lessor as an excuse for the delay. The excuse given for the delay in July was accepted. None was offered for the delay in August. We are unable to say this single condonation of delay, founded upon an excuse and apology, justified Westerman in the belief and assumption that the stipulation in the contract would be waived as to the next

payment. This finding and conclusion, as to the facts and their interpretation, make a clear and plain case of forfeiture. This, however, would not preclude relief under the principles above stated. The forfeiture extinguished the legal right of the plaintiffs. Thereafter they could claim no more than a mere equity, possibly resting in the discretion of the court, unless some other principle affords them a claim of right on a different ground.

[3] While the authorities do not explicitly assert the duty of haste and diligence in seeking relief under such circumstances, we are of the opinion that it must necessarily exist. Rescission, cancellation, and other similar forms of relief, based upon fraud, accident, mistake, and the like, are matters of absolute right, though they render the contracts in respect to which they may be obtained only voidable. In such cases relief follows allegation and proof of the fact as a matter of course; but, if the circumstances are such as to impose, in equity and conscience, a duty of election, unreasonable delay is fatal, and what is reasonable diligence depends upon the circumstances. Thus legal rights are sometimes lost by conduct under the principles of laches and estoppel. In the case of a plain forfeiture, not induced or caused by fraud or inequitable conduct on the part of the beneficiary thereof, the legal right is wholly lost. Nothing remains but a mere equity. Such a case seems to me to impose duty to exercise a high degree of diligence and demand full protection to every right and interest respecting the property obtained by third persons in good faith, and also preclusion of relief against the beneficiary, when, in reliance upon the forfeiture, he has in good faith altered his condition by making a new contract or otherwise. Relief against contracts fraudulently obtained is sometimes barred by delay of only a few months. *Whittaker v. S. W. Va. Imp. Co.*, 34 W. Va. 217, 12 S. E. 507; *Hunt v. Blanton*, 89 Ind. 38; *Steveking v. Litzler*, 31 Ind. 13; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799. In cases of application for relief from forfeiture, the rule of laches ought to be rigidly applied, for there is no absolute right even in equity, when time is made essential by the contract in express terms or the nature of the subject-matter and circumstances. *Pom. Eq. Jur. sec. 455*. Some authorities say relief will not be given at all under such circumstances. 16 Cyc. 78. Personally I doubt the soundness of decisions so holding, but it is unnecessary to review them. Assuming susceptibility of relief from forfeiture resulting from noncompliance with such a stipulation, we think the conduct of the plaintiffs, herein set forth in detail, constitutes laches, barring it, as to all against whom it is sought on the sole ground of equity jurisdiction to relieve from forfeitures. *Westerman*, promptly advised of the

declaration of forfeiture, made no complaint, offered no excuse for delay of payment, acquiesced in it, abstained from inquiry as to the identity of the new lessee and as to operation under the new lease, and delayed assertion of claim or right by suit for seven months, in which period the new lessees, by the expenditure of considerable money, had brought in a producing well. His claim of ignorance of operation under the new lease cannot be accepted in view of knowledge as early as August, 1908, of the execution thereof. That sufficed to put him upon inquiry, and made his ignorance of subsequent open and patent transactions inexcusable. It was due either to gross negligence or deliberate and willful abstention from inquiry. Either bars relief on the principle of estoppel.

[4] By negligence or design, the plaintiffs permitted a material change in the value and condition of the property to occur and the rights of third parties to intervene before they sought relief from the forfeiture. Such conduct is everywhere condemned as being inequitable. *Hale v. Hale*, 62 W. Va. 609, 612, 59 S. E. 1056, 14 L. R. A. (N. S.) 221; *Depue v. Miller*, 65 W. Va. 120, 131, 64 S. E. 740, 23 L. R. A. (N. S.) 775; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; *Whittaker v. S. W. Va., etc., Co.*, 34 W. Va. 217, 12 S. E. 507; *Trader v. Jarvis*, 23 W. Va. 100.

[5] Some of the evidence indicates intention on their part to await the event of operations on the lease and make their election depend upon the results, a course of conduct forbidden by the rule of laches. *Anthony v. Leftwich*, 3 Rand. (Va.) 238; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501.

[6.7] An alleged trust relation between *L. J. Murphy* and the plaintiffs, founded upon the circumstances under which he took the new lease, he having been a joint owner with the plaintiffs under the old one, constitutes an equity wholly different in nature from the one we have been discussing, if established and not subsequently destroyed. That the acquisition of a new lease on property covered by a former one by a tenant in common under such former one after forfeiture thereof falls within the principle making a tenant in common who buys in an outstanding superior title a trustee for his cotenants is a plausible view. The lease creates a term, subject to forfeiture for nonperformance of a condition subsequent, similar in some respects to a freehold liable to forfeiture for nonentry for taxation and sale for nonpayment of taxes, or sale to satisfy a lien by deed of trust or mortgage, in all which cases a purchase by a cotenant is deemed and held to have been made for the common benefit of himself and his cotenants. But are the cases so nearly analogous as to call for the application of this principle? There is a material and radical difference. By rightful declaration of forfeiture the lessor destroys the term—clears his land from the burden

thereof. It ceases to exist. He is again clothed with absolute and plenary power over his land, and may create a new lease or not as he sees fit, and give it to whom he pleases. If he executes a new one, the lessee therein becomes the owner of an entirely new estate, which the lessor has undoubted power to create. A mere term for years, forfeitable by the lessor for nonperformance of a covenant or condition subsequent, is not like a nonforfeitable freehold, extending until the happening of a contingency, or an estate in fee simple, continuing forever. Unlike them, the means of its own destruction are inherent in it and borne on its face. Though one of these should be sold for a debt or taxes or become subordinate to a better outstanding title, it does not cease to exist. It is not destroyed. A cotenant, purchasing at such a sale thereof, obtains the subject-matter of the cotenancy, and, purchasing an outstanding title, strengthens his hold upon that subject-matter. He obtains or retains it. After such transaction, he has in his hands by virtue of his purchase the identical thing he previously held in common with his cotenants, and equity demands subject to certain conditions a continuation of the pre-existing relation among them. As the forfeiture of a lease not relieved nor relievable destroys the subject-matter of the cotenancy, and the execution of a new lease brings into existence a separate and distinct thing, there is no basis for the continuance of the former relation of cotenancy. All equitable considerations are overridden and destroyed by the legal dominion and power in the lessor over his property, out of which the new estate is carved, arising by virtue of the forfeiture. In reaching this conclusion we do not ignore the ground usually stated as the basis of the equity out of which the trust springs on a purchase by a cotenant, namely, his failure of duty, causing the sale, nonpayment of the taxes, or debt for which it was made. This failure of duty and continued existence of the subject-matter of the cotenancy unite in those cases with which it is said this one can be assimilated. We differentiate this case on the ground of the nonexistence of one of these two necessary elements or factors. The precedents do not extend to it, nor does the principle include it. *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762, relied upon in this connection, does not assert the contrary of this proposition. There the forfeiture claimed either did not exist at all, or was relievable as against the lessor, on account of a breach of his implied covenant for quiet enjoyment, or inequitable conduct, causing default in respect to payment of the rental. The decree restored the old term or lease in which the plaintiffs were jointly interested, or declared it never to have terminated or ceased to exist. They neither sought nor obtained, nor did the court take jurisdiction to give them, a new lease or any interest in one.

Nor does *Potts v. Fitch*, 47 W. Va. 63, 34 S. E. 959, conflict with this view. *Potts* was let into a lease which constituted the subject-matter of his contract with *Fitch* and others, a new lease, but one obtained under and in pursuance of the agreement. The plaintiffs here had no agreement with *L. J. Murphy* by which he was to obtain a new lease on the property for their common benefit. There is neither claim nor evidence of any such an agreement. *Murphy* does say he intended to let them into it, upon conditions to be agreed upon, but not that he obtained it in pursuance of any agreement of that kind. He denies the existence of any such agreement and also communication to any of the plaintiffs of his admitted intent or desire to associate them with him under the new lease. This lease is new, not only in respect to its commencement and termination, but also in other respects. It is for three years, and contains a covenant to drill a well within one month or pay rentals. The other was for two years without such a covenant, providing only that it should become void, unless a well should be completed in two months or rentals paid monthly in advance. It gives the lessor a better contract which by reason of the forfeiture he was free to obtain from anybody willing to give it.

The principles here announced and applied do not prevent relief in any case in which the forfeiture may be set aside for any reason, such as mistake or accident on the part of the lessee, or fraud on the part of a cotenant, or inequitable conduct on the part of the lessor, causing or superinducing the forfeiture; but they limit the complaining lessee to the acquisition of the estate or term which he owned or in which he had an interest, and require him to seek it with reasonable diligence.

There is no evidence of any actual fraud on the part of *Murphy*. Alleged constructive fraud, arising out of the subsisting relation of cotenancy, is the basis of the suit in so far as it proceeds upon the theory of fraud. *Murphy* in no way induced or caused the failure to pay the rent when it should have been paid. Nor did *Noland*, the executor. It was not expected that *Murphy* should pay the rentals out of his own funds. As to this, the evidence harmonizes. Besides, he kept the new lease wholly in his own name and ownership for three months after execution and recordation thereof, and almost that long after *Westerman* had been apprised of its execution. To obtain full information as to the status of the property, it was only necessary for the latter to examine the records. Having wholly neglected to take any steps for the protection of their interests in the old lease, and awaited the event of operations under the new one, he and his associates utterly fail to make out a case for equitable relief.

Seeing no error in the decree, we affirm it.

(89 W. Va. 100)

COMSTOCK v. J. R. DRONEY LUMBER CO.

(Supreme Court of Appeals of West Virginia.
April 4, 1911. Rehearing Denied
May 17, 1911.)*(Syllabus by the Court.)*

1. CORPORATIONS (§ 630*)—LICENSE TAXES—FAILURE TO PAY—EFFECT.

The provision in section 136 of chapter 32 of the Code, relating to proceedings against corporations, delinquent as to license taxes, saying, "Any person or persons who shall exercise or attempt to exercise any powers under the charter of such corporation, after the issuing of the Governor's proclamation, shall be guilty of a misdemeanor," etc., does not prevent a delinquent corporation from prosecuting or defending suits, after the issuance of such proclamation, respecting contracts made or rights acquired prior to the issuance thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2482-2486; Dec. Dig. § 630.*]

2. PLEADING (§ 8*)—SUFFICIENCY.

In a declaration in assumpsit by one member of a partnership on a contract made with the firm, an allegation that the plaintiff has acquired the entire interest of the firm in such contract is one of fact and not of law, and therefore sufficient in form and effect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

3. LOGS AND LOGGING (§ 8*)—CONTRACTS—PLEADING.

An averment in general terms of performance of all conditions precedent is sufficient in a declaration on a contract for damages in the form of profits or gains prevented by refusal of the defendant to permit the plaintiff to fully perform his contract.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 8.*]

4. CONTRACTS (§ 321*)—CONTRACT OF EMPLOYMENT—TERMINATION.

Performance of an executory working contract may always be discontinued or terminated by the employer, subject to liability on his part for compensation for work already done and damages in the form of profits or gains prevented as to the unexecuted portion thereof.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 321.*]

5. ABATEMENT AND REVIVAL (§ 8*)—ACTION FOR DAMAGES—INJUNCTION.

After the employer in a contract for the cutting of timber on his land has given notice of his desire to discontinue or terminate further performance or execution thereof on the part of the employé and enforced such right by an injunction, the employé has a right of action on his contract for breach thereof, provided he is not in fault himself, and the injunction constitutes no bar thereto.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 39-72; Dec. Dig. § 8.*]

6. ABATEMENT AND REVIVAL (§ 8*)—OTHER ACTION PENDING.

In such case the pendency of the injunction suit cannot be pleaded either in bar or abatement of the action.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 39-72; Dec. Dig. § 8.*]

7. ABATEMENT AND REVIVAL (§ 8*)—OTHER ACTION PENDING.

To be available as matter of abatement, a former suit pending must be as broad in its

scope and effect as the subsequent one in which it is tendered by way of abatement.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 39-72; Dec. Dig. § 8.*]

8. WITNESSES (§ 245*)—RECEPTION OF EVIDENCE—REPEATING TESTIMONY—DISCRETION.

A trial court has discretionary power to prevent repetitions of questions previously propounded and answered.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 827, 828; Dec. Dig. § 245.*]

9. EVIDENCE (§ 520*)—QUANTITY—EXPERTS.

The opinion of an experienced timberman who has partially gone over a tract of land for the purpose of estimating the quantity of standing timber thereon as to the quantity thereof is admissible in an action for damages on a contract for the cutting of the timber, but is not entitled to as much weight as if he had made a careful estimate of it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2329; Dec. Dig. § 520.*]

10. EVIDENCE (§ 571*)—QUANTITY—OPINION OF EXPERTS—WEIGHT.

In an action for damages to be measured by the profits obtainable from the cutting of standing timber at certain prices per thousand feet, the opinions of witnesses, not shown to have made full and careful examinations and estimates, as to the quantity thereof, are not entitled to as much weight as testimony of other witnesses, founded upon actual measurement of the timber after it had been cut, and showing much less timber; and a verdict based thereon must be set aside as being against the decided preponderance of evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2395-2398; Dec. Dig. § 571.*]

(Additional Syllabus by Editorial Staff.)

11. CORPORATIONS (§ 630*)—"EXERCISE OR ATTEMPT TO EXERCISE ANY POWER"—"DOING BUSINESS."

The phrase "exercise or attempt to exercise any power," within Code 1906, c. 32, § 136, relating to proceedings against corporations, delinquent as to license taxes, should be read as if it said "carry on the business" of the corporation, and "doing business," as found in such statutes, is construed as not extending to the mere act of suits in respect to contracts made or rights acquired while the corporation had power to do business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2482-2486; Dec. Dig. § 630.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641; vol. 3, pp. 2581-2583; vol. 8, p. 7656.]

Error from Circuit Court, Pocahontas County.

Action by M. L. Comstock against the J. R. Droney Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Dillon & Nuckolls and Henry Gilmer, for plaintiff in error. Price, Osenton & McPeak, for defendant in error.

POFFENBARGER, J. Assigning numerous errors, the J. R. Droney Lumber Company complains of a judgment against it in the circuit court of Pocahontas county for the sum of \$12,000 in favor of M. L. Com-

stock, rendered in an action of assumpsit on a working contract.

[1] The plaintiff in error is a corporation, organized under the laws of this state, and, having failed to pay its license tax for the year 1909, it has been included in a proclamation by the Governor declaring the delinquency of corporations for that cause, and also in an order of publication, made in a suit instituted by the Attorney General, to forfeit the charters of all the corporations included in said proclamation. Copies of these two papers have been filed here since the allowance of the writ of error in support of a motion to dismiss it.

[11] The theory of this motion is that the prosecution of the writ of error is an exercise of the company's charter powers, which the statute (section 136 of chapter 32 of the Code) inhibits after the publication of such proclamation. This statute must receive a reasonable construction. In our opinion, the phrase "exercise or attempt to exercise any power," under the charter, must be read as if it said carry on the business of the corporation, and "doing business," as found in such statutes, has been construed as not extending to the mere act of suing or defending suits in respect to contracts made or rights acquired, while the corporation had power to do business. *Lumber Co. v. Coal Co.*, 66 W. Va. 696, 66 S. E. 1073, 26 L. R. A. (N. S.) 1101; *Typewriter Co. v. Piggott*, 60 W. Va. 532, 55 S. E. 664; *Story's Const.* § 1385; 19 Cyc. 1280. The power to sue and make defense is incident to property and contract rights and the exercise thereof the vindication of such rights, and, though attendant upon or included in the corporate franchise, the exercise of such power does not amount to a prosecution of corporate business in the ordinary sense of the term. Its continuance, after the right to do business or exercise the ordinary corporate powers has ceased, is necessary to the preservation of rights lawfully acquired, and which the Legislature cannot be deemed to have intended to destroy or leave unprotected by denying or withholding it. The legislative purpose is fully accomplished, without detriment to vested rights, by forbidding subsequent acquisitions of contract and property rights, including inhibition of remedy for enforcement thereof.

The sufficiency of the declaration is challenged on several grounds; a demurrer to it and each count thereof having been interposed and overruled. It contains one count only, based upon a written contract between the J. R. Droney Lumber Company, of the one part, and M. L. Comstock & Co., of the other part, by which the parties of the second part agreed to cut and deliver at certain places all of the merchantable timber on a certain tract of land belonging to the party of the first part, which service the latter agreed to pay for at certain prices, ranging from \$2.50 to \$6 per thousand feet. This contract further provided that if the parties

of the second part should comply with the terms thereof, respecting that tract of land, designated in the record as tract No. 1, they should have an option to cut the timber on another tract, designated in the record as tract No. 2. Before cutting the timber on tract No. 2, the parties of the second part were to peel and deliver on board the cars the bark from all chestnut oak trees thereon, for which service the party of the first part agreed to pay them \$4.50 per cord. This done, they were to cut the timber into logs and deliver them at certain points called landings or skids, for which service they were to be paid certain prices, ranging from \$5 to \$5.50 per thousand feet. M. L. Comstock alone sues for breach of this contract, made by a copartnership, consisting of himself and another party, one Odell.

[2] In the declaration he alleges that he had "acquired the entire interest of the said M. L. Comstock & Co. with the knowledge and consent of the said defendant." As the declaration, filed by an individual plaintiff, asserts liability in his favor upon a contract made with a firm, and not otherwise, an allegation of assignment of the contract, or the equivalent thereof, is necessary. *Malsby v. Lanark Co.*, 55 W. Va. 484, 47 S. E. 358. Protesting the lack of such an allegation, the defendant insists that the demurrer should have been sustained. The form of an allegation is immaterial, if, fairly and reasonably construed, its effect is certain in a legal sense. *Ceranto v. Trimboli*, 68 W. Va. 340, 60 S. E. 138. This declaration says M. L. Comstock acquired the entire interest of the firm, in whose name the contract was made. His sole ownership thereof is all that is required to enable him to maintain an action on it. 1 Chitty, Pl. 11, 12; *Dacey, Parties*, 172-174. It is usually acquired by assignment, but, if it be acquired in some other way, as by descent or purchase at a judicial sale, the right to sue upon it would be complete. It may be said the averment of mere acquisition of the firm interests states a conclusion, and not a fact, but we do not think so. If the pleader had said the company had assigned to him its entire interest in the contract, this averment would have included matter of law as well as matter of fact, since it might have turned out that the facts relied upon as constituting an assignment were insufficient in law. So here, in saying he acquired his partner's interest, he asserts matter of fact, though matter of law is incidentally included and involved. Hence in our opinion this allegation is sufficient.

[3] The next contention is that the declaration covering both tracts of land and charging a breach of the entire contract does not sufficiently aver performance of all that was required of the plaintiff respecting the work to be done on tract No. 1; completion of that work having been made a condition precedent to any right on his part to work on tract No. 2. The declaration sets forth the contract,

showing what it was incumbent upon the plaintiff to perform. This is followed by an averment that he had performed and fulfilled all things on his part and behalf in the said agreement to be performed and fulfilled, and that he did enter upon and commence the said work, and, for that purpose, did procure and find all materials and labor necessary for performing the same and did the same in part, to wit, ——— feet thereof, to the satisfaction of the defendant, and has always been ready and willing to perform and complete the whole of the said work; but that the defendant did not, nor would, perform said agreement, nor his promise and undertaking, and prevented plaintiff from proceeding further with his said contract by securing an injunction against the further performance of the same. We see no just ground of criticism of these averments. In this respect the declaration follows substantially the form prescribed in 2 Chitty, Pl. (11 Am. Ed.) pp. 328-329, departing therefrom in two respects only. Instead of saying how many feet the plaintiff cut by way of part performance, it leaves a blank as to the quantity, and, instead of saying the defendant would not advance or pay money for the work done, it says it secured an injunction and thereby prevented further performance of the contract. It suffices to say as to the first departure that the declaration nevertheless shows part performance. It says some of the work was done. As to the second, we have no hesitancy in saying the general averment is prevention of full performance, though effected by an injunction. Anything constituting a breach of the contract on the part of the defendant excused further performance on the part of the plaintiff and gave him a right of action. The extent to which the contract had been performed, when this accrued, is important only in its bearings upon the quantum of damages, the right of recovery for gains prevented decreasing with the extent of performance, and that for work done increasing correspondingly, if not paid for. *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4, does not sustain the contention of the plaintiff in error, for the declaration in that case contained no general averment of performance. It stopped with the averment of performance of certain things which did not include all that was required.

The next question raised upon the demurrer embraces also a charge of error in the rejection of a special plea. As the declaration shows, on its face, the awarding of an injunction to prevent the further cutting of timber, under the contract, it is insisted that this admission of the pendency of an injunction suit makes the declaration bad on the theory, either that the plaintiff has no remedy, since the prevention of further performance was by legal process, or that his remedy is by an action upon the injunction bond, and not otherwise. It seems to be well settled that at common law there was

no right of action for damages occasioned by an injunction, unless it was sued out without probable cause or maliciously prosecuted. This defect in the law was supplied by statute, requiring a bond and giving a right of action thereon for the damages. *Railway Co. v. Railway Co.*, 47 W. Va. 725, 35 S. E. 978. Therefore, if this action included only the damages occasioned by the injunction and extended no further, it could not be maintained, there being no averment of want of probable cause or malicious prosecution. We are of the opinion, however, that the declaration goes beyond the subject-matter of the injunction. It demands damages for the breach of the contract. The defendant by its injunction seeks only to preserve its timber. The contract involved is a working contract. The plaintiff had no interest in the timber nor title thereto.

[4] The defendant had the power to stop performance of that contract, or at least to give the plaintiff cause to treat it as broken, but, by doing so, it could not discharge itself from the obligation thereof. *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92, 104 Am. St. Rep. 998. An employer may always discontinue the work contracted for, but, in doing so, he may break his contract. *Lord v. Thomas*, 64 N. Y. 107; *Davis v. Bronson*, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783; *Hyland v. Giddings*, 11 Gray (Mass.) 232; *Wigent v. Marra*, 130 Mich. 609, 90 N. W. 423; *Black v. Woodrow*, 39 Md. 194; *Clark v. Franklin*, 7 Leigh (Va.) 1-8. Performance of an executory contract of sale of personal property may be terminated, subject to liability for damages. *Arme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235, 11 L. R. A. (N. S.) 807; *Danforth v. Walker*, 37 Vt. 239.

[5] Defendant's wrongful prevention of further execution of the contract gave the plaintiff a right of action for the breach of the agreement. It was not the purpose of the injunction to rescind, cancel, or destroy the contract, or try the right to damages or fix the amount thereof, but only to prevent further execution of the contract. In the chancery cause there was no decree of cancellation, rescission, or annulment, or adjudication as to damages. The declaration admits none, nor does the special plea aver it. The plain purpose and extent of the injunction was enforcement of the defendant's election to stop further performance by the plaintiff and nothing more.

[6, 7] It does not reach the subject-matter of this action, and constitutes no bar by estoppel or otherwise. We are of the opinion, therefore, that this ground of demurrer and the action of the court in rejecting the special plea are governed by principles applicable to pleas of former suit pending, and that these principles neither sustain the demurrer nor the special plea. "To sustain the plea of a former suit pending, it must appear that the subject-matter and the relief sought in

the second suit are the same as in the first suit." *Stafford v. Board of Canvassers*, 56 W. Va. 870, 874, 49 S. E. 364, 365; *Foley v. Ruley*, 43 W. Va. 513, 27 S. E. 268; 1 Beach, Mod. Eq. Pr. § 33. This declaration goes far beyond the scope and effect of the chancery suit.

[8] The action of the court in sustaining an objection to a question propounded to the plaintiff on cross-examination is the subject-matter of another assignment of error. This question related to the completion of the work under the first contract and was a repetition of one which had been previously propounded and answered, both on the examination of the witness in chief and his cross-examination. The court clearly had discretion to prevent such repetition. The defendant already had the benefit of more than one answer to that question.

[9] The opinion of a witness as to the quantity of timber uncut and standing in the woods was objected to, and to the action of the court in overruling the objection the defendant excepted. This witness testified that he had had about 35 years experience as a woodsman, and 10 years of such experience in the state of West Virginia. He also said he had had something like 30 years experience as a contractor in respect to the cutting and manufacture of timber, and had gone over tract No. 2 for the purpose of estimating the timber on it as well as to see what kind of work the plaintiff had done. In his examination he seems not to have gone entirely over the tract of land, but he says the boundaries were pointed out to him, and he went up the main hollow on both sides, but did not know how far the timber extended back. Having stated this knowledge and experience, he was permitted to say he thought by the looks of the timber there was at least 8,000,000 or 10,000,000 feet. We think this evidence was admissible. Having been upon the ground and seen the timber, the witness was competent to give his opinion as to the quantity, but his failure to go carefully over all the ground and ascertain the boundaries was a matter for consideration of the jury in passing upon the soundness, accuracy, and probative value of his opinion. His evidence may not have been very valuable, but it was relevant and material, and therefore admissible. It proved the existence of a large amount of timber, the cutting of which, under the contract, would have been profitable to the plaintiff.

We have carefully examined all the instructions, concerning which the benefit of exceptions were saved, and find no fault with the rulings of the court thereon. No. 1 and No. 3, given for the plaintiff, read together, tell the jury to find for the plaintiff and properly state the measure of damages, if they believe the plaintiff was ready and willing to perform the contract, or had partly performed it, in a manner satisfactory

to the defendant, but not in strict conformity with its terms, and had been prevented by the defendant from completing it. Substantially all the argument against them has been disposed of by the principles declared respecting the special plea. Plaintiff's instruction No. 2, relating to the credit to be accorded the testimony of witnesses, is in accord with well-settled principles and rules often declared by this court. Defendant's instruction No. 2, relying upon the effect of the injunction as a bar to the action, was properly refused for reasons already stated. Its instruction No. 4, peremptorily directing a verdict for the defendant was properly refused, since the evidence, as will be hereinafter shown, was sufficient to sustain a verdict. Its instruction No. 6, relying upon the partnership relation as a bar, was properly refused for reasons stated in passing upon the demurrer.

[10] Substantially all the evidence adduced by the plaintiff to fix the amount of damages on the basis of eight or ten million feet consists of his own testimony and that of the witness Lord, and amounts to nothing more than their opinions as to the quantity of standing timber. Neither of these witnesses shows how his estimate was made. They do not state the area of the land nor the estimated quantity of timber per acre. Lord admits that he did not know the area of the boundaries. Obviously they have given mere rough guesses as to the quantity of uncut timber. On the other hand, two witnesses for the defendant who superintended the work of taking this timber off of the land for a purchaser thereof, after the plaintiff's work was stopped, place the amount taken off, as ascertained by actual measurement, at less than 2,000,000 feet. A. J. Cook says the exact quantity taken off was 1,576,096 feet. W. O. Tomb says it was approximately 1,551,096. Both say that, after this had been taken off, there remained on tract No. 2 less than 300,000 feet. The credibility of these witnesses has not been assailed in any way, and their statements as to the quantity of timber cut by them stand upon actual knowledge and the test of measurement. What they say as to the quantity remaining uncut, after this was taken off, is not controverted. In this state of the evidence as to quantity, affecting the amount of damages recoverable, we find a decided preponderance against the assessment made by the jury, resting upon the relative completeness and accuracy of the knowledge of the witnesses for the defendant and the slowness of the knowledge of the facts on the part of the witnesses for the plaintiff. Such a preponderance or superiority of evidence must prevail.

We deem it necessary to say for the purposes of a new trial that the plaintiff's case was open to objection on the ground of variance, since he did not prove full performance of precedent conditions, in accordance with

the allegations of his declaration, but did adduce evidence, without objection, of modifications of the contract and excuses for failure to comply strictly with all its terms and conditions. On the trial, the variance was waived by the failure of the defendant to take advantage of it by proper objections. *Long v. Campbell*, 37 W. Va. 685, 17 S. E. 197; *Smith v. Lawson*, 18 W. Va. 212, 41 Am. Rep. 688; *Damarin v. Young*, 27 W. Va. 438; *Davis v. Miller*, 14 Grat. (Va.) 19. It is not a total variance, or one incurable by amendment, and, if the objection had been made, no doubt the declaration would have been amended, and this should be done before a new trial is had.

For the reason stated, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

BRANNON, J., absent.

(68 W. Va. 609)

RUNYAN v. KANAWHA WATER & LIGHT CO.

(Supreme Court of Appeals of West Virginia.
Feb. 7, 1911. Rehearing Denied
May 17, 1911.)

(Syllabus by the Court.)

1. ELECTRICITY (§ 16*)—PERSONAL INJURY—INSULATION OF WIRES.

Workmen have right to be on any part of an iron bridge in necessary work in painting it, and an electric light company having its wires on the bridge must keep them properly insulated, so that such workmen coming accidentally in contact with the wires may not be injured thereby.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.*]

2. ELECTRICITY (§ 19*)—INSULATION OF WIRES—NEGLIGENCE—PRESUMPTIONS.

If a person, at a place where he has right to be, is injured by contact with an electric light wire, there is a prima facie presumption that the wire was not properly insulated, which presumption, unless rebutted, will establish negligence in the owner of the wire in failing to have a properly insulated wire.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

3. TRIAL (§ 359*)—VERDICT—SPECIAL FINDINGS—CONFLICT WITH VERDICT.

A special finding, to prevail over a general verdict, must be irreconcilably inconsistent with it, and clearly exclude every conclusion that would harmonize it with that verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 857-860; Dec. Dig. § 359.*]

4. TRIAL (§§ 350, 359*)—VERDICT—INTERROGATORIES.

An interrogatory under section 5, c. 131, Code 1906, must put only questions of fact, not of law. It cannot ask an opinion from a jury, not asking as to facts on which such opinion may rest, and a finding upon such defective interrogatory has no force to overrule a general verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 828-833, 857-860; Dec. Dig. §§ 350, 359.*]

5. TRIAL (§ 350*)—VERDICT—INTERROGATORIES.

Interrogatories requiring mere speculation by the jury as to what might or might not have been in a certain contingency should not be submitted.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 828-833; Dec. Dig. § 350.*]

6. TRIAL (§ 357*)—VERDICT—INTERROGATORIES—SUFFICIENCY.

Answers to interrogatories should be direct, definite, and complete.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 855; Dec. Dig. § 357.*]

7. TRIAL (§ 352*)—VERDICT—INTERROGATORIES—SUFFICIENCY.

Interrogatories must not assume facts controverted in the case.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 840-845; Dec. Dig. § 352.*]

8. ELECTRICITY (§ 14*)—ELECTRIC LIGHT COMPANIES—CARE REQUIRED—INSULATION OF WIRES.

An electric light company is bound to use a high degree of care to keep its wires safely insulated at places where persons may be lawfully in close proximity to them, and accidentally come in contact with them.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. § 14.*]

Error to Circuit Court, Kanawha County.

Action by C. D. Runyan, administrator of Walter Runyan, against the Kanawha Water & Light Company. A verdict for plaintiff having been set aside, he brings error. Reversed, and judgment rendered on the verdict.

Littlepage, Cato & Bledsoe, for plaintiff in error. Chilton, McCorkle & Chilton, for defendant in error.

BRANNON, J. The Kanawha Water & Light Company, a corporation furnishing electricity for public consumption in the city of Charleston, had its wires on a bridge over Kanawha river for conveyance of electricity. Walter Runyan was an employé of the bridge company engaged in painting the bridge, and while so employed came in contact with an electric wire, and was so badly burnt by the electricity that he died. His administrator sued the Kanawha Water & Light Company, and recovered a verdict for \$5,000, and, the court having set the verdict aside, the plaintiff comes to this court.

The claim is that a wire was not insulated safely, and Runyan's contact with it is the source of his death. An important question is made by the contention of defendant that the place where Runyan met his death was where the light company was under no duty to insulate its wires, and where Runyan had no right to demand such insulation, because that place was not a place where any one had right to go for work, business, or pleasure. It is law that such a corporation is not compelled to insulate its wires everywhere, but only at places where people may go for work, business, or pleasure, where they may reasonably be expected to go. *Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217.

The bridge is a steel bridge having crossbeams some 15 to 17 feet above the floor of the roadway of the bridge. Standing on one of these crossbeams are wooden cross-arms about 10 inches high, and on these arms the wires were strung near the middle of the bridge. Runyan was engaged in painting, at just what point does not appear. For some reason he was walking on a crossbeam, and came in contact with an electric wire and was discovered hanging over it on his stomach, his clothes on fire, his body burning, a wire under him on the beam, forming a short circuit, when the wire separated from melting, and fell, and Runyan fell to the floor. The claim is that the electric company had placed its wires far away from the roadway, out of danger to the public, and it could not anticipate that any one would be walking on a beam high up in the bridge. But we say that painting or repairing of this large, costly bridge is indispensable, and the defendant was bound to expect that workmen would be upon it. Under the case of *Thornburg v. Railroad Co.*, 65 W. Va. 379, 64 S. E. 358, we say that, as Runyan was there engaged in painting, he was lawfully there in work. It has been held that persons going on roofs of houses to do work injured by defective wires may recover, though people do not frequently go on roofs. *Fitzgerald v. Edison*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732, is the case of a painter. *Giraudi v. Elec. Co.*, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; *Joyce on Electricity*, § 664; *Clements v. Louisiana Co.*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348.

The claim for recovery by the plaintiff rests on the theory that the electric wire was not well insulated, as a portion of the wire was uncovered by insulating material. The defense denies this, and says that no adequate proof of negligence has been made. We could dispose of this matter at once by saying that there was evidence that the wire was not insulated, and the general verdict imports that it was not, and by saying that a special interrogatory propounded to the jury the question whether the defendant failed to perform any duty which it owed to Runyan, and, if so, what and in what way; the answer being, "Yes; by failure to insulate the wire." But beyond this the doctrine of *res ipsa loquitur* proves negligence *prima facie*, and aids the oral evidence. Our cases surely apply this rule in such cases, holding, when injury comes to a person by contact with an electric wire at a place where he has a right to be, and where there should be good insulation, it is a case of negligence rendering the company *prima facie* liable. We need not go over this principle again. *Snyder v. Elec. Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922; *Thomas v. Elec. Co.*, 54 W. Va. 395, 46 S. E. 217; *Thornburg v. City Co.*, 65 W. Va. 379, 64 S. E. 358, and other cases. There is no

room to say that this is not the rule everywhere. *Winkleman v. Kansas C. Co.*, 110 Mo. App. 184, 85 S. W. 99, says that the fact of injury is conclusive evidence of want of insulation. This goes very far, I suppose on the idea that, if safely insulated, accident could not happen from the wire. I cite for this doctrine *Alexander v. Nanticoke Co.*, 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475, and 113 Am. St. Rep. 987, 999. The rule is stringent; but people must and do go about over the face of the earth, and those who use dangerous things must carry the burden, however heavy or costly, of so using them as to save life.

The main defense in the case is contributory negligence. The general verdict finds against that defense; but defendant insists that that verdict is overruled by a finding in answer to an interrogatory. This has given us some perplexity, and is the question of gravity in the case. The interrogatory is this: "If Walter Runyan had been careful, considering the knowledge he had of the wires, would he have been injured?" The answer is, "We think not." Is this inconsistent with the general verdict so as to overrule it? It must be so inconsistent that both cannot stand together. If possible, they must be construed so as to harmonize; or rather, as applied to this case, we must be able to say that the finding finds a fact which inevitably overthrows the general verdict. It must exclude every conclusion that would authorize a verdict for plaintiff. *Peninsular Land Co. v. Ins. Co.*, 85 W. Va. 666, 14 S. E. 237. As a practical question in this case, does this finding find as a fact that Runyan was guilty of contributory negligence defeating the action? If it does not, it is not the overthrow of the general verdict. It does not find facts to enable the court to say whether such contributory negligence was a fact. This consideration at once denies this finding any force to overthrow the general verdict. This interrogatory was put to get from the jury an expression to sustain the charge of contributory negligence. It does not ask the jury whether such and such facts exist, facts which would in law constitute negligence, as it must. The law is that an interrogatory must put only questions of fact from which a legal proposition may be deduced. What facts arising on the evidence does this interrogatory inquire about? The interrogatory must ask as to facts such as, if answered as desired by the interrogator, will make a verdict for his adversary inconsistent. Any question the answer to which would be inconclusive, and which would not be so inconsistent, should not be put. 20 Ency. Pl. & Prac. 328. Questions which require the jury merely to answer as to acts or omissions which may or may not in their opinion be evidence of care or negligence, or from answers to which, either way, the court cannot say, as a matter of law, whether care or negligence is the result, are not material. *Clementson*

on Special Verdicts, 73. This interrogatory, without specifying facts on which to base the opinion, simply asks the jury whether in its opinion Runyan exercised care. Virtually it asks the jury whether in its opinion Runyan was guilty of contributory negligence, a mixed question of law and fact—I may say of law. Such an interrogatory is not good. The failure to ask as to facts on which carelessness, or, in other words, contributory negligence, is sought to be predicated, is a fatal defect in this interrogatory, and must render its answer abortive. The answer does not find in words that Runyan was guilty of contributory negligence, and could not, since a question calling upon a jury to find on a question of law must not be submitted. 20 Ency. Pl. & Prac. 326; Clementson on Special Verdicts, 117, 217. He is not proven negligent. It does not appear.

But take the question and answer as they are. This finding says that, if Runyan had been careful, he would not have been injured. Does this come up to the standard of full contributory negligence? No. It does not tell in what he was careless or to what degree. Runyan having a right to be where he was in work, he could go near or over the wires, unless he knew that there was positive actual danger staring him in the face. If he by accident fell upon or caught his foot in the wires, this would not bar recovery. He might not have used the highest degree of care, and yet not be found guilty of contributory negligence defeating the action. We cannot see what was the extent of his knowledge of danger, whether or not he knew of defects in insulation. He was called on to use only ordinary care required of a prudent man under the circumstances; but this finding does not indicate what care or carelessness he used. We cannot from the finding say, or guess, whether he exercised the only care required by law, ordinary, or was chargeable with gross negligence. In the one case he would not be guilty of contributory negligence defeating the action; in the other he would. We cannot say which from the question and answer. The main verdict finds no negligence, and we are asked to say from the special finding that there was, and thus make the special finding inconsistent with the main verdict, when the special one does not give facts which in law impute contributory negligence.

There is another defective feature of this finding to show its inadequacy to overcome the general verdict. It is in the inconclusive language, "We think not." "Answers expressing only the inclination of the minds of the jury, as to say, 'We think not,' are insufficient, and too uncertain to base a judgment on." *Hopkins v. Stanley*, 43 Ind. 554. Eminent authority there cited says: "An opinion is not a legal verdict, and verdicts must be positive, certain, and free from all ambiguity." This position may be assailed as technical; but remember that special find-

ing, to overcome general verdicts, must be certain and clearly and plainly inconsistent with it. I grant that there are authorities holding otherwise. 20 Ency. Pl. & Prac. 344. I cannot say that I would for this defect alone reject the answer; still it must be said that the answer is indefinite and leaves the mind in doubt whether the jury intended to find a definite fact. Why did it not say "No," if so intended? The law says that answers to interrogatories should be "direct, definite, certain, and complete." 20 Ency. Pl. & Prac. 342.

Again, this question 10 called upon the jury to say whether, if Runyan had been careful, he would have been hurt. "Only such questions as can be fairly and intelligently answered should be submitted. Interrogatories requiring the jury to speculate as to what might have happened in a certain contingency should not be submitted." *Atchison, etc., v. Lannigan*, 56 Kan. 109, 42 Pac. 343. Therefore we must regard the answer mere speculation, and not on specific facts, not a flat finding. Findings must be free of obscurity. "They must destroy the general verdict, if at all, only by their own inherent clearness and strength." Clementson on Special Verdicts, 135. Thompson on Trials, § 2698, says: "The court will not strain the language of the special findings to override the general verdict. If possible, they will be interpreted to support the verdict rather than overturn it. No presumption will be made in their favor; nor will they control the general verdict, unless they are invincibly antagonistic to it."

Another objection to this finding depriving its answer of force is that it assumes a very material fact, that is, that Runyan knew the condition of the wires, their danger, etc. This had a tendency to lead the minds of jurors to conclude that Runyan had such knowledge, that even the judge thought so, else he would not have allowed such an interrogatory. An interrogatory must not assume material facts. 20 Ency. Pl. & Prac. 322; *Elllott v. Reynolds*, 38 Kan. 274, 16 Pac. 698; *Toledo R. Co. v. Goddard*, 25 Ind. 185. A ladder was standing on the bridge floor and resting against the crossbeam on which Runyan was. A special interrogatory was propounded, "Would Runyan have been injured if he had stood on the wooden ladder while painting?" Answer was, "No." Evidence goes to show that Runyan did not have or use this ladder, but that it was brought there after he was down burning on the crossbeam. I think the court would have been justified in refusing this interrogatory, because not in the case on evidence. 20 Ency. Pl. & Prac. 331. If so, the answer is out of the case. But the interrogatory was put. Now, it does not appear that Runyan was on the ladder or using it; and I say that, if he had been, he was not confined to it, but could lawfully go on the crossbeam in working, if the place where he was painting

or intended to paint required it. We do not know, no evidence shows, where he was painting. We know nothing about where his work called him. Now, this interrogatory does not ask as to facts from which the jury or court could form an opinion as to safety, and what has been said as to interrogatory 10 applies to this one. It calls for mere opinion regardless of found facts.

Complaint is made of plaintiff's instruction No. 1. It says that electric companies must use very great care to keep the insulation of its dangerous wires perfect at places where people have right to go for work, and if Runyan, while working on the bridge, and in a place he had right to be, came in contact with a wire or wires of the company, and through defect in insulation received a shock from which he died, they must find for the plaintiff unless Runyan was guilty of contributory negligence. It is said that it assumes the wires were dangerous. We surely know that wires conveying electricity are dangerous from our knowledge of things. The court say they are dangerous unless insulated. It is said it applies the rule of a man's right to go for work at certain places to any work that Runyan might do on this bridge. He had right to go on the bridge where work might call, as we have shown above. It is said against the instruction that it assumes that Runyan died from a shock, whereas he died from falling on a wire pressing it on a crossbeam, causing a short circuit which caused him to be burnt. The instruction does not so assume, but makes it depend on evidence, there being evidence on both theories.

It is assigned as error that defendant's instructions Nos. 4, 6, and 7 were refused. Instruction 1 says that if Runyan while working on the bridge and when injured was warned not to touch the wires, and "disregarded the instructions and touched the wires," and thereby a circuit of electricity was formed through his body, which shocked and burned him, then, whether the wires were insulated or not, the jury must find for the defendant. A criticism might be made of this instruction that it imports that Runyan rashly, carelessly, and voluntarily took hold or otherwise touched a wire. No evidence of such contributory negligence. It does not appear how he came in contact with the wire. An interrogatory, 3, asked whether he stepped or fell on it or caught hold of it, and was answered, "Fell on the wire." If the language quoted does not mean to convey the idea of wilful negligence by voluntary touching of the wire, then this binding instruction says that merely because he had been warned not to touch the wire his mere contact with it charged him with contributory negligence. Suppose that while close to the wire in working or passing to a place to work he fell on a wire, or his foot caught in trying to cross over the wires, or in any way by accident he came in contact with the

wire; would this exonerate the defendant for failure to insulate its wires, if the harm came from that? Surely not. Being where he was lawfully engaged in work, using ordinary care, this accident might befall him. Owner of electric wires stringing them over a bridge so near to its top that it is impossible to make repairs on the bridge without coming in contact with them is chargeable with negligence. A workman engaged in repairing a bridge over which electric wires with apparently safe insulation are strung, where he must come in proximity with them in performing his work, has right to assume that contact with them will not be dangerous. *Perham v. Portland Elec. Co.*, 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730. "An electric light company is bound to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires, and liable to come accidentally or otherwise in contact with them." *Daltry v. Media E. L. Co.*, 208 Pa. 403, 57 Atl. 833. This authority allows Runyan to do work, though in proximity to the wires, and leaves room for unfortunate accident; whereas the instruction does not allow him to go near them, though his work should call for it, and leaves no allowance for accident. If such be law, then our case of *Thomas v. Elec. Co.*, 54 W. Va. 395, 46 S. E. 217, is not sound. Cases cited in the early part of this opinion show that workmen on roofs, walls, and bridges are not held guilty of contributory negligence where there is no gross negligence. No. 6 is substantially the same as instruction 1. It denies Runyan right to go near the wires in his work, and would debar action even for mere accident, though Runyan was using ordinary care.

No. 7 is much the same. It is binding, and leaves no room for accident. Moreover, it says that the occurrence raised no presumption of negligence, for the reason, as I understand, that Runyan had knowledge that the wires were in bad condition. I do not see how Runyan's knowledge would do away with the presumption of negligence from the occurrence of the accident. Besides, the instruction is not clear in import. I think, also, that instructions given the defendant presented its claim fully and fairly on the subject of contributory negligence.

A witness, Alexander, was asked if he knew whether or not from the construction of the bridge in painting any part of the bridge it would be necessary to touch the wires, and the question was not allowed to be answered. Of course, it might not be necessary to touch the wires voluntarily. The question is not whether it would be necessary to paint near the wires, but to touch the wires. It would be necessary to paint the crossbeams near the wires, and in so doing Runyan might accidentally touch them. And, though not necessary to paint near the wires, Runyan had right to pass over the wires walk-

ing on the crossbeam in going to paint elsewhere. If answered as desired, it would not be material. Moreover, it is sufficient to say that it does not appear what answer was expected, nor can we say with certainty from the form of the question.

Therefore, we reverse the order setting aside the verdict, and render judgment upon that verdict for the plaintiff.

(69 W. Va. 181)

LITZ et al. v. LOWRY et al.

(Supreme Court of Appeals of West Virginia.
April 18, 1911. Rehearing Denied
May 19, 1911.)

(Syllabus by the Court.)

1. TAXATION (§ 848*)—FAILURE TO LIST LAND—FORFEITURE.

Land omitted from the land books for the years 1865 to 1874, inclusive, was forfeited, for such omission, by chapter 125 of the Acts of 1869, inflicting forfeiture for such omission for any period of five years, either prior or subsequent to the passage of said act, subject to certain exceptions therein specified.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1664; Dec. Dig. § 848.*]

2. TAXATION (§ 855*)—LANDS FORFEITED FOR OMISSION FROM LAND BOOK—ACQUISITION.

A tract of land, granted in 1851, sold by the grantee by title bond, occupied by the vendee and successive assignees of his until 1873, omitted from the land books until 1875, conveyed by one of such assignees, in 1873, to his assignee and successor in possession, entered upon the land books for taxation in 1875, in the name of the grantee in the deed of 1873, forfeited for omission from the land books from 1865 to 1869, was subject to acquisition by said last-mentioned assignee and those claiming under him and succeeding him in possession, by transfer under section 3 of article 13 of the Constitution (Code 1906, p. lxxxiv).

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1672; Dec. Dig. § 855.*]

3. TAXATION (§ 855*)—ACQUISITION—LANDS FORFEITED FOR OMISSION FROM LAND BOOK.

Such assignee's deed constituted color of title, and the relation of privity between him and the vendor did not preclude him from acquiring title under said section; he having been under no duty to pay the taxes for the year for which the forfeiture occurred, and being neither an heir nor devisee of any person or persons for whose default the land was forfeited.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1672; Dec. Dig. § 855.*]

Error to Circuit Court, Raleigh County.

Action by A. Z. Litz and others against James D. Lowry and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

McGinnis & Hatcher, File & File, and Campbell, Brown & Davis, for plaintiffs in error. M. O. Litz, J. Lewis Bumgardner, Ritz & Ritz, and Sanders & Crockett, for defendants in error.

POFFENBARGER, J. In an action of ejectment brought by A. Z. Litz and others against James D. Lowry and James H. Gil-

more, trustees, and Joseph Bolen, in the circuit court of Raleigh county, for the recovery of a small tract of land containing about 65 acres, the defendants demurred to the evidence of the plaintiffs, and the court, deeming the evidence sufficient to warrant a verdict, overruled the demurrer and rendered a judgment for the plaintiffs.

The case is peculiar, in this, that both the plaintiffs and the defendants claim under the same title. Though the plaintiffs set up an additional claim under a different and strange title, their principal claim is under the same title which defendants claim. The history of that title is as follows: About the year 1849, Christian Cline entered upon the land in controversy and had a survey thereof made with intent to obtain a patent for it. The patent was issued August 1, 1851. Before he obtained the patent, Cline sold the land to Anos Walker and gave him a title bond therefor. Walker sold it to Sire Meadows, who moved on the land when Cline left it. He sold it and transferred the possession to Peter Meadows, who sold it to Alias Read. Read sold to John H. Smith. In all these instances the title bond was assigned. On the 3d day of April, 1875, John H. Smith sold the land to William Smith and executed to him a deed purporting to convey it. He also left the title bond with him. William Smith conveyed it to John A. Smith in the year 1883. John A. Smith conveyed it to John A. Cadle December 13, 1884. Cadle and others conveyed it to Litz and others December 16, 1890. Though the fact is questioned, this land was occupied and portions of it inclosed and cultivated successively, by the parties just named, from a time prior to April, 1875, until after the year 1890. The house on the land burned down at a date not fixed definitely by the evidence; but John A. Cadle testifies positively that he occupied the house and held possession of the land for Litz for a period of two years after he had conveyed it to him. The land appears on the land books for the first time in the year 1875. It seems to be admitted that, prior to that year, it never had been entered for taxation, and that no taxes had been paid thereon. Christian Cline, in whom the legal title was vested by the patent, issued in 1851, never conveyed the land to any of said parties. Moses C. Cline, one of his heirs at law, having obtained the interests of all the other heirs, conveyed it to Lowry and Gilmore, by deed dated March 29, 1907. These grantees placed Bolen on the land as their tenant, and Litz and others brought this action.

[1] The controlling inquiry is whether the plaintiffs' claim of title, by forfeiture, for nonentry of the land upon the land books for taxation, and transfer of the forfeited title to them by operation of section 3 of article 13 of the Constitution, is well founded.

We have already said this land was never entered upon the land books under the title of Cline or any claimant under that title until 1875. If any forfeiture had occurred prior to 1863, section 4 of article 9 of the Constitution of 1863 released it, since it released "all lands forfeited for the failure of the owners to have the same entered on the land books of the proper county and charged with the taxes chargeable thereon since the year 1831, where the tract does not contain more than one thousand acres." This tract did not contain 1,000 acres. An act of the Legislature, passed on the 24th day of February, 1866 (Acts 1866, c. 66) released "all persons and property, either real or personal, from all liability for taxes of 1861 to 1864, inclusive, in any county in which the same had not been assessed, or, having been assessed, the assessment had not been returned to the auditor's office. In this act there was an exception of lands owned by nonresidents. By section 7 of chapter 125 of the Acts of 1869, it was made the duty of any person owning any real estate to cause the same to be entered upon the land books and charged with taxes, for the year 1832, or any year thereafter, before or after the date of the passage of that act, not released, paid or in any manner discharged. It then provided that "when any person owning real estate has not, or shall not have for five successive years, been charged on such books with taxes on such real estate, the same, and all the title, right and interest of the owner, legal and equitable thereto, shall without any proceeding be absolutely forfeited to and vested in this state. Provided, however, that such owner may within one year after the passage of the said act cause such real estate to be charged with such taxes, chargeable for any such years heretofore, and thereby prevent a forfeiture for the failure so to charge the taxes for such years." This statute is clearly retroactive to and including the year 1865 as to all lands, as well as prospective. It says there shall be a forfeiture when any person owning real estate has not, or, for five successive years, shall not have, been charged with taxes. The preceding clause contains an exception of taxes previously released. Some other exceptions are made by this act; but this case does not fall within any of them. This land was not entered upon the land books at any time between 1865 and 1875, a period of more than five years. Obviously, therefore, the title was forfeited for such omission by the force and effect of this statute.

[2] The title thus forfeited was transferred to and vested in the plaintiffs and those under whom they claim, if they were such persons as are mentioned as eligible transferees in section 3 of article 13 of the Constitution, and had complied with the conditions found in either of the three clauses, creating classes of transferees for the purposes of that section. Clearly they were in

possession for more than 10 years after the forfeiture occurred. Their possession was actual and continuous. That forfeiture extinguished the title of Christian Cline. His entire interest became vested in the state. If, therefore, the Smiths, Cadle, and Litz, being in the actual possession of the land for more than 10 years, and paying all the taxes thereon as they did, were such persons as could take the forfeited title by transfer, it clearly vested in them. The first clause of said section says the forfeited title "shall be, and is hereby transferred to, and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees), for so much thereof as such person has or shall have had actual continuous possession of, under color or claim of title for ten years, and who, or those under whom he claims, shall have paid the state taxes thereon for any five years during such possession."

[3] When William Smith obtained his deed from John A. Smith, though it vested no legal title in him, he caused the land to be entered upon the land books and paid the taxes thereon. All of his successors did likewise. Prior to the acquisition of their deeds, they were under no duty to pay the taxes on this land. William Smith, the first grantee, had been under no such duty. The forfeiture did not result from any failure of duty on their part. They paid all taxes accruing after they received their deeds. They were remote assignees of Christian Cline, but not his heirs nor devisees. Hence they are not excluded by the exception. The alleged friendly character of their possession up to the date of the forfeiture does not preclude them from taking title under this clause. It does not require open, notorious, exclusive, and hostile possession. It requires only actual and continuous possession. After the forfeiture there was no title in Christian Cline. They could not be his tenants, nor could they hold either adversely to him or in subordination to his title or for his benefit. All of his previous right, title, and interest in and to the land became vested by the forfeiture in the state. Upon the happening of a forfeiture, the statute of limitations ceases to run between adverse claimants. The forfeiture produces a new order of things. If, before the forfeiture, title has been acquired by adverse possession, the state takes the title forfeited subject to the new title so acquired; but, if there is only one title by grant, and that is forfeited, and no other has been acquired by adverse possession, the title vests in the state free from all claims, and the statute no longer runs as between the parties. "If, at the time of the forfeiture or afterwards, the forfeiture is declared by law to inure to the benefit of the party in possession, a deed subsequently made by the commissioners would of course pass nothing to the purchaser. And so if,

at the time of the forfeiture, the claimants of the title so forfeited had been barred of their right to recover by the long-continued adversary possession of the party holding, under the statute of limitations, the commonwealth would only take the title in the same plight and condition in which the claimants held it, and the commissioners' deed would be inoperative to convey to the purchaser any other or better right to recover. But, if the party in possession had acquired no such rights at the time of the forfeiture, from that time his adversary possession and the statute of limitations must cease to run as against the commonwealth, and the commissioners' deed would pass her title thus acquired unaffected by the continued possession of the party holding with whatever claim of title." *Smith v. Chapman*, 10 Grat. (Va.) 464. Such being the force and effect of the forfeiture, there could be no adverse possession while the title remained in the state. There was no outstanding title to which subsequent possession could be adverse, and this condition continued until the title again passed out of the state in some way. To obtain a transfer of the forfeited title, therefore, it was only necessary to have "actual and continuous" possession under claim or color of title for ten years and pay taxes for five. The plaintiffs and those under whom they claim had such possession under color of title and paid the taxes. Hence their title is clear.

This conclusion renders it unnecessary either to inquire whether any title vested in them under the Welch patent upon which also they rely, or to determine whether the possession under the title bond, or under the deed from John H. Smith to William Smith and subsequent deeds was adverse to Christian Cline or his heirs, questions extensively discussed in the briefs. The forfeiture and transfer gives them rather an academic character in this case.

In our opinion, the judgment is plainly right and will be affirmed.

BRANNON, J. I concur with Judge POF-FENBARGER that the plaintiffs can recover on title derived from forfeiture. But the question squarely arises: Are they entitled to recover on title derived by adversary possession under the statute of limitations? I am clear that they are. I have always been a strong advocate of a liberal application of the statute of limitations in land matters. It has been about the only panacea for the ills which have afflicted for 100 years all the country in Virginia and West Virginia west of the Alleghany Mountains springing from the many conflicting grants, sometimes three or four deep, on the same land. I am not satisfied with the position that a vendee in actual possession under an executory contract, after he has paid the purchase money and is entitled to a deed, still holds not adversely to his vendor. I assert that it ought

to be the law, and is, that such possession is adverse to the vendor. It is said not to be so in Virginia and West Virginia. Not so under the generality of expression in the decisions; but I do not find any actual decision pointedly so holding. True, Judge Snyder, in stating the elements of adverse possession in *Core v. Faupel*, 24 W. Va. on page 244, did say so; but he was only speaking in a general way, and it was not the point of decision. As far back as *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388, it was held that such possession was not held in privity and for the benefit of the vendor. In *Jackson v. Kamp*, 1 Cow. (N. Y.) 605, whilst it is held that a vendee under executory contract does not hold adversely to the vendor, yet it is said that when he has performed the conditions of his contract his possession is hostile. "After performance of a contract to purchase and an equitable title to a deed to the premises acquired, there is no good reason why the vendee's possession may not become adverse to his vendor." *Briggs v. Prosser*, 14 Wend. 277. Indeed, an agreement for conveyance, the consideration being paid, has been held to be tantamount to a deed as a foundation for adverse possession. *La Frombois v. Jackson*, 8 Cow. [N. Y.] 589 [18 Am. Dec. 463]; *Clapp v. Bromaghnam*, 9 Cow. [N. Y.] 530. These and others are old cases cited in *Tyler on Ejectments*, 878, 879, 884.

I find in 1 Cyc. 1047, this: "While the law seems to be otherwise in some states, the decided weight of authority is to the effect that a vendee of land in possession under a contract of sale, by parol or in writing, holds adversely to the vendor, from the moment of the payment or performance of the conditions of the contract; and, if this possession is continued for the statutory period, the purchaser acquires title by statute of limitations." "After payment of the purchase money, however, the possession is presumed to be antagonistic to the vendor because all duty to him has been performed, and, if it continues for the necessary period without some act of recognition or of subordination to the legal estate of the vendor, his right to action is barred." 1 Am. & Eng. Ency. L. 801, and cases cited. See, also, 1 Cyc. 1046. I observe in the very late work, 2 Ency. L. & P. 450, the following: "After the vendee has performed the conditions of the contract or bond for title and has become entitled to a conveyance, it is well settled that his continued possession will be deemed adverse to the vendor, in the absence of any recognition of the latter's title." A vast array of authorities is there cited for this proposition. *Warvelle on Vendors*, § 187, after stating that possession by a vendee is not adverse to the vendor, adds: "The full payment of the purchase price, however, removes the reason for the rule; and hence, where the consideration is paid and the owner consents that the purchaser may enter and hold the land as his own, such entry and pos-

session cannot be deemed subordinate to the title of the vendor, but is adverse, and a practical disseisin. And it is immaterial, in a case of the kind, whether the contract be in writing or by parol, for the vendee, having discharged all pecuniary duty to the vendor, becomes clothed with an equity which renders his possession antagonistic both to the vendor and to strangers. If such possession is continued for the statutory period, it will form a complete bar to the vendor's right of entry or action." To *Schafer v. Hanser*, 111 Mich. 622, 70 N. W. 136, 35 L. R. A. 835, 66 Am. St. Rep. 403, holding that possession under a parol promise of a gift is adverse, is a note saying that "the doctrine almost universally accepted now is that one who enters by virtue of a parol gift, claiming as owner, continues for the statutory period in open, exclusive, adverse, and uninterrupted possession thereby acquires perfect title," citing a host of cases.

I therefore hold that the plaintiff, without regard to the deed purporting to convey the legal title from John H. Smith to William Smith, became vested with legal title by adversary possession under the title bond, and, having legal title acquired by adverse possession under the statute, was entitled on that ground to recovery in this action. It is the law almost everywhere. As pertinent to this subject, I will ask: Where is the reason for saying that a vendee who has paid his purchase money and is entitled to a deed is not in possession adverse to the vendor? What interest has the vendor in the land? Whose possession is it? The statute (Code 1906, c. 90, § 20) says that a vendor cannot at law recover possession from his vendee. This makes the possession that of the vendee, not of the vendor. It is the vendee's exclusive possession. One in possession under a title bond who has paid the purchase money is a freeholder. *Helmondollar's Case*, 4 Grat. (Va.) 536; *Cunningham's Case*, 6 Grat. (Va.) 695. And I observe to-day for the first time that the Supreme Court of the United States away back in 1836 said this: "Equity makes the vendor without deed a trustee to the vendee, for the conveyance of the title; the vendee is a trustee for the payment of the purchase money and the performance of the terms of the purchase. But a vendee is in no case a trustee for the vendor, as to the possession of the property sold; the vendee claims and holds it in his own right, for his own benefit, subject to no right of the vendor, save the terms which the contract imposes; his possession is therefore adverse as to the property, but friendly as to the performance of the conditions of the purchase." *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388. With much more force can we say so under the statute which I have mentioned. The purchase money was paid in this case.

It occurs to me to be a very refined doctrine, very technical, that in this case, where there was a possession of more than 50 years, the defendants can come in and claim this land—a peaceable possession—from which the law would presume a deed. *Riffe v. Skinner*, 67 W. Va. 75, 89, 67 S. E. 1075, and many cases cited. The title of the plaintiffs ought to be in peace after so great a stretch of time.

Another theory touching the statute of limitations: I incline to the opinion, pretty decidedly incline, aside from possession under the title bond, that, after Smith conveyed to Smith in 1873, the possession under that deed was adverse to the vendor and those claiming under him. It was a deed purporting to convey the legal title, and did not possession under it give notice of adverse claim? It so strikes me. Point 5 in *Pickens v. Stout*, 67 W. Va. 422, 68 S. E. 354, says that, if one tenant in common by executory contract or deed conveying title sell to a stranger, that stranger is entitled to the benefit of adverse possession by open, notorious, and exclusive possession. Surely as much so where one holding under a title bond makes a deed purporting to convey legal title. Smith and those under him have been in such possession under that deed 29 years. Why have they not good title under that deed by adverse possession? The statute runs against the state under Code 1906, c. 85, § 20.

(69 W. Va. 34)

EDINGER v. SOUTHERN OIL CO. et al.
(Supreme Court of Appeals of West Virginia.
March 14, 1911. Rehearing Denied
May 17, 1911.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 99*)—MINING PARTNERSHIP—POWERS OF PARTNERS OWNING MAJORITY INTEREST.

Mining partners, owning the majority interest, and controlling the operations on a mining lease, have no right, without their consent, to sell and convey the interest of their co-partners, or co-lessees, in the lease, or in the product thereof.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 99.*]

2. MINES AND MINERALS (§ 99*)—MINING PARTNERSHIP—ACCOUNTING.

But if such managing partners, on obtaining a gas well, in good faith, and for the benefit of all concerned, and for the purpose of obtaining a test of the caliber and persistency of such well, make a temporary agreement with a local gas company, to connect with the well, and take and commingle the gas therefrom with gas from other wells and to sell the same to its customers, at a monthly rental deemed reasonable by them, such managing and controlling partners having no interest in the said gas company, or in the profits to be derived by it from the sale of such gas, should not, in accounting with their co-partners for the gas used by them from such gas well, be chargeable with the price which such gas company received, or the value thereof at the point of delivery to its customers, but

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

only for what it actually and in good faith received from the gas company therefor, and the value of any gas used by them elsewhere, the rules obtaining in general partnerships being properly applicable in such cases.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 99.*]

Appeal from Circuit Court, Harrison County.

Bill by Henry H. Edinger against the Southern Oil Company and others. From the decree, the mentioned defendant appeals. Reversed and rendered.

John Bassel, Charles N. Kimball, and Eugene Mackey, for appellant. Davis & Davis, for appellee.

MILLER, J. Originally plaintiff's right to the relief prayed for, or to any relief, was put in issue by the pleadings and proofs; but on this appeal it is conceded that by decree of April 30, 1907, these rights were finally adjudicated, and that the questions here presented must be governed by the principles of that decree. Thereby it was adjudged and decreed that plaintiff "is the owner of an equal one-eighth part of the working interest in and to all the gas or oil produced from the premises in the bill described, and as such is entitled to an accounting from" the defendants, Southern Oil Company, and Reserve Gas Company, "for any and all gas used therefrom by them or either of them"; and the cause was thereby also referred to a commissioner to state such an account according to direction given and to report the same to the court.

This appeal is from the final decree below, on said report, and the several exceptions of the parties thereto, pronounced on October 29, 1909, whereby said report was modified and reformed in certain particulars, and thereon as so modified and reformed, it was adjudged and decreed "that the total value of the gas marketed from the well in controversy during the period in suit was \$104,733.75; that the cost of such marketing was \$8,500.00; that the plaintiff Edinger is entitled in this suit to recover a sum equal to one-eighth of the net value of the gas so marketed; that he is likewise chargeable with \$728.60, being his proportionate share or rentals paid, and that there is accordingly due to said Edinger from the defendant Southern Oil Company, as of the 1st day of June, 1902, the sum of \$11,300.62"; and whereby it was accordingly further "adjudged, ordered and decreed that the defendant Southern Oil Company do pay to the plaintiff the sum of \$16,269.07, with interest thereon from the date of this decree until paid and the costs of this suit."

The gas in controversy was the product of a well on the Thomas Thompson land, in Harrison County, under a lease to the Southern Oil Company, obtained June 6, 1899, but which the decree of April 30, 1907, held subject to the prior contract between the oil

company and plaintiff relating to other leases and the operation thereof by said company, dated June 2, 1899.

The parties to said contract, as clearly appears from its terms, contemplated only the discovery of oil and operations of the leases therefor. Wherefore the special provisions mentioning oil. But gas, and not oil, was found in the Thompson well, the first drilled, and the one in controversy. It is urged, however, and correctly no doubt, that the provisions of the contract apply also to gas. It is true as argued that no provision is found specifically providing that the Southern Oil Company shall have power to market the oil. The contract does specifically provide, however, that the oil company shall control the operations and management of the property, and that in the event, the oil company, after drilling the first two wells, in order to protect the leases, shall be required to put down wells faster than plaintiff can pay for his share of the cost thereof, the oil company agrees to carry the cost thereof, for plaintiff, "the same to be paid for out of the production, which would be coming and payable or deliverable to the interest of said Edinger until such time as the amount of oil or its value shall equal the liability of said Edinger for the cost of his interest so carried." And the first condition of the contract is: "That the said Southern Oil Company, in developing said leases, or any of them for oil, shall as to the first two wells that may be put down upon any one of said leases, or one well on each lease of any two, shall carry a working interest therein to the extent of one-eighth undivided to the said H. H. Edinger free of compensation or cost to him whatever, with the right to him to take and receive one-eighth of the net production of said well or wells not exceeding two as aforesaid, other than the actual one-eighth cost of operating said wells after they are bored to the producing sand, and producing sand for the purpose of said well unless oil is obtained at a lesser depth shall be bored to what is known in that territory as the fifth sand." This provision clearly contemplates the production of oil only. So little was gas or the production thereof thought of that it is not mentioned in the contract and no provision made for disposing of it, if it should be found.

Shortly after bringing in this gas well on the Thompson farm, in 1900, and after testing it for oil at a still greater depth, on the request or demand of plaintiff without success, the Southern Oil Company, as the uncontradicted evidence shows, in order to get a test of the capacity and persistency of the well, and without other means of doing so, agreed with the Flaggy Meadow Gas Company, a small company, owning some forty miles of pipe, engaged in supplying gas locally to local drillers and operators in the oil field, that it might hitch on to the Thomp-

son well, and temporarily use the gas therefrom. The result was a temporary agreement between the oil company, and the gas company, by which the latter company was to pay the former for the use of the gas used and to be used, one hundred dollars per month while it remained connected with the well, and to furnish the oil company with free gas to drill wells on the Smith farm. This agreement continued in force from February 2, 1900, to February 18, 1902, covering the period from the time the gas company first began to take gas until it was cut off on the latter date, a period of two years and sixteen days. During that time the gas from the Thompson well was run into the pipe line with gas from numerous other wells owned or controlled by the gas company and in which the oil company had no interest whatever. The value of the gas used by the oil company on the Smith farm is proven to have been \$1,200.00, and a little gas sold by the oil company after February 18, 1902, to Phoenix and O'Gara, is proven to have brought \$700.00. For all the gas sold and so used by the oil company it realized for the gas sold the Flaggy Meadow Gas Company, \$2,500.00; used on the Smith farm, \$1,200.00, and sold to Phoenix and O'Gara, \$700.00, total \$4,400.00.

It is evident from the record that Edinger knew from the beginning of the agreement with the Flaggy Meadow Gas Company, and made no objection thereto. There is some evidence that some time during the summer after the agreement was made he made some complaint to Mowris, in charge for the oil company, that he was not receiving his part of the receipts from the well, evidently referring to the oil company's receipts, for the oil company had no interest in the gas company, or in its receipts, and there is no evidence that Edinger pretended at that time to have any interest in the gas company's receipts, or that he made demand upon it therefor. It was not until after the gas company cut loose from the well in February, 1902, that Edinger began making his demands on the oil company for a share of the amount realized by the gas company, from the sale of the gas to its customers, resulting finally in the institution of this suit, and the decree of April 30, 1907.

The Southern Oil Company does not deny its liability under said decree to account to Edinger for the gas used by it from said Thompson well or the amount realized by it from the sale thereof to the gas company and others, aggregating said sum of \$4,400.00, but Edinger claims and the court below has decreed to him an amount equal to one eighth of the value of 2,056,675.113 cubic feet, estimated production from the well during the period covered by the contract with the gas company, at five cents per one thousand cubic feet, and a like one eighth interest in the value of the gas used by the oil company on the Smith farm, and the amount sold Phoenix

and O'Gara, less \$728.60, balance due the oil company from Edinger for rentals paid for him on said leases.

The numerous exceptions to the commissioner's report and the several assignments of error present for our decision on this appeal, the single question, what is the correct basis of settlement between the parties under the decree of April 30, 1907, and the law of the contract governing them. Appellant of course contended that the settlement should be made upon the rules and principles governing mining partnerships. It claims that owning the majority interest in the Thompson well it had the legal right to make the agreement with the gas company, and temporarily dispose of the gas as it did, and should account to Edinger only for what it actually realized from the gas company, and which it used, and what it afterwards sold to others. On the other hand Edinger contends, and the court so decreed, that the oil company should account to him, for the one-eighth of the net amount which the gas company realized for the gas marketed through its pipe lines, on the principle that the oil company was a wrong doer, in so disposing of the gas without Edinger's consent, and in allowing the gas company to confuse the gas from the Thompson well with gas from other wells, and to sell it without keeping any account of the production, and that whether the oil company be treated as mining partner of Edinger, with controlling interest, or as co-tenant, its liability is the same, the rights and powers of a mining partner only authorizing him "to do what may be necessary and proper for carrying on the business, and control the work, in case all cannot agree, provided the exercise of such power is necessary and proper for carrying on the enterprise for the benefit of all concerned." The oil company does not controvert the latter proposition, and as applicable here, except in so far as its authority may have been enlarged by special contract. The proposition stated is the law of mining partnerships as declared by this court in *Childers v. Neely*, 47 W. Va. 74, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777; *Blackmarr v. Williamson*, 57 W. Va. 252, 50 S. E. 254; *Kirchner v. Smith*, 61 W. Va. 444, 58 S. E. 614; *Greenlee v. Steelsmith*, 64 W. Va. 353, 62 S. E. 459, all in consonance with many decisions of other states, and the leading text-books on the subject, and cited and relied on in the briefs of counsel.

At once we realize we have for decision a very close case, on the question of power to sell the gas. We give no force, however, to the theories of counsel for Edinger, of fraud or intentional wrong doing on the part of the oil company, or of any of its officers, in disposing of the gas to the gas company. None of them had the slightest interest in the gas company, or the profits realized by it from marketing the gas. They had seven-eighths, Edinger but one-eighth interest to

conserve and protect. The officers of the oil company appear to have been successful and experienced operators. They evidently did what they thought they had the right to do and what they thought was for the benefit of all concerned, else they would have been voluntarily sacrificing their own large interests along with those of Edinger, which is inconceivable. Then there is strong evidence that Edinger agreed with Barnsdall, in the presence of Mowris, to release to the oil company his interest in the gas as a consideration for drilling the Thompson well deeper. Their evidence of this fact, and the evidence of other witnesses of Edinger's subsequent admissions, we think, would undoubtedly have prevailed over Edinger's denials, if Barnsdall for the oil company, by mistake, he says, had not in December, 1902, in transferring to Edinger his interest in the Thompson well, omitted to reserve the gas rights.

[1] We entirely agree with the learned counsel for Edinger that the rights of mining partners partake so nearly of the rights of cotenants that the majority interest, in case of disagreement, would have no right to sell and convey away the interest of a minority holder in a mining lease. Our decisions and the law on that subject would deny such authority. And we entirely agree with counsel, and with *Stone v. Marshall Oil Co.*, 208 Pa. 85, 57 Atl. 183, 85 L. R. A. 219, 101 Am. St. Rep. 904, and *Mining Co. v. Mining Co.*, 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 232, cited and relied on by them, that if an assignee of an oil lease, or a mining partner, in order to avoid accounting with his assignor, or with his partner, fraudulently commingles the gas product of a joint well with the product of other wells, without keeping account, or any record of the amount produced, from the joint well, he should be compelled, on the principles applicable in case of fraudulent confusion of goods, to account for the proportionate part of the whole amount of the gas produced and sold, called for by the contract.

In *Stone v. Marshall*, the owners of a lease, sublet a part of the leased premises to the Marshall Oil Company, with right to drill and operate for oil and gas for one year and as much longer as oil and gas should be found in paying quantities, the oil company covenanting to drill four wells within the time stipulated. The stipulation of the assignment relating to the gas was: "It is also agreed that in case gas shall be discovered and conducted off the premises for use or sale, the said parties of the first part in the proportionate interests aforesaid, shall receive one-fourth of the profits thereof above cost bonus of \$700.00 to the original lessor." This assignment was duly admitted to record, and notice thereby given to the world of its provisions; binding all subsequent purchasers. The Marshall Oil Company drilling one well, a very strong gas well. It did not

utilize the gas but sold it to the Washington Oil Company, another defendant. Thereafter it induced the original lessor to execute a new lease covering his whole farm, and by it and subsequent agreements to reduce the annual rent for gas wells first to \$600.00, then to \$500.00, and then subleased an additional portion of the farm to the Washington Oil Company. The latter company thereafter transferred the gas to the Taylorstown Natural Gas Company, practically a selling company for it. Later the Marshall Oil Company and the Washington Oil Company drilled other wells on the leased premises, and got gas which they turned into a common pipe line, with the gas from the first well and sold and delivered it to pipe line customers and refused to account to the assignors of the Washington Oil Company, according to the contract of that company with them. This was a plain case for the application of the principle, enunciated by the court, based on fraud and the fraudulent confusion of the goods, so as to deprive plaintiffs of their rights. But it does not seem to us we have any such a case presented here. The case cited was originally before the Supreme Court of Pennsylvania, in 1898, and is reported in 188 Pa. 602, 41 Atl. 748, 1119. The principles governing it were then adjudicated. Referring to the provision of the contract reserving a part of the oil and the covenant above quoted, providing for a proportionate share of the profits realized from the sale of the gas the court says, that this provision was the "foundation of the suit." And it is said of the assignment of the plaintiffs to the Marshall Oil Company, containing the said provisions: "It is a sub-sublease, and as such subject to all the covenants of the original lease," and that the covenants therein were covenants running with the land, binding defendants.

[2] In the case at bar we have no such conditions. There is not a particle of evidence connecting the Southern Oil Company in interest with the gas company, except only in the matter of furnishing gas for drilling on the Smith farm. But no fraud was intended in this. Besides the oil company admits its liability therefor and has been charged with the value of that gas. The sale to the gas company was not intended to defraud plaintiff in any way, but done for the purposes already noted. The oil company had no gas lines, or means of marketing the gas. The gas company was a small local concern, and so far as the evidence shows the only customer to whom the gas could be sold, or who could make the tests desired. The evidence shows, however, that its small plant had involved an investment of \$50,000.00. The only way those interested had of marketing the gas, as conditions then existed, was to either build a pipe line or to sell the gas well as a whole. The managing partners thought no doubt that by making a test of the well, was the way of obtaining

a purchaser; and in the interest of all concerned, adopted the method complained of. We think this was within the power covered by the contract, if not by the general law controlling mining partners. There is no evidence showing that a better bargain could have been made. If defendant's act was wrongful and fraudulent it was wrong and fraud working no real wrong to him, but hurtful in a degree unheard of to the oil company, if we should allow the decree in Edinger's favor to stand against it. This we cannot consent to do. The amount of this decree, according to the evidence, is twice as much as the whole interest in such a gas well could then have been sold for, as conditions then were, or even now are. The majority had rights to protect as well as Edinger. As was said in *Stone v. Marshall Oil company*, supra. A share of the gas could not like oil be delivered in specie at the well, or elsewhere, the only way of sharing it, being in the proceeds of the sale. We think the oil company had the power to make suitable tests, and that the contract with the gas company was reasonably within their power.

Conceding that the oil company may not have acted with the best judgment in making the contract with the gas company, we think the law applicable to general partnerships, applicable to the facts in this case. That law is that good faith obtaining, the interests of the majority shall not be rendered liable for improvident contracts. Loss due merely to lack of discretion or judgment, not amounting to negligence or bad faith, will not put the loss all upon the interests of those responsible therefor. In such cases it must fall on all the partners as a firm. This doctrine is fully supported by numerous authorities cited and relied on by counsel for appellants. 22 Am. & Eng. Ency. Law, 128; *Snell v. De Land*, 136 Ill. 533, 27 N. E. 183; *Bank v. Gardner*, 104 Iowa, 176, 73 N. W. 591; *Charlton v. Sloan*, 76 Iowa, 288, 41 N. W. 303; *Caldwell v. Leiber*, 7 Paige (N. Y.) 483; *Peters v. McWilliams*, 78 Va. 567.

Our conclusion, already indicated, is that the decree below is erroneous; is based on wrong principles, and should be reversed, set aside and annulled; that in settlement with Edinger appellant Southern Oil Company should be charged with \$550.00, an eighth part of \$4,400.00, the gross amount realized by it from the sale of gas to the gas company, and other gas used or sold by it, and credited with the balance due it from Edinger, \$728.60, leaving a balance in its favor of \$178.60, for which it should have a decree against Edinger, with its costs incurred in this court. A decree will be entered here in accordance with this finding.

BRANNON, J., absent.

(89 W. Va. 276)

MAXWELL v. DAVIS TRUST CO. et al.
(Supreme Court of Appeals of West Virginia.
May 2, 1911.)

(Syllabus by the Court.)

1. BANKRUPTCY (§ 20*)—JURISDICTION OF STATE COURT.

A state court of competent jurisdiction may enforce actionable rights under the federal bankruptcy law, as well as may a federal court that also has jurisdiction in the premises.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 20.*]

2. BANKRUPTCY (§ 166*)—"PREFERENCE."

Payments of money by a bankrupt to creditors, enabling them to obtain a greater percentage of their debts than other creditors of the same class, made within four months prior to the filing of the bankruptcy petition, constitute illegal and voidable preferences under the federal bankruptcy act, if the creditors receiving the payments have reasonable cause to believe that preferences are thereby intended.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 166.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5495, 5499; vol. 8, p. 7759.]

3. BANKRUPTCY (§ 295*)—TRUSTEE—RIGHT TO SUE IN STATE COURT—RECOVERY OF PREFERENCES.

A trustee in bankruptcy may sue in the courts of this state to recover money preferentially paid by a bankrupt to creditors contrary to the federal bankruptcy law.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 295.*]

4. BANKRUPTCY (§ 295*)—RECOVERY OF PREFERENCES—ACTIONS IN STATE COURT—PROCEDURE.

When a trustee in bankruptcy resorts to the state court to recover money preferentially paid contrary to the bankruptcy law, the jurisdiction and practice are governed by the law of the state.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 295.*]

5. EQUITY (§ 46*)—JURISDICTION—ADEQUATE REMEDY AT LAW.

Equity does not have jurisdiction of cases in which the plaintiff has a full, complete, and adequate remedy at law, unless some peculiar feature of the case comes within the province of a court of equity.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 151, 152, 157, 159-163; Dec. Dig. § 46.*]

6. BANKRUPTCY (§ 287*)—RECOVERY OF PREFERENTIAL PAYMENTS—RIGHT TO SUE IN EQUITY.

A bill in equity by a trustee in bankruptcy does not lie to recover payments constituting preferences, when no ground of general equity jurisdiction is alleged, and no necessity for equitable relief is shown. The case is one for an action at law as for money had and received.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 287.*]

Appeal from Circuit Court, Randolph County.

Bill by C. W. Maxwell, trustee in bankruptcy, against the Davis Trust Company and others. A demurrer to the bill was sustained, and plaintiff appeals. Modified and affirmed.

James A. Bent, for appellant. Samuel T. Spears and Talbott & Hoover, for appellees.

ROBINSON, J. Plaintiff is a trustee in bankruptcy. Defendants are creditors to whom the bankrupt paid debts in cash within four months prior to the filing of the petition in bankruptcy, and at a time when defendants knew the bankrupt to be insolvent. By this equity suit in the state court, plaintiff seeks to recover from defendants the sums so paid, for the benefit of the bankrupt estate. It is alleged that the payments constitute illegal and voidable preferences, recoverable by the trustee, under the national bankruptcy act. On demurrer, the circuit court dismissed the bill. Was that dismissal proper?

Defendants say that the bill cannot be maintained, because the acts alleged do not constitute illegal preferences under the statutes of this state. They also say that, even if preferences unlawful by the state law appeared, the allegations are insufficient to make a case for the setting aside of the same. It is true that the bill does not present a case of preferences forbidden by state law. Mere payments of money in satisfaction of bona fide pre-existing debts are not declared to be preferences under the insolvency laws of West Virginia. But may not plaintiff invoke the aid of the state court for the recovery of rights arising to him by the provisions of the national bankruptcy law? The bill expressly rests the demand for relief on rights arising under the bankruptcy act. It does not invoke a remedy by state law.

[3] That a trustee in bankruptcy may sue in the state court to set aside preferences declared unlawful by the bankruptcy act, or to recover money or property transferred as a preference contrary to the provisions of that act, is settled. This right to proceed in the state forum is clearly pronounced in the terms of the act itself, and is fully recognized in the federal and state decisions. When the state court is appealed to, however, the laws and rules of that court pertaining to jurisdiction, form of action, pleading, and practice must control. The Circuit Court of Appeals, Fourth Circuit, in *Westfall v. Avery*, 171 Fed. 626, 96 C. C. A. 428, says: "A proceeding instituted by a bankrupt's trustee to set aside fraudulent conveyances or illegal preferences is not a proceeding in bankruptcy, but, while ancillary to such proceeding and authorized by the bankrupt act to be instituted in either the federal District Court or in a state court of competent jurisdiction, it must be governed, so far as pleading and practice is concerned, by the laws and rules of the court wherein it is instituted."

[4] The Supreme Court of Michigan, in *Detroit Trust Co. v. Old National Bank*, 155 Mich. 61, 118 N. W. 729, holds: "When a trustee in bankruptcy resorts to a state court to recover payments constituting a preference, as authorized by the bankruptcy law, the jurisdiction and practice are governed by the law of the state in which the suit is brought."

[1] The state court of competent jurisdiction may enforce rights under the bankruptcy law as well as may some federal court that also has jurisdiction in the premises. The bankruptcy act is the law of the land. It is binding on all courts. The state courts have full power to enforce its mandates in all proceedings properly before them. "Where rights conferred by the peculiar provisions of the bankruptcy act are involved, such rights are cognizable in the state court and the state court will enforce the bankrupt law wherever applicable." *Remington on Bankruptcy*, § 1687.

[2] The allegations of the bill present a case disclosing preferences that are clearly illegal and voidable under the bankruptcy law. Payments of money, though not expressly mentioned in the act, have been held to constitute preferences. *Carson, Pirie et al. v. Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. They have been held to come within the meaning of "transfers." *Remington on Bankruptcy*, § 1331. If a payment is made within four months prior to the filing of the bankruptcy petition, for the purpose of enabling a creditor "to obtain a greater percentage of his debt than other creditors of the same class," and the creditor receiving the payment has reasonable cause to believe a preference is thereby intended, it is a voidable preference. The trustee may recover the money for the benefit of the bankrupt estate. If the creditor who receives the payment of his debt has intent in the transaction to deplete the trust fund in order to obtain satisfaction of the whole or a part of his own claim, the payment is an illegal preference. Just such a case is made by the bill in the case under consideration.

[5] But, as we have seen, the remedy for the recovery of the property or money transferred as an illegal preference must be governed by the law of the forum in which suit is instituted for that recovery. Plaintiff sues in equity. Can a preference under the bankruptcy act be avoided by such suit under the law and practice of this state? Clearly so, if the preference is by the transfer of title to property, such as a conveyance or bill of sale. Suits in equity are proper in cases of that character because they are more adequate and efficacious than actions at law. Equity must be called upon to set aside and avoid the illegal memorial of transfer. But is the equity forum the proper one when the preference to be avoided is one growing out of a mere voidable payment of money? Is not a suit at law to recover that money quite as adequate and effective a remedy as the trustee in bankruptcy needs to accomplish all that is due to him? Will not a suit at law itself completely avoid the preference? If plaintiff has an adequate remedy at law, he is barred from equity procedure. The bankruptcy act gives the trustee the right to recover the money—vests in the trustee title to the money that has been preferentially paid.

The bankruptcy law says that the creditor has only received the money for the use of the trustee. Then may not the trustee most effectively sue for it by the ordinary action at law as for money had and received? What more can equity give him in such case than law?

[6] The bill in this case presents only a demand for mere pecuniary claims. It asks nothing but a decree for money, simply because that money is legally due plaintiff. It presents absolutely no ground of equity cognizance. It makes no case of fraud; for the preference alleged is merely an unlawful one, not a fraudulent one. It seeks no accounting or discovery in relation to that which plaintiff claims, nor does it pretend to show any necessity for such equitable proceedings. No record or memorial in relation to the transfer is sought to be cancelled and annulled. Not a single recognized ground of equity cognizance is relied on to sustain the resort to equity. The bill, in substance, alleges an indebtedness to the trustee and seeks to recover the amount thereof. It avers the exact amount that each of the defendants received and owes, and the date that he received it. Actions at law lie against each of them, and afford a complete remedy to recover the money. The doctrine that equity may be invoked to save a multiplicity of suits cannot apply.

That an action at law is the proper procedure in such a case as the one presented in the bill, is established by *Laidley v. Laidley*, 25 W. Va. 525, and *Teter, Adm'r, v. Teter*, 65 W. Va. 167, 63 S. E. 967. In the latter of these cases, it is held: "Ordinarily a court of law is the proper forum in which to establish a debt. For equity to interpose, there must be something more than a mere claim or demand; there must appear some equity in relation to such claim or demand—something remedial to plaintiff that the law does not give."

The precise point now under consideration was before the Supreme Court of Michigan, in a case exactly like this one—a suit in equity by a trustee in bankruptcy to recover money preferentially paid creditors. *Detroit Trust Co. v. Old National Bank*, supra. The demurrer to the bill was sustained. It was held: "Equity does not take jurisdiction of cases where a suitor has a full, complete, and adequate remedy at law, unless it is shown that there is some feature of the case peculiarly within the province of a court of equity."

In New York, when a trustee in bankruptcy seeks a money judgment only, to cover an amount alleged to have been paid as a preference, the action is one at law. *Cohn, Trustee, v. Small*, 120 App. Div. 211, 105 N. Y. Supp. 287; *Merritt v. Halliday*, 107 App. Div. 596, 95 N. Y. Supp. 331; *Stern v. Mayer*, 99

App. Div. 427, 91 N. Y. Supp. 292; *Coudert v. Jarvis*, 188 N. Y. 584, 81 N. E. 1162.

It is true that there are federal cases holding that an equity suit is appropriate, but they do not appear to be based on careful consideration of the subject. *Pond v. Bank* (D. C.) 124 Fed. 992, relies on *Wall v. Cox*, 101 Fed. 403, 41 C. C. A. 408. The latter case was one growing out of a fraudulent sale of property, not a mere preferential payment. Of course fraud was a basis of equity jurisdiction. Then, *Parker v. Black* (D. C.) 143 Fed. 560, seems to have been decided on the authority of the *Pond* and *Wall* Cases, and *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. There is nothing in the latter case to make it an authority on the point. Besides, the case of *Parker v. Black* was one for an accounting, the opinion says, thus having a recognized basis for equity procedure. On appeal, *Parker v. Black* was affirmed on the point that jurisdiction was in equity, 151 Fed. 18, 80 C. C. A. 484, but the Circuit Court of Appeals said that it would have been of different opinion if the question had been originally presented. That court cites the *Wall* Case and *Off v. Hakes*, 142 Fed. 364, 73 C. C. A. 464, as binding on the point. It seems to have overlooked the fact that the *Wall* Case was properly a suit in equity for an accounting. The *Off* Case does not reach the point. That case was justified in equity because the surrender or cancellation of a note was involved. But it is useless further to review federal cases in this connection. They cannot control the established policy and procedure in the courts of this state, even if any of them squarely and considerately meet the point. None that we have observed do so. The settled law of this state is that a mere money demand cannot be recovered by an equity suit when there is no feature of the case peculiarly within the province of a court of equity—when the remedy at law is complete, adequate, and efficacious.

The demurrer to the bill was properly sustained. But the right to institute suits at law on the claims of the trustee in bankruptcy against the preferred creditors should have been saved by a reservation in the decree. The decree will now here be modified in that particular. As so modified, the decree will be affirmed, with costs to the appellee.

(99 W. Va. 319)

STATE v. BELCHER.

(Supreme Court of Appeals of West Virginia.
May 2, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1069*)—WRIT OF ERROR—PROCEEDINGS FOR TRANSFER—TIME—WRIT OF ERROR TO CRIMINAL COURT.

Section 16 of chapter 6 of the Acts of the Legislature, passed at the extraordinary session

of 1908, creating a criminal court for the county of Mingo, provides the manner of obtaining an appeal or writ of error to the circuit court of said county from the judgment of the criminal court, and concludes as follows: "Provided, however, no such appeal, writ of error or supersedeas to said court shall be allowed unless the petition therefor be presented in six months from the date of such judgment or order." *Held*: (1) The circuit court has no power to award a writ of error to a judgment of said criminal court unless application therefor be made within six months from the date of the judgment. (2) It is not error for the circuit court to dismiss a writ of error which had been awarded by the judge in vacation more than six months after the date of the judgment of said criminal court. (3) This court cannot review the judgment and rulings of said criminal court when the writ of error to the circuit court was not applied for in time, or when it was properly dismissed after it had been awarded too late.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1039.*]

Error to Circuit Court, Mingo County.

Columbus Belcher was convicted of murder, and he brings error. Affirmed.

F. H. Evans, for plaintiff in error. Wm. G. Conley, Atty. Gen., and J. O. Henson, for the State.

WILLIAMS, P. Columbus Belcher was convicted by a jury of his peers in the criminal court of Mingo county for the murder of one Kirtus Carter, and on the 4th of June, 1909, sentenced to death. On the 1st of February, 1910, in vacation, he obtained from the judge of the circuit court of Mingo county a writ of error, which the court, in term, on the 11th of March, 1910, dismissed as having been "improvidently awarded and granted because the petition for said writ of error and supersedeas was not presented within the time required by law." Thereupon defendant obtained a writ of error to this court on the 31st of May, 1910.

[1] The only question which we can inquire into is whether the circuit court erred in dismissing the writ of error to the judgment of the criminal court of Mingo county. The criminal court of that county was created by chapter 6 of the acts passed by the Legislature at the extraordinary session of 1908. It confers upon that court jurisdiction to try and determine criminal cases, whether misdemeanors or felonies. Section 15 of the act authorizes appeals and writs of error to the circuit court of the county from the judgments, rulings, and orders of the criminal court in cases involving the "freedom of a person or the constitutionality of a law." Section 16 provides the manner of applying to the circuit court or the judge in vacation for appeals and writs of error, and concludes with this important proviso: "Provided, however, no such appeal, writ of error or supersedeas to said court shall be allowed unless the petition therefor be presented in six months from the date of such

judgment or order." The right and power of the Legislature to provide the manner of appeals, and to prescribe a reasonable time within which applications therefor shall be made, is unquestionable. Six months is not an unreasonably short time within which to apply for an appeal or writ of error. Final sentence in this case was pronounced by the criminal court on June 4, 1909; and the defendant did not make application to the circuit court, or to the judge thereof, for a writ of error until February 1, 1910. This was nearly eight months after the date of the judgment. There was therefore no jurisdiction in the circuit court to award the writ of error. The right of appeal was then barred by limitation. It therefore necessarily follows that the circuit court did not err in dismissing the writ of error as having been improvidently awarded by the judge in vacation.

Finding no error in the judgment of the circuit court dismissing the writ of error, we have no jurisdiction to enter upon a review of the trial of the case in the criminal court. But, even if we were permitted to do so, we could not say that the criminal court erred in refusing to set aside the verdict and grant defendant a new trial, because the evidence is not made a part of the record by bill of exceptions. We have, however, taken the pains to read the evidence appearing in the record, although it is not legally made a part of it, for the purpose of satisfying our consciences on the questions whether a fellowman may not have been convicted and sentenced to death on insufficient or improper evidence, and whether he may not have lost his right of appeal by neglect or mistake of his counsel; and we do not hesitate to say that if the evidence which we find in the printed record is the evidence on which defendant was tried, and if we were authorized to review it, we could not say that the evidence does not warrant the severe verdict which the jury found. But we do not mean to intimate by this observation upon the sufficiency of the evidence to warrant the verdict that we would or could have done otherwise than affirm the judgment of the circuit court, if we had thought the evidence insufficient to warrant the verdict.

The judgment will be affirmed.

(69 W. Va. 305)

AILES et al. v. HALLAM et al.

(Supreme Court of Appeals of West Virginia.
May 2, 1911.)

(Syllabus by the Court.)

1. EASEMENTS (§ 12*)—CONSTRUCTION—RIGHT OF WAY.

A deed executed by a number of adjoining and neighboring property owners in a community partially laid out in town lots, for the purpose of establishing certain roads for their

common benefit, conveying the fee-simple title of the strips of land constituting the roads to two of their number, and securing to the grantees and all the other parties thereto the right to use the roads "as a right of way for all purposes as completely as if they were a public street," confers upon all the parties thereto and their successors in title the right to free and wholly unobstructed use of such roads.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 12.*]

2. EASEMENTS (§ 12*)—CONSTRUCTION BY CONDUCT.

The terms of such a deed being plain and unequivocal and its purpose clear, the existence of gates on such roads at the date of the deed and the subsequent maintenance thereof do not alter the construction by conduct. The rule of practical construction is not applicable to an unambiguous instrument.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 12.*]

3. EASEMENTS (§ 5*)—TITLE OR RIGHT ACQUIRED—RIGHT TO MAINTAIN GATES ACROSS PRIVATE WAY.

Right to maintain a gate across a private way may be obtained by prescription.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 5.*]

4. TENANCY IN COMMON (§ 3*)—RIGHTS IN RIGHT OF WAY.

A right of way vested in a number of adjoining and neighboring property owners makes them tenants in common of such way.

[Ed. Note.—For other cases, see Tenancy in Common, Dec. Dig. § 3.*]

5. TENANCY IN COMMON (§ 15*)—HOSTILE CHARACTER OF POSSESSION—ACTS OF TENANTS IN COMMON.

If one of such persons maintain a gate or gates across such a way without notice to his cotenants of any claim of right to do so, his exercise of such privilege is deemed to have been permissive, and not adverse.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

Appeal from Circuit Court, Jefferson County.

Bill by Milton E. Ailes and others against W. F. Hallam and others. Decree for plaintiffs, and defendants appeal. Affirmed.

Faulkner, Walker & Woods, for appellants. Forrest W. Brown, for appellees.

POFFENBARGER, J. The decree complained of here enjoins the maintenance of gates upon certain private ways, and the correctness thereof involves the construction of a deed, and an inquiry as to a claim of a prescriptive easement or right to maintain them.

Near the towns of Bolivar and Harpers Ferry, in Jefferson county, on a high ridge between the Potomac and Shenandoah rivers, certain lands owned by a corporation known as the "President and Trustees of Storer College," and adjacent lands owned by individuals, were some years ago partially sold out in small tracts with a view to the location thereon of summer residences. The first sale, embracing 18.1 acres, was made to one Col. Whitman, who erected a costly residence on it, known as the "Scottish Castle." The present owner of this piece of

land is one of the defendants, Mrs. Mary Van Dake Hallam. Other sales of smaller portions of the land were subsequently made to other persons, Mary G. Moore, Emmett Truitt, Louise C. Goodman, F. M. Pennock, and one Judge Vale, now deceased. On the northern side of the Whitman property, an avenue known as Whitman avenue was laid out. Through it runs another avenue known as Prospect avenue. Neither of these was ever dedicated or opened as a public highway. Gates were maintained across them from the first.

[1] On the 22d day of May, 1895, all of the persons interested in the lands adjacent to these roads executed a deed, a recited purpose of which was to make some changes in the plat, according to which the lands had been sold, and particularly to designate certain rights of way through the lands, to be enjoyed by the several owners thereof with respect to Prospect and Whitman avenues as indicated on said plat. It further recited that the change in the plat had been made; that the parties had agreed that Prospect avenue, between two designated points, and Whitman avenue, from the Harpers Ferry turnpike to Prospect avenue, as indicated on the plat, should "be opened as a right of way for the use and enjoyment of all the parties" to the deed; and that they had "concluded and determined to dedicate the land occupied by said streets for the purpose of a right of way or road." It then granted to S. W. Lightner and N. C. Brackett, their heirs and assigns forever, all the joint and several right, title, and interest of the parties of the first part in and to all of the land occupied by Whitman avenue and Prospect avenue, defining the width of each, reserved to the grantors, including said Lightner and Brackett, their heirs and assigns forever, the right to use said avenues "as a right of way for all purposes as completely as if they were a public street," and granted the like right to the said Brackett and Lightner. Then the parties of the second part granted to the parties of the first part "a right of way for all purposes as fully as if it were a public street over said Prospect avenue and Whitman avenue." This deed seems to have vested the title in fee of these roads or strips of land in Lightner and Brackett, and then secured to them and all the other parties an easement, consisting of the right to use the same as a road.

As has been stated, these were originally farm lands, and, when the roads were established across them, gates were erected and maintained to protect them from cattle and other stock running at large. There was one at the intersection of Prospect avenue with the Charlestown pike. There was another across Whitman avenue and another on the north end of Prospect avenue. With a single exception, they seem to have been there

at the time the deed was executed and have ever since been maintained. The location of one has been changed. W. F. Hallam, the owner of land adjoining the Whitman land, and purchased in 1904 of Storer College, moved one of the gates to a different location. The deed makes no reference to any of these gates. It neither secures any right to any person to maintain them, nor forbids them by name. The Hallams became the successors of the Vales to the title to the Whitman property, and, of course, acquired such rights, respecting it, as the Vales had and no other. The deed to them from Wilmer P. Vale and others, dated November 10, 1899, contains the following clause, referring to the right of way deed: "This conveyance is made subject to an easement or right of way through the land herein conveyed, known as Prospect avenue, as indicated in a deed by the said parties of the first part and others to S. W. Lightner and N. C. Brackett." Only one half of Whitman avenue was originally on the Whitman land, the other half being on land subsequently acquired by W. F. Hallam. The deed dated May 2, 1904, conveying it, contained an exception of such rights and interest as had been conveyed by the right of way deed of August 22, 1895. After the Hallams, husband and wife, had acquired these properties, they made some changes in the fences and gates, and so fixed and adjusted one of the gates as to make it more burdensome to their neighbors who used the road than it had been. They also constructed a new road in a different location, leaving it entirely open and free from gates, with the supposed intent to induce travelers to use it instead of the old one, and so ultimately get rid of the old ones, or one of them. These acts led to the present controversy. The right of the Hallams to maintain any gates at all on the roads was questioned. The matter was taken up with them, and a meeting was held at the Vale residence for the purpose of securing a better understanding of the situation. The highway deed was read and considered, and Mr. Hallam seems to have been convinced that it forbade his maintenance of gates. He had some further interviews with interested parties, and seemed inclined to consent to the removal of the gates. An agreement was prepared and submitted to him, providing for such removal, and this seems to have impressed him with the view that the highway deed, properly construed, did not deny to him the privilege of gates. He made further inquiry, and was advised that it did not. Thereupon he declined to sign the agreement or remove the gates.

Counsel for the appellants very properly insist upon the consideration of all the facts and circumstances existing at the date of the execution of the deed, the situation of the parties and their purposes, together with its terms, in seeking its true meaning and intent; and, in this connection, place great

stress upon the presence of the gates across the roads in question, and continuance thereof. This fact, though important, is not necessarily controlling. It does not preclude the consideration of others, nor deny to them such force and effect as they naturally and reasonably have on the question of intent. The intent to make the section traversed by these roads one of small holdings for homes and summer residences was well known to all the parties at the date of the execution of the deed. A portion of the land had been platted off into town lots, and some of the parties to the deed were owners of such lots. A village or town had been commenced, though not incorporated. A small commencement had been made with the expectation of growth and development and the conversion of a great deal more of the Storer College and Brackett lands into such lots and residences. Around the small beginning thus made lay broad acres of land, suitable for cultivation which it was neither advisable nor provident to throw open to the public, nor economical to fence off with reference to these roads, so as to make them highways. The trustees of Storer College and Brackett, owning adjacent and neighboring lands, were deeply interested. It was their purpose to avoid the expense of fencing and breaking up the farms to such extent and in such manner as to cause unnecessary expense, or, indeed, any expense that could be avoided. They were parties to this deed. Ultimately, they expected to dispose of all the land, and their intent to make the deed broad enough to secure such right to property owners whenever they should demand it, and depend, for the time being, upon the indulgence of the gates, as a mere act of friendship and neighborly courtesy, may well be supposed. The terms of the deed indicate this. The owners of the land through which these two roads pass conveyed the fee in them to Brackett and Lightner, leaving in the adjacent landowners only a right of use. These roads were also given a greater width than is usual in the case of private ways or even country highways. For the most part they were made 40 feet wide. The extent of this right of use on the part of adjacent property owners is clearly defined. They are given the right to use the roads named as avenues and called streets "for all purposes as completely as if they were public streets." In the argument it is said this description relates to the use of the ways, and not to the ways themselves. In other words, the ways are not described nor defined as public streets. Granting this, the use which the parties are entitled to make of them includes all the purposes for which public streets are used, and there is a further extension of this right of use. The deed says they may be used for all purposes for which public streets may be used, and as completely and fully, for such purposes, as public streets are used. Viewing these terms in the

light of all the facts and circumstances, obtaining at the date of the deed and the situation and conduct of all the parties thereto, we see no reason for saying the meaning, import, and effect of these terms shall be restrained. While some of the facts may indicate the possibility of intent and purpose, falling short of the terms used, other facts, circumstances, and purposes have an equally potent bearing in the opposite direction.

In thus considering surrounding facts and circumstances and the situation and purposes of the parties, some of which are not disclosed by the terms of the deed, we are treating it as ambiguous, and therefore as susceptible of construction by reference to extraneous evidence. In view of its terms and the facts and circumstances and purposes disclosed by them, we do not regard it as being in any sense ambiguous. As we have observed, it vests the fee in these roadways in Brackett and Lightner. The strips of land are severed in title from the tracts and lots to which they formerly belonged and made separate and distinct parcels of land, the use of which, for roadways, is given to all the interested parties. They are not mere rights of way granted by property owners over their own lands to owners of adjacent lands. They go beyond that and become community roads; and the right of use thereof is as broad and extensive, in respect to purposes and manner, as it was possible to make it without declaring the roads to be public highways. So we think it is not at all ambiguous. It is clear and positive in its terms, and wholly inconsistent with right in anybody to maintain gates or other obstructions across the roads so established.

[2] Treating the deed as ambiguous, counsel for the appellants rely upon prior and subsequent conduct under the rule of practical construction; but this principle has no application in the case of a plain and unequivocal instrument. Its terms cannot be annulled nor their effect destroyed by mere conduct. *Camden v. McCoy*, 48 W. Va. 377, 37 S. E. 637; 2 *Parsons, Con.* (8th Ed.) 495.

[3] As more than 10 years intervened between the date of the right of way deed and that of the first protest against the gates made to the Hallams, they claim a prescriptive right to maintain them. That such a right may be so acquired seems clear upon both principle and authority. It is not corporeal property and incorporeal property is peculiarly the subject-matter of title by prescription. *Woodbridge v. Coughlin*, 46 W. Va. 345, 33 S. E. 233; *Jones on Easements*, § 161; 22 A. & E. Enc. L. 1185. Under this principle of acquisition or rule of property, this court upheld a claim to the free use of a toll road in an individual and his family and servants. *Lucas v. Turnpike Co.*, 36 W. Va. 427, 15 S. E. 182. The right to obstruct a private hall or entry may be so acquired. *Sorkin v. Sentman*, 162 Pa.

548, 29 Atl. 722. A stairway projecting into a private way owned in common by adjoining owners is also within the principle. *Moon v. Mills*, 119 Mich. 298, 77 N. W. 926, 75 Am. St. Rep. 390. The important and controlling inquiry then is whether Mr. and Mrs. Hallam have so acquired the right they claim. The right of way deed clearly created a right for the benefit of the properties owned by the parties thereto and annexed it to those properties. This right thereby became appurtenant to the properties passing with them through successive alienations as an appurtenance thereof.

[4] When so created and for such purpose, it was a right in common, made for all the owners of the properties and their successors in title, and intended to be exercised and enjoyed by them on equal terms. They were therefore tenants in common, and incorporeal property, such as this, may be the subject of such a tenancy. 17 A. & E. Enc. L. 668. Owners of lots abutting upon a private way established for their common benefit and appurtenant to each lot have unity of possession, and are tenants in common of such way. *Goralski v. Kostuski*, 179 Ill. 177, 53 N. E. 720, 70 Am. St. Rep. 98.

[5] This relationship of the parties applies certain principles which precluded Judge Vale, the predecessor in title of Mrs. Hallam, from obtaining any right in respect to the roads, adverse to his cotenants, without notice to them of his intention to claim it. *Pickens v. Stout*, 67 W. Va. 422, 68 S. E. 354; *Clark v. Beard*, 59 W. Va. 669, 53 S. E. 597. He owned the Whitman property until November, 1899, and there is no evidence of any hostile claim of right against the interests of his cotenants or inconsistent with their rights as defined by the deed. On the contrary, all the circumstances herein detailed indicate a permissive and temporary maintenance of the gates. Others, owning lands to which the ways were appurtenant, kept gates across them at times, without any claim of right to do so or belief that they had such right. The ownership and possession of Vale and his permissive and friendly exercise of the gate privilege extend to a time within 10 years before the institution of this suit. The possession of the appellants themselves was therefore less than the statutory period of 10 years, if it be conceded that they have maintained the gates with hostile intent. Even though the element of cotenancy were not involved, the acts relied upon to establish title by prescription must have been done under a bona fide claim of right. *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020; *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. 632. That any such claim existed on the part of Vale is completely negated by the circumstances. He was a party to the deed and fully cognizant of its purpose, as well as the reasons for allowing temporary gates. While they stood across the roads, a deed

was executed by him and others owning them which plainly required their removal. Full explanation of the nonremoval thereof, immediately after the date of the deed, is found in the peculiar circumstances already adverted to. The roads were established by the deed to facilitate sales of property and induce people to establish homes in the community, and in contemplation of a largely increased number of users. The accomplishment of these purposes would shift the burden of fencing from the parties to the deed to others, distribute it among a larger number, reduce the area of agricultural land, and increase the travel on the roads to a point not reasonably consistent with the maintenance of gates thereon.

Failure to make Brackett and Lightner parties to the bill is assigned as a ground of demurrer, but they were obviously not necessary parties. Though they were parties to the deed and hold the legal title to the strips of land constituting the roads, their interest as such fee owners is not at all involved in this controversy, relating to an obstruction of the use of the roads and constituting a private nuisance to any person having the right to use them.

Perceiving no error in the decree, we affirm it.

(89 W. Va. 292)

COLLINS v. WHITE OAK FUEL CO. et al.
(Supreme Court of Appeals of West Virginia.
May 2, 1911.)

(Syllabus by the Court.)

1. JUDGMENT (§ 183*)—MOTION FOR JUDGMENT ON FORTHCOMING BOND—NATURE OF PROCEEDINGS.

A proceeding by motion for judgment on a forthcoming bond, being informal in character, is not subject to the technical rules of common-law pleading and practice.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 183.*]

2. JUDGMENT (§ 183*)—MOTION FOR JUDGMENT ON FORTHCOMING BOND—PROCEDURE—METHOD OF DEFENSE—STATUTORY PROVISIONS.

The last clause of section 7 of chapter 121 of the Code of 1906, providing that defense to such actions may be made in the same manner and to the same extent as in actions at law, is merely permissive, not mandatory; and informal pleas, giving reasonable notice of the matters relied upon for defense, are sufficient.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 183.*]

3. JUDGMENT (§ 189*)—MOTION FOR JUDGMENT ON FORTHCOMING BOND—SUFFICIENCY OF PLEADING.

Failure of the record in such an action to show a joinder of issue, or the disclosure of a technical misjoinder of issue, is not cause for setting aside a verdict, if the claims and defenses of the parties have been set out in informal pleadings with reasonable certainty and the trial has proceeded as if formal issues had been made up.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 350; Dec. Dig. § 189.*]

4. MINES AND MINERALS (§ 70*)—COAL MINING LEASES—CONSTRUCTION.

A provision in a coal mining lease for suspension of a minimum royalty clause or exemption therefrom so long as a "fault" in existence in the mine, contact with which occasioned such exemption clause, should be a hindrance and obstacle to the successful operation of the mine, and for resumption of the minimum royalty after the "fault" had been pierced and the normal vein recovered, exempts from such royalty on account of hindrance and obstruction only at the place at which the fault had been encountered at the date of the agreement, and does not extend to later and other separate and distinct obstructions by the same fault or others.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192-197; Dec. Dig. § 70.*]

5. MINES AND MINERALS (§ 70*)—COAL MINING LEASES—CONSTRUCTION—"PIERCED"—"RECOVERED."

Under such a clause, the words "pierced" and "recovered" mean more than a mere breach of the fault and discovery of the coal on the opposite side; but, if the immediate obstacle has been overcome, the main entry put in condition for successful operation, and, together with side entries, carried into the body of the coal for several hundred feet, encountering the same obstacle or others in some of the entries, but none in others, it is for the jury to say whether the fault has been overcome within the meaning of these terms.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192-197; Dec. Dig. § 70.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6019, 6020.]

6. TRIAL (§ 145*)—DIRECTION OF VERDICT.

If the evidence adduced under one of two defenses to an action goes to the entire demand and tends to defeat it wholly, and the evidence adduced under the other does not extend to the entire demand and tends only to reduce the amount thereof, it is not error to give a binding instruction applicable to the first of said defenses only, if it properly submits that defense upon the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 328; Dec. Dig. § 145.*]

Error to Circuit Court, Fayette County.

Action by Justus Collins against the White Oak Fuel Company and another. A verdict for plaintiff was set aside, and he brings error. Reversed and rendered.

Osenton & Horan and Leo Loeb, for plaintiff in error. Dillon & Nuckolls, for defendants in error.

POFFENBARGER, J. In a proceeding by motion on a forthcoming bond, by the White Oak Fuel Company, as principal, and S. Dixon, as surety, to release property from distraint under a distress warrant for rent, claimed under a coal lease and amounting to something over \$6,000, Justus Collins obtained a verdict for the amount so claimed, which the court set aside. To sustain this denial of the benefit of the verdict, the defendants in error rely upon a number of alleged errors and insufficiency of the evidence.

The first assignment of error charges nonjoinder or misjoinder of issue. The defendants tendered three so-called special pleas. The first two, though concluding with verifications, bring no new matter into the case,

and amount to mere denials of liability. The first one says there is no rent due; the second, in substance, that the demand of the plaintiff is made under the eighth clause of a written contract, described in the notice, and denies liability for any rent under that clause or the contract or any other. Objections to these two pleas having been overruled, they were filed, and, without reciting any replication, the order says issue was joined thereon. The third plea claims a suspension of the operation of the clause under which the proceeding was instituted, under another clause providing therefor in case of strikes by employes of the lessee or unavoidable accident, delaying shipments of coal and coke. It avers, as an unavoidable accident, an explosion in the mine on or about the 1st day of May, 1907, which it says greatly delayed and hindered the lessee from shipping coal for and during the entire period for which the rent was claimed, under the distress warrant. Objection to this plea having been overruled, it was filed, a general replication entered, and issue joined.

[1] That this is an informal proceeding, not governed in all respects by the common-law rules of pleading and practice is well established. *Knox v. Horner*, 58 W. Va. 136, 51 S. E. 979; *Board v. Parsons*, 22 W. Va. 308; *White v. Sydenstricker*, 6 W. Va. 46; *Higginbotham v. Haselden*, 3 W. Va. 266; *Hale v. Chamberlain*, 13 Grat. (Va.) 658. Under this view of its character, the technical requirements of formal pleading and joinder of issue have been dispensed with. *Hornbrooks v. Lucas*, 24 W. Va. 493, 49 Am. Rep. 277; *Wallace v. McCarty*, 8 W. Va. 193, 199; *Land Co. v. Calhoun*, 16 W. Va. 361, 375; *McKinster v. Garrott*, 3 Rand. (Va.) 554.

[2] The last clause of section 7 of chapter 121 of the Code of 1906 says, "Defense to such actions may be made in the same manner and to the same extent as in actions at law," and the decisions just referred to were rendered in cases submitted to the court, in lieu of a jury, for trial; but we do not regard the statute as mandatory, nor these decisions as declaring principles applicable only to cases so tried. Its language is permissive, not mandatory. It was passed long after the character of the proceeding by motion had been judicially established. Its terms are indicative of intent not to make the procedure technical. It says, not that defense shall be made in the same manner as in actions at law, but that it may be so made. At the time of the decision in *McKinster v. Garrott*, the statute was silent as to the mode of defense, but, after the enactment thereof, the court adhered to the rule of practice declared in that case.

[3] The old common-law rule, making a plea and joinder of issue essential to the trial of a case is still adhered to by this court in common-law actions, but is always reluctantly applied, when it appears that the parties have treated the issue as having been

made up and fully submitted their respective claims and contentions to the jury. If it were possible consistently to avoid reversals for such cause, the court would cheerfully do so. It looks upon the rule with great disfavor. *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361. Hence we are not disposed to extend it to summary and informal proceedings in which it has not hitherto been applied. Substantial justice requires statements of the nature of the demand and the defenses sufficient to give each of the parties notice of what is asserted against him and constitute a basis for the introduction of evidence; but it does not require any particular formality in them. It is enough that the respective claims and contentions of the parties are put into the record. That has been done in this instance by the notice and special pleas. Tested by the strict rules of common-law pleading, these papers are lacking in respect to nothing except form. They so present all claims and demands in the action as to give full and complete notice thereof to the parties, the court, and the jury.

[4] A statement of salient facts is necessary to an intelligent disposition of the other assignments of error. The original lease, covering about 1,000 acres of coal, was executed by Collins to the Whipple Colliery Company, September 21, 1901. After that company had driven its main entry or hallway for some distance into the property, mining the coal on each side thereof, it encountered what is known in coal mining as a "fault," consisting of a complete loss of the vein and an obstruction in the form of solid rock. Having come to this and burrowed under it for some distance, in an effort to recover the vein, it assigned its lease to the White Oak Fuel Company by deed dated June 19, 1905. In anticipation of such purpose, a supplemental agreement was entered into by Collins, the lessor, and the White Oak Fuel Company, on the 15th day of June, 1905, by which certain modifications of the original lease were made, one of which related to the minimum royalty, the subject-matter of this proceeding. The original lease provided for the payment of 8 cents per gross ton until January 1, 1903, and thereafter a minimum annual royalty of \$8 per acre, amounting to \$8,088.90. The modification in the supplemental agreement, respecting the royalty or rent, reads as follows: "The rents and royalties to be paid by the party of the second part to the parties of the first part shall be at the rate provided in said deed of lease, except that no minimum royalty shall be paid so long as the fault in existence in said Whipple mine is a hindrance and obstacle to its successful operation. But after said fault has been pierced and the normal vein recovered, then there shall be a minimum royalty of eight thousand (\$8,000.00) dollars per annum paid as provided in said deed of lease." The vein of coal beyond the fault was discovered not later than December,

1905. Some time before the discovery thereof, the men were taken from that portion of the mine and put to work at other points in it, but later the work there was resumed. The entry, after having been driven gradually down for some distance, had been carried from the lowest point gradually upward, and the coal was discovered above it after some explorations and tests had been made. It became necessary, then, to bring the entry up to the level of the coal, and put it in condition for use. The depression in it was from 350 to 400 feet long, and so deep as to make it impracticable for a roadway. To remedy this, the rock over the depression was shot down so as to fill it up and the surplus stone carried out. In this way the entry was raised at that point so as to conform to the bottom of the coal on each side of the fault. This done, the main entry was driven on for several hundred feet, and side entries turned from it, both to the right and the left. In the first left entry, turned near the end of the fault, the coal again became thin and practically disappeared. Two other left entries were driven in a northwesterly direction from the main entry, and there is no evidence of any obstruction in them. The first right entry, turned opposite or about opposite the first left entry, encountered an obstruction within a short distance. The second right entry was driven a distance of about 800 feet, and there the coal began to disappear. An obstruction was found in the main entry also, carried forward in a northeasterly direction, at a distance of about 1,200 feet from the first right and left entries. This extension of the main does not pursue the general course of the Collins land, which is almost due north and south. The theory and contention of the defendant are that the fault encountered in the first left, the two right, and the main entries is the same fault through which the main entry was driven; that it has not ceased to be an obstacle and hindrance to the operation of the mine; and that the normal vein has not been recovered in the full and substantial sense of the terms used in the contract. Expert mining engineers gave their opinion, based upon a geologic theory, that the fault is due to an elimination of the carboniferous matter, while in a viscous state and condition, by a current of water which cut out a channel, after the manner of rivers and creeks, into which there was a later deposit, now forming the rock. In other words, they say such faults were produced by a stream or current which washed away the coal ingredients or matter, and the winding space thus made through that substance was afterwards filled with a different kind which became solid rock. In conformity with this theory, they expressed the opinion that the fault, so created, continues through the land in a northerly direction, and constitutes the obstructions now found in said side and main entries. These and other witnesses further testify that the

operation of the mine and output of coal are seriously retarded by it. It has narrowed the field of operation, rendering it impossible to work as many crews and as large numbers of miners as are necessary to the mining of enough coal to justify the payment of the large minimum royalty stipulated for. In opposition to this contention, lack of evidence of obstruction in the second and third left entries, indicative of free and untrammelled opportunity to mine in that direction, and failure to carry the main entry in the direction of the main body of the leased land, are insisted upon. Just when the work at the fault, called, in the record, the "rock heading," abandoned some time in 1905, was resumed, does not appear. The minimum royalty prior to October 1, 1907, is not demanded; plaintiff conceding exemption therefrom until that date. From the time the mine was purchased by the defendant until October 1, 1907, more than two years elapsed, and from the time of the discovery of the vein at the end of the fault until said 1st day of October, 1907, more than 18 months. In that period, some coal was necessarily taken from the Collins land, as the work beyond the fault already mentioned was done. This was paid for at the rate of eight cents per ton. The lease permitted coal from some adjacent tracts belonging to other persons to be brought out through the Collins land. There was no cessation in the operation of the mine, but the mining in the Collins land was light. On the 1st day of May, 1907, an explosion occurred in an entry, carried to the left through the Collins land, and into a tract known as the "Thurmond Land." It took place in the Thurmond entry and on the Thurmond land. The defense based upon the explosion is that for several months thereafter nervousness and fear on the part of miners deterred them from working in this mine, and rendered it impossible to keep enough of them at work in it to carry on the operations in the manner and to the extent contemplated or desirable.

An important element in the case is the construction of the suspension or exemption clause in the supplemental agreement. On this question very divergent views are expressed in the argument. The defendants claim contact with the fault, defined and understood as described by its witnesses, anywhere in the Collins land, no matter how far distant from the point at which it was originally encountered was contemplated and will work a suspension of the minimum royalty. This conclusion is reached by placing particular stress upon the words "no minimum royalty shall be paid so long as the fault in existence in said Whipple mine is a hindrance and obstacle to its successful operation." On the other hand, the plaintiff says no obstruction other than that already encountered at the time of the execution of the supplemental agreement, or at any other place, was contemplated, and that on the ac-

complishment of a passage through it at that point and recovery of the normal vein the suspension should cease. This rests upon the following terms: "But after the said fault has been pierced and the normal vein recovered then there shall be paid the minimum royalty," etc. We think the phrase "in existence" must be interpreted as relating to what was known to the parties at the time it was used. The obstruction in the main entry as it stood at the date of the supplemental agreement was the only fault then known. How far it extended and in what direction could not have been definitely known. While we think the phrase "in existence" must be limited to the obstruction at that point, we are also compelled to say that it must extend to the limits of that obstacle in the main entry at that point. This harmonizes with the other terms used in the first clause, exempting from the payment of royalty "so long as the fault * * * is a hindrance and obstacle" to the successful operation of the mine. The next clause stipulates the conditions under which the exemption should terminate, and the fault cease to be a hindrance and obstacle. These consequences were to ensue upon the piercing of the fault and recovery of the normal vein. If, therefore, the lessee pierced the fault and recovered the normal vein, the conditions calling for resumption of the payment of the minimum royalty were accomplished, and, once accomplished, we do not think a subsequent, distant, and wholly disconnected contact with the same fault in the further progress of the development of the mine would produce a second exemption from royalty. The contract contemplates but one suspension. There is no provision which says, after the fault shall have pierced and the normal vein recovered, there shall be another suspension or exemption. The clause does not give exemption so long as the fault exists, but only so long as it hinders and obstructs, and the terms used must be deemed to be applicable to an existing obstruction as well as an existing fault. The obstruction rather than the fault was the real subject-matter of the clause.

[7] In seeking the intention of the parties to a contract, all the provisions of the instrument, together with its purpose, the nature of the subject-matter, and the situation of the parties at the time are to be considered. All of the facts known to the parties are presumed to have entered into their negotiations, and measurably to have contributed to the final result as expressed in the contract. "It is practically impossible to state these facts in the contract, and is rarely, if ever, attempted. The court which construes the contract must therefore either disregard all the material facts which led the parties to express their intention as they did, or else admit extrinsic evidence of the surrounding facts and circumstances. In this dilemma the courts have chosen the lat-

ter alternative. It is a recognized rule of construction that the court will place itself in the position of the parties who made the contract as nearly as can be done by admitting evidence of the surrounding facts and circumstances, the nature of the subject-matter, the relation of the parties to the contract, and the objects sought to be accomplished by the contract." Page on Cont. § 1123. To the same general effect, see *Gas Co. v. Oil Co.*, 56 W. Va. 402, 49 S. E. 548; *Uhl v. Railroad Co.*, 51 W. Va. 103, 41 S. E. 340; *Armstrong v. Ross*, 61 W. Va. 38, 55 S. E. 895. The terms used in the written contract must also be construed in the light of the knowledge of the parties. All recitals and references in a deed in any way descriptive of the property are read and construed in the light of the state and condition of the property as it was at the time, unless some other time is expressly referred to. *Barbour et al. v. Tompkins*, 58 W. Va. 572, 52 S. E. 707, 3 L. R. A. (N. S.) 715; *Martindale on Convey.* § 91. If a deed or contract contain references to a certain thing or object and it is afterwards disclosed that there were two or more such objects, one of which was known to the parties and the others unknown, the language is applicable only to that which was known. *Armstrong v. Ross*, 61 W. Va. 38, 55 S. E. 895. Theoretically and scientifically it may be true that this fault holds a sinuous or serpentine course through the coal field or the land of the lessor, and may be encountered at different places in the prosecution of mining operations, but this could not have been a matter of certain knowledge to the parties. Nothing known to them indicated what course or direction the fault pursued from the point at which it was discovered. All they knew at the date of the contract was its presence and its character at the particular point at which it had been encountered. Anything in addition to this would then have been mere surmise and conjecture. If we could suppose a purpose to anticipate the possibility of subsequent contact with the same fault, we find nothing in the terms of the exemption clause, indicating intention to make such provision.

[5] On the contrary, it deals only with what was then known to the parties, and indicates belief on their part that the piercing of the fault and recovery of the normal vein would free them from its effect. These terms impliedly negative intent to make provision for contact or obstruction at other and remote places within the leased territory. The interpretation of the words "pierced" and "recovered" must, however, be reasonable. Mere discovery of the vein on the opposite side of the fault would amount to a piercing and recovery in a practical and substantial sense. The parties must have intended the allowance of a reasonable time in which to put the mine beyond the fault in a workable and productive state. As to this,

there seems to be no difference of opinion. The lessor allowed more than 18 months in which to fill up the depression, put the main entry in condition for transportation of coal through it, and extend the entries into the coal lying beyond.

The respective claims and contentions of the parties and the material facts have now been sufficiently shown to enable us to consider some of the additional errors assigned. Exception was taken to the action of the court in admitting the evidence of certain witnesses, relating to the time required to overcome the obstruction. The competency of these witnesses to express their opinions upon that question is entirely clear. They were both practical mining engineers, and had personally inspected the defendants' mine and particularly the rock heading or fault, and knew its extent and character. Treating their evidence as expert testimony, it was clearly admissible. *Redd v. Carnahan*, 65 W. Va. 330, 64 S. E. 138; *Delmar Oil Co. v. Bartlett*, 62 W. Va. 70, 59 S. E. 634; *Sebrell v. Barrows*, 36 W. Va. 212, 14 S. E. 996; *McKelvey v. Railroad Co.*, 35 W. Va. 500, 14 S. E. 261. In support of this assignment, the attorneys for the defendants in error have said very little in their brief, a circumstance from which we infer that at the time the exception was taken it was based largely upon the construction of the clause we have just interpreted. If their view of it were the true one, this evidence might have been inadmissible, for, if the fault had not been pierced nor the normal vein recovered, it might have been prejudicial to allow the lessor to prove a lapse of time necessary for the performance of work which did not amount to a piercing of the fault or recovery of the vein. Under our conclusion as to the force and effect of the clause, however, this argument fails.

The defendants requested a peremptory instruction to find for them, which the court refused. Upon their motion, it gave six other instructions, five of which fairly submitted to the jury the question whether the fault had been pierced and ceased to be a hindrance to the successful operation of the mine, and the other one the additional question whether the explosion of May 1, 1907, was an unavoidable accident, and delayed the shipping of coal from the leased premises for any portion of the period for which the plaintiff claims rent, and in each of those relating to the fault told the jury to find for the defendant, if it had not ceased to be a hindrance, and, in the other, told them they might take the fact of delay by the explosion into consideration. At the instance of the plaintiff, the court gave seven instructions, three of which relate to the fault, and the others to credibility of witnesses, burden of proof, the explosion, and diligence on the part of the lessee in the operation of the mine. All of these were objected to, but the brief takes no notice of any except those

three which relate to the fault. The criticism upon these three instructions has been substantially disposed of in the construction of the exemption clause of the supplemental agreement. It rests largely upon the construction put upon that clause of the contract by the defendants. As their interpretation has failed, the criticism likewise fails.

[6] A further objection is made to one of them on account of its form. Though binding in form, it takes no notice of the defense based upon the explosion. This objection is also without merit, since the evidence of delay, resulting from the explosion, does not cover the whole period for which the rent is claimed. It did not make out a complete defense. All that it tends to prove could be conceded and yet there would necessarily be a verdict for the plaintiff. This instruction does not deal with the amount of the recovery. It simply tells the jury that, if they should find for the plaintiff upon the issue respecting the fault in the mine, they should render a verdict for him. It relates to the right to recover, not the amount of the recovery.

We think the defendants' peremptory instruction was properly refused. The evidence shows completion of the main entry through the fault and progress of the same for at least 1,200 feet beyond it. Though the fault was again encountered in the first left entry, in the first and second right entries and in the main entry at its terminus, it does not appear that any obstruction was found in either the second or third left entries. The jury may well have inferred that by a deflection of the main entry toward the north, so as to carry it up through the main body of the plaintiff's land instead of in the direction of the southeast line, the mine could have been operated much more successfully and to the limit contemplated by the parties. It does not appear, therefore, that the fault continued to be necessarily a hindrance or obstacle to successful operation. It is not to be supposed that either the lessee or the lessor contemplated the leaving of vast quantities of coal in the mine in the neighborhood of the fault, if it does continue its course through the land. That the lessee has been advancing its entries so as to obtain the coal up to the fault on each side, after having passed through it, so as to obtain all of the coal in that part of the mine, does not signify a continuation of the obstruction, nor impossibility of driving entries in other directions so as to work larger numbers of men and obtain larger quantities of coal. The lease gives right and imposes obligation to take out all the coal in the land that is reasonably susceptible of profitable mining. Hence it was both the right and duty of the lessee to take out the coal in the neighborhood of the fault, and its work in that part of the mine argues no impossibility of larger operations in other parts. In view of this we perceive ample room for the jury

to say the lessee is simply exercising discretion, allowed it by the contract, as to method of operation. We have already said the defense asserted under the clause providing for relief on the ground of unavoidable accident does not cover the entire period nor constitute a complete defense.

The evidence introduced under the defense of unavoidable accident, if sufficient to prove delay from that cause, and not negated by any evidence to the contrary, would reduce the amount of the recovery, and justify the action of the court in setting aside the verdict, since the jury allowed the whole amount sued for. But there were circumstances tending strongly to disprove the statement that men could not be induced to work in the mine after the explosion. Just where the accident occurred is not clearly shown, but it must have been at least 600 or 700 feet from the main entry running through the lessor's property, and, 2,500 or 3,000 feet from the region beyond the fault or rock heading in which the larger body of the plaintiff's coal lies. The explosion occurred on the 1st day of May, 1907, five months before the date from which the minimum royalty is demanded. The witnesses testifying on this subject do not pretend to claim any delay on account of the explosion for a period of more than six months, and they are not as positive and specific as they might be in dealing with the reluctance of men to work in the mine. They specify no particular instance of refusal to work in that part of the mine. Besides, operations were carried on in the mine immediately after the explosion. It is a shaft mine, and the shaft is not more than 600 or 700 feet distant from the scene of the explosion. The men must have gone into and out of the mine by means of that shaft. In April, May, and June, 1907, 17,456 gross tons were taken out of the mines, nearly one-half of which came out in the months of May and June. In July, August, and September, 25,551 gross tons were taken out. In this last quarter, the quantity mined was not greatly less than the amount taken out in the quarter immediately preceding the explosion. We think these facts and circumstances made the effect of the explosion upon the operation of the mines on and after October 1, 1907, a question for the jury.

What we have said here on the subject of the peremptory instruction applies to the motion to set aside the verdict as being unsupported by the evidence or against the preponderance thereof. In sustaining it the trial court erred.

These conclusions result in the reversal of the order setting aside the verdict, reinstatement of the verdict, and rendition of judgment thereon in favor of the plaintiff in error for the sum of \$6,113.64, with interest on said sum from the date of the verdict, the

14th day of February, 1910, until paid, and judgment for his costs in the court below, as well as his costs in this court.

(69 W. Va. 282)

**WELCH LUMBER CO. v. PAGETON
LUMBER CO. et al.**

(Supreme Court of Appeals of West Virginia.
May 2, 1911.)

(Syllabus by the Court.)

1. COURTS (§ 252*)—REVIEW—JURISDICTIONAL AMOUNT.

If the distributable share of a creditor, in a suit to wind up the affairs of a copartnership, be less than the sum necessary to give jurisdiction, this court will not entertain his appeal from a decree denying him such distributive share.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 252.*]

2. APPEAL AND ERROR (§ 266*)—REVIEW—OBJECTIONS NOT RAISED BELOW.

Error, not apparent on the face of a commissioner's report, taken in connection with the pleadings, or which might be affected by extraneous evidence, will not be available as error in this court, unless the report has been excepted to on that ground in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1552-1571; Dec. Dig. § 266.*]

Appeal from Circuit Court, McDowell County.

Bill by the Welch Lumber Company against the Pageton Lumber Company and others. Judgment for plaintiff, and defendants the Graham Grocery Company and America Franklin appeal. Affirmed.

Ritz & Ritz, for appellants. T. F. Heritze and Anderson, Strother & Hughes, for appellee.

MILLER, J. This was a suit to wind up the business of the defendant B. R. Myers, trading as Pageton Lumber Company. His debts, secured and general, and their priorities, were ascertained and decreed, and his assets marshalled and distributed in accordance with sundry reports of a commissioner, to whom the cause was referred.

The defendants, Graham Grocery Company, an execution creditor, and America Franklin, administratrix of Henry L. Franklin, deceased, the latter, in her petition, filed, asserting a lien on the funds in the hands of the special receiver, prior to all other creditors, have appealed.

The commissioner, by his several reports, in effect, at least, reported, and the court decreed, that the first lien on said funds was the deed or deeds of trust of the Welch Lumber Company; the second, the lien by execution, of the Graham Grocery Company. The commissioner also reported the execution of the Graham Grocery Company the first lien on all property of said Pageton Lumber Company, not covered by plaintiff's deeds of trust.

The lien of the Welch Lumber Company, so reported and decreed, was largely in excess of the net proceeds of the sale of the lumber in the hands of the special receiver for distribution, and the court by the two decrees appealed from, the first of October 3, 1908, the other of July 8, 1909, though not in specific terms, yet in effect, confirmed the several reports of the commissioner, and directed that the balance of the money in the hands of the receiver, after payment of costs, expenses and counsel fees allowed, should be paid to plaintiff on account of its trust debt.

The commissioner in his final report, at the request of M. O. Litz, attorney for America Franklin, administratrix, also reported, "that there is due the estate of said Franklin from the Pageton Lumber Company, the sum of \$732.80, as shown by the statement of said M. O. Litz, which is herewith returned." He did not, however, report this debt a lien, and it was not decreed a lien on the funds in the hands of the special receiver. Litz's statement, or evidence, before the commissioner, was purely hearsay, was objected to, as incompetent, which in fact it was. In her petition, or answer, the administratrix alleged said debt to be six hundred dollars, not seven hundred and thirty-two dollars and eighty cents, as found by the commissioner. Litz says, that he had mislaid the papers at the time of preparing said petition, and that he estimated the amount.

The findings of the commissioner in his first and second reports, as to the liens and their priorities, were not excepted to, either by appellants or appellees. The decree of October 3, 1908, so finds, and decreed distribution to plaintiff of the larger portion of the funds in the hands of the special receiver. It appears from recitals in this decree, however, that a third report, by agreement of counsel, was made up by the commissioners in open court, and filed on the same day. It is to be inferred from this decree and the arguments presented here that the agreement was, that the commissioner should make up the report on the pleadings and proofs already filed in the cause. He reported, however, that in order to ascertain the fact directed by the court to be inquired into and reported he had taken the deposition of Purcell, which he filed with his report. From this evidence he "finds and reports that the lumber taken over by the receiver in this cause was manufactured either from the logs mentioned in said deeds of trust in favor of Welch Lumber Company, or from timber mentioned in certain timber contracts referred to and embraced in said deeds of trust or some of them."

To this report and the reading of the deposition of Purcell thereon the decree recites there were exceptions indorsed on the report, but by whom the decree does not say. We find in the record, however, following the report, an exception signed by counsel for appellants, excepting thereto, "in so far as it

attempts to report any property belonging to the Pageton Lumber Company, which went into the hands of receiver in this case as being covered or affected by the deeds of trust set up by the Welch Lumber Co., there being no evidence to justify such finding." The report shows also counsel for appellants was present at the taking of the deposition of Purcell, cross-examined the witness, and that no exceptions were noted to the testimony. Without passing upon this exception, the decree for the fourth time re-committed the cause to the commissioner for the purpose of taking proof, and directed him to report what property went into the hands of the special receiver; whether any property other than that covered by the deeds of trust went into his hands; whether the logs mentioned in the deeds of trust were converted into lumber after the execution thereof; whether the lumber manufactured from said logs went into his hands, and whether any lumber which went into the hands of the special receiver was sawed from timber or logs other than those mentioned in said deeds of trust.

In his fourth report, the commissioner reports his inability to ascertain all the facts called for in said decree. He refers to his report filed at a former term, in which he says he reported as nearly as he could, from the evidence, all property of the Pageton Lumber Company, and the value thereof, which had been taken over by the special receiver. He reports that a few logs cut from the lands of R. L. Johnson were not covered by said deeds of trust, but that all other logs, except those, came from the Franklin land, and were covered by the deeds of trust; also that a portion of the lumber was manufactured after the execution of the deeds of trust, and that all the timber at the mill at the time the receiver was appointed went into his hands. He was unable to report what quantity of lumber was manufactured after the deeds of trust were executed, or what logs were cut and hauled in after that time, or what logs were on the skidways at that time, that were afterwards cut into lumber and went into the hands of the receiver; he was of the opinion that it would be impossible to get information that would be sufficiently definite to report these facts. Another fact reported is that the receiver took possession of three horses levied on, under executions in favor of the Graham Grocery Company, and Henritze & Henritze, as the property of the Pageton Lumber Company. He does not report whether these horses were or were not covered by the deeds of trust. This report was excepted to by no one.

By the final decree of July 8, 1909, the cause was brought on to be heard upon the several reports of said commissioner, and it recites that, "upon consideration whereof the court doth hereby confirm the said report * * * except as herein otherwise

decreed." While "report" is used in the singular, we must interpret this decree as a confirmation of all the reports, treated as one. In effect it is so. It finally disposes of all the matters in controversy.

This is a very incomplete and unsatisfactory record. To arrive at correct conclusions and to do exact justice between the parties is next to impossible. We can only do the best we can, consistent with established rules of practice, and with due regard to the findings of the commissioner, and the several decrees of the court below thereon.

[1] We will first dispose of the appeal of the Graham Grocery Company. The commissioner in his second report, reports the judgment of this company a first lien upon all the property of the defendant company, not embraced in said deeds of trust; in the fourth, that the horses levied on were turned over by the constable to the special receiver. The special receiver, in his report, has accounted for the proceeds of the sale of two horses, one at forty dollars, the other at sixty dollars. What became of the other it is not shown in the record. From the description given by the constable of one of them it is not unlikely he has gone the way of all the earth. The decree filing this report of the special receiver, directs him to sell all the remaining property and assets of the Pageton Lumber Company. In his final report, confirmed by the decree of July 8, 1909, he reports the sale of no other horse. Presumptively all the property left in his hands had then been sold and disposed of, and so far as we are permitted to see from the record before us, there was no other property shown or reported, not subject to the first lien of the plaintiff company. The first item of disbursements with which the special receiver is credited in his report is: Paid Greenwalt, Justice, costs in the case of Graham Grocery Company against Pageton Lumber Company, \$20.43. There may be other items not apparent properly chargeable against the proceeds of the sale of the horses levied on. If we should find, however, that the Graham Grocery Company was entitled to all the proceeds of the sale of these horses, its distributable share would be less than the sum necessary to give this court jurisdiction of their appeal. *Wees v. Elbon*, 61 W. Va. 380, 56 S. E. 611, and cases cited.

Next what disposition shall we make of the appeal of America Franklin, administratrix? Her petition and answer claims a lien upon the funds in the hands of the special receiver. No seller's lien was specifically reserved in the contract exhibited with her petition. This contract, a deed under seal, granted and conveyed standing timber, with right to the purchaser to enter upon the land, and to occupy it, to the exclusion of the grantors, with mills, houses and other

structures necessary to successfully operate the land for the timber thereon, and to store the manufactured lumber. One hundred dollars was paid down on the price, and an additional one hundred dollars was to have been paid, and so far as we know was paid, at the time the mill was set on the land, these sums to be deducted from the first one hundred thousand feet of lumber sawed, at the prices stipulated per thousand feet, to be determined by measurements by log rule at the small end of the log. Whether under this contract, or under the rules and principles applied in *Wiggin v. Mankin*, 65 W. Va. 219, 63 S. E. 1091, *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432, and *Curtin v. Isaacson*, 36 W. Va. 391, 15 S. E. 171, a lien existed, for the unpaid purchase money for the timber, asserted in appellants' petition, we need not, and do not decide, for in our view of the case, as presented, the decree below must be affirmed, on another ground.

[2] That ground is, that Mrs. Franklin did not except to the reports of the commissioner, finding specifically, or in effect, that the plaintiff's deeds of trust constituted the first lien on the proceeds of the sale of the lumber and timber. Our decisions hold that where a commissioner's report is confirmed without exception this court will not look into the evidence on which it was founded, or by which it might be effected, but will accept the findings of the commissioner as to all the facts depending on extrinsic evidence, as final and conclusive. *Long v. Willis*, 50 W. Va. 341, 40 S. E. 340; *Bank of Union v. Nickell*, 57 W. Va. 57, 62, 49 S. E. 1003; *Gay v. Lockridge*, 43 W. Va. 267, 27 S. E. 306, and cases cited. It is quite true that an error apparent on the face of the report of a commissioner, taken in connection with the pleadings, which can not be affected by extraneous evidence, may be corrected, even in this court, though not excepted to in the court below; but if it depends on extrinsic evidence, to be available as error here, the report must have been excepted to in the lower court. *Bank v. Shirley*, 26 W. Va. 563; *Bank v. Wilson*, 25 W. Va. 242; *Bank v. Nickell*, supra; *Haymond v. Murphy*, 65 W. Va. 616, 64 S. E. 855.

The result of these considerations is that the decree below must be affirmed.

(60 W. Va. 271)

DEMPSEY v. NORFOLK & W. RY. CO.
(Supreme Court of Appeals of West Virginia.
May 2, 1911.)

(Syllabus by the Court.)

1. TRIAL (§ 156*)—DEMURRER TO EVIDENCE.

In considering a demurrer to evidence a proper test is whether the evidence would sustain a verdict for the party as to whose evidence the demurrer is entered, if one was returned by the jury and there was a motion to set it aside. If a verdict against the demurrant

could not properly be set aside, there should be a judgment against him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.*]

2. RAILROADS (§ 378*) — TRESPASSERS ON TRACK—INFANTS.

It is the duty of a locomotive engineer to look out for helpless trespassers on the track, so far as may be consistent with other duties of his position, and when he observes a child of irresponsible age on the track to take reasonable precaution for its safety.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 378.*]

2. RAILROADS (§§ 359, 378*) — INJURY TO CHILD NEAR TRACK—NEGLIGENCE.

It is negligence, binding the railway company, for a locomotive engineer, when his other duties do not demand attention and the situation permits a view, to fail to observe a child of irresponsible age walking by the side of the track and in dangerous proximity thereto, or, when he does observe it and has distance in which to stop, to undertake to run a rapidly moving train by the child in that position.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1239, 1281, 1282; Dec. Dig. §§ 359, 378.*]

Error to Circuit Court, Mingo County.

Action by James A. Dempsey, administrator, against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Holt & Duncan, for plaintiff in error.
John S. Marcum and John L. Stafford, for defendant in error.

ROBINSON, J. A child sixteen months old was injured by a freight train of the defendant company so that it died. An administrator sued for damages in the premises. On the trial, defendant demurred to the evidence, the jury ascertained damages at \$1,500, and the court overruled the demurrer and entered judgment for plaintiff.

Two distinct grounds are submitted for a reversal of the judgment. First, it is asserted that negligence on the part of defendant has not been established. Second, the point is made that the injury resulted from the contributory negligence of the parents and that the same is imputable to the child.

[1] The real question with which we must deal, in the determination of the propositions presented to overthrow the judgment, is this: If the jury had found a verdict for plaintiff on the evidence taken from their consideration by the demurrer, would it be proper to set aside the verdict? In other words, could a jury have found from the evidence a warranted verdict for the plaintiff? If a verdict so found could not be sustained on motion to set it aside, then the judgment on the demurrer is erroneous; otherwise, it is not. *Kelley v. Railroad Co.*, 58 W. Va., at page 221, 52 S. E. 520, 2 L. R. A. (N. S.) 898. See, also, 4 Enc. Digest, Va. & W. Va., 540.

We have carefully considered the evidence. A verdict for plaintiff founded on it could

not properly be disturbed. A finding of negligence on the part of defendant is sufficiently warranted. The case is very nearly controlled by *Gunn v. Railroad Co.*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

A jury reasonably could have believed that the child was on the track at the time the train was approaching, or so close to the track that the engine or cars were sure to endanger it. One reasonable inference is that the child wandered from its home near the railway, across the east bound track, to the space between the double tracks, and was toddling along that narrow, dangerous space in the direction its sister and other children had gone only a few minutes earlier. Again, it may be said that the little foot prints leading to the railroad, the place where the injured body was found immediately after the train had passed, and the time that elapsed after the child left the mother's sight, reasonably prove that the child was on the east bound track when the train was approaching, or across that track in the narrow space between the two tracks. These facts and circumstances place the child in a position where other evidence tends to prove that it was in full view from the engine when nearly 1,400 feet away. True, for a small part of this distance, portions of the engine, because of a curve, would cut off the engineer's view. But we deem this immaterial. There is evidence tending to establish that the distance from which the engineer first could see the child was one sufficient in which to stop the train before reaching it. The engineer testifies that he was looking ahead while running this distance and that he saw no child on the track. But a jury could say that the facts and circumstances proved in relation to the child's position contradict the engineer's testimony. They could refuse to give his testimony credibility. Besides, the engineer does not say that he did not see the child walking by the side of the track. He invariably speaks of the track itself and not the space between it and the other track. A jury could reasonably believe that he was purposely not contradicting the facts and circumstances from which it may be inferred that the child was in that space at the time he says he was looking ahead. The time that the child had been out of the mother's sight was too short, as may well be inferred, for it to have been at some hidden point beyond the other track and to have come from its hiding and approached the train after the engine had passed. And there are other reasonable inferences which may be drawn from the evidence, supporting a conclusion that the child was either on the track or in the dangerous space between the tracks at the time the engineer first could see it. It may have been on the track and some part of the engine have pitched it where it lay. The engineer

says he was looking ahead. He says he saw no child "on the track." A reasonable conclusion from the evidence, disregarding the credibility of the engineer as a jury could do, is that he did see the child on the track. At no time in his testimony does he directly contradict the fact that he did not see the child between the tracks. One may accept his statement that he did not see it on the track and reasonably conclude that the engineer saw the child between the tracks and took the risk of running by it.

The conductor, who was riding in the cab at the time, says he was looking ahead. But there is a proved admission by him which contradicts his testimony in this particular. Singularly enough he also refers only to the fact that he saw no child "on the track." He does not say that he did not see the child between the tracks. The testimony of the fireman is that he saw no child "on the track," but he does not know whether he was looking ahead at this particular place or engaged in firing the engine. A brakeman also was in the cab, but he is not produced as a witness. The cab was occupied by these four persons. Another reasonable inference that a jury could use in contradicting the testimony of the crew, if indeed it needs contradiction, is that they were engaged in conversation and attention to each other. They had just left a station. There the conductor and brakeman had joined the engineer and fireman in the cab. It was a natural time for comment and discussion.

[2] It was the duty of the engineer to observe this child, and to stop. 11 Enc. Digest, Va. & W. Va., 573; 2 Wood on Railroads, 1267. He was not engrossed in duties which took his eyes from the track. He insists he was looking ahead. The weather conditions were evidently good for observation at a distance, and the light pink dress of the child was favorable as a mark clearly to be seen. If the child was on the track, he could not assume that it would get off. That rule as to adults does not apply to irresponsible looking children. If the child was walking between the two great tracks of this railway line, it was likewise the duty of the engineer to take no risk in passing it with the swiftly moving machinery and cars. He was chargeable with knowledge that an infant in such a position is likely to become bewildered and to take a step to its injury. Even adults cannot safely stand near a rapidly moving train. Grease on the child's body and clothing indicated that it might have been struck by the sides of the engine or cars. We do not know how it came to injury. But pregnant is the fact that the child was on or very near the track when the train approached and that the engineer was derelict in not observing its danger and protecting it. That the train injured the child is certain. Why did not the engineer

protect it, if he was looking ahead as he says?

[3] Clearly was it negligence to undertake to run a great fast train by this little boy, if the reasonable inference that the engineer undertook that risk is adopted. A cautious man would not do so. He would know that the excitement and confusion would, in a sense, blind the child and cause its fall to injury. To undertake to run by a child in such a place would seem quite as reckless as to rely on a child's leaving the track when on it ahead of an approaching train. The law does not permit the latter, nor will it justify the former. The certain danger because of the immaturity of the child affords the reason in either instance. It is not any particular position of the child that excuses the engineer from failure to stop. The probability of injury, though the child may be wholly off the track, must impel him to stop when circumstances reasonably indicate that injury may happen if he does not do so.

Now, as to the alleged negligence of the parents. It suffices to say that they have not been shown guilty of such negligence as would bar a recovery, even were we to approve the doctrine of imputed negligence, which defendant would have us apply. As to that doctrine we express no opinion. In this case "there was not that omission of ordinary care as persons of ordinary prudence deem adequate care with their children." *Gunn v. Railroad Co.*, supra.

On the demurrer to the evidence, the trial court properly adopted the inferences and conclusions most favorable to the party whose evidence was thereby taken from the jury. These inferences and conclusions were not overcome by any decided preponderance of probability and reason against them. The demurrer was rightly overruled, and judgment against the demurrant entered. The judgment will be affirmed.

NOTE.

I. HEARING AND DETERMINATION IN GENERAL.

[a] The only question for the consideration of the court, on a demurrer to evidence, is whether the evidence supports the issue or not; and the judgment is that it does, or does not, support it.

—(U. S. 1826) *United States Bank v. Smith*, 24 U. S. (11 Wheat.) 171, 6 L. Ed. 443; (Conn. 1795) *Gates v. Nobles*, 1 Root, 344; (Va. 1825) *Humphrey's Adm'r v. West's Adm'r*, 8 Rand. 516.

[b] (Ark. 1842) In case of a demurrer to the evidence, it is error for the court to retain the jury, and, after overruling the demurrer, have the damages assessed by the same jury. A new jury should be summoned for that purpose.—*Obaugh v. Finn*, 4 Ark. (4 Pike) 110, 37 Am. Dec. 773.

[c] (Fla. 1852) Where the evidence is so loose, uncertain, and indeterminate that no verdict could be rendered upon it by a jury, the court, upon a demurrer to such evidence, should not give judgment, but set aside the demurrer, and

award a venire de novo.—Higgs v. Shehee, 4 Fla. 382.

[d] (Fla. 1895) When the evidence demurred to is conflicting, loose, and indeterminate, and there is no statement on the record making it certain, though there be a joinder in the demurrer, it is error to give judgment thereon.—Fee v. Florida Sugar Mfg. Co., 36 Fla. 612, 18 South. 853.

[e] (Fla. 1905) A demurrer to the evidence is to be taken most strongly against the demurrant.—Mugge v. Jackson, 50 Fla. 235, 39 South. 157.

[f] (Fla. 1905) It is not the province of a demurrer to the evidence to bring before the court an investigation of disputed facts, but it is intended to state and admit the facts which the adverse party attempts to prove, and not merely the testimony which may conduce to prove them; and where a demurrer to evidence violates these principles, and a judgment is rendered therein by the trial court, it will be reversed and a new trial awarded.—Mugge v. Jackson, 50 Fla. 235, 39 South. 157.

[g] (Ga. 1853) When defendant demurs to plaintiff's evidence, it is his right to demand the judgment of the court as to the law arising from the testimony; and, if the demurrer be sustained, a nonsuit should be awarded.—Gray v. McNeal, 12 Ga. 424.

[h] (Ind. 1856) On demurrer to the evidence, the court is bound to do against the defendant all that the jury might reasonably have done.—Griggs v. Seeley, 8 Ind. 264.

[i] (Ind. 1873) The judgment rendered on a demurrer to the evidence is substantially the same as a final judgment on demurrer to the complaint or answer.—Lindley v. Kelley, 42 Ind. 294.

[j] (Ind. 1882) On demurrer to evidence, the demurrant cannot make admissions in his own favor and thereby have them influence the determination of a dispute as to the facts. If he wishes to set up any facts in his favor, he must resort to the jury to have them established.—Plant v. Edwards, 85 Ind. 588.

[k] (Ind. 1884) Where a demurrer to a complaint has been overruled, and a demurrer to plaintiff's evidence has been filed, in considering the demurrer to the evidence, defects in the pleadings cannot be taken into consideration.—Bish v. Van Cannon, 94 Ind. 263.

[l] (Kan. 1904) A demurrer to the evidence raises the question of the legal sufficiency of the evidence to sustain the issue of fact in support of which it is offered.—Coy v. Missouri Pac. Ry. Co., 69 Kan. 321, 76 Pac. 844.

[m] (Miss. 1835) A demurrer to evidence presents an issue in law, and it is error for the court, on overruling the demurrer, to award a jury trial.—Hall v. Browder's Adm'rs, 5 Miss. (4 How.) 224.

[n] (Tex. 1873) If plaintiff demur to the evidence of defendant, and defendant join in the demurrer, the question of fact on the evidence is cast on the court. On appeal, the court will render such judgment as the testimony warrants.—Stephens v. Hix, 38 Tex. 656.

[o] (Vt. 1904) The purpose of a demurrer to the evidence is not to bring before the court an investigation of facts in dispute, nor the weight of evidence, but to refer to the court questions of law arising on the facts as ascertained.—Bass v. Rublee, 76 Vt. 395, 57 Atl. 965.

[p] (Va. 1806) On a demurrer to evidence, an unconditional verdict is not error, provided the demurrer be afterwards determined by the court.—Bigger's Adm'r v. Alderson, 1 Hen. & M. 54.

[q] (Va. 1825) After the demurrer is joined, the jury may either be discharged, and, if the judgment is that the evidence does not support the issue, a writ of inquiry will be awarded, or the jury then impeached may assess condi-

tional damages.—Humphrey's Adm'r v. West's Adm'rs, 3 Rand. 516.

[r] (Va. 1827) A demurrer to the declaration was filed, and also a demurrer to the evidence. The jury found a verdict for plaintiff, subject to the opinion of the court on the demurrer to evidence. The court decided that the demurrer to the declaration was insufficient, and rendered judgment for plaintiff. *Held*, that this must be considered as a judgment on the demurrer to the evidence in favor of plaintiff.—Holman v. Gilliam, 6 Rand. 39.

[s] (Va. 1904) Where the evidence is such that the jury might have found the issues in favor of the party against whom a demurrer to the evidence is interposed, the court must so find on the demurrer.—Chesapeake & O. Ry. Co. v. Pierce, 103 Va. 99, 48 S. E. 534.

[t] (Va. 1905) After issue was joined on the plea of not guilty in an action for negligence, defendant obtained leave to file a plea of limitations, and liberty was granted plaintiff to reply. Defendant during vacation filed the plea, but no issue was taken by plaintiff. Plaintiff's counsel obtained for the first time on the argument of the demurrer to the evidence knowledge of the existence of the plea, and he was taken by surprise. *Held*, that the court of its own motion should have set aside the demurrer to the evidence and the award of damages thereon, and caused issues to be made up on the plea, and ordered a new trial.—Norfolk & W. Ry. Co. v. Coffey, 104 Va. 665, 51 S. E. 729, petition for rehearing set aside, 52 S. E. 367, 104 Va. 665.

[u] (Va. 1905) Where, in an action for personal injuries, the evidence as to plaintiff's alleged contributory negligence is conflicting, and defendant, by demurring to the evidence, withdraws that question from the consideration of the jury, the court must find plaintiff not guilty of contributory negligence, if the jury might have so found.—Lane Bros. & Co. v. Bott, 104 Va. 615, 52 S. E. 258.

[v] (W. Va. 1886) Where defendant demurred to plaintiff's evidence, which showed that defendant was guilty of the negligence which caused plaintiff's injury, but further proved that plaintiff was guilty of contributory negligence, the court should sustain defendant's demurrer, or ought, on motion of defendant, to exclude from the jury all of plaintiff's evidence.—Gerity's Adm'r v. Haley, 29 W. Va. 98, 11 S. E. 901.

[w] (W. Va. 1887) If a demurrer to evidence be so negligently framed that it does not contain the necessary facts on which a judgment on the merits can be safely founded, and the court, from the facts appearing on the record, judicially knows that other evidence exists, within the reach of the parties, by which the omitted facts may be supplied, the demurrer should be set aside, and a new trial awarded.—Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. 888.

[x] (W. Va. 1887) The whole proceeding upon a demurrer to evidence is under the control of the judge before whom the trial is had; and if, owing to a mistake or other causes, a material fact be omitted, without which the merits of the case cannot be decided, the demurrer should be set aside, and a new trial awarded; and this may be done on motion of either of the parties, or by the court itself before final judgment.—Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. 888.

[y] (W. Va. 1887) When it has been shown, or by the record it appears to the court, that a demurrer to evidence should be set aside, and a motion for that purpose has been made and improperly overruled, and the court afterwards renders judgment on such demurrer in favor of the party making such motion, the error in overruling such motion is prejudicial to both par-

ties, and the party against whom such judgment on the demurrer was rendered may, upon writ of error, have the same reversed, the demurrer set aside, and a new trial awarded.—*Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

[z] (W. Va. 1904) A demurrer to evidence should be overruled, though the evidence in favor of the demurree may be weak, unless on some decisive point the evidence in favor of the demurrant decisively preponderates over the evidence as to that point in favor of the demurree.—*Barrett v. Raleigh Coal & Coke Co.*, 55 W. Va. 395, 47 S. E. 154.

II. CONSIDERATION OF EVIDENCE IN GENERAL.

[a] A demurrer to evidence admits all facts of which there is any evidence, and all conclusions and inferences which can fairly and logically be drawn from such facts.

—(U. S. 1808) *Pawling v. United States*, 8 U. S. (4 Cranch) 219, 2 L. Ed. 601; (1826) *United States Bank v. Smith*, 24 U. S. (11 Wheat.) 171, 6 L. Ed. 443; (1826) *Fowle v. Common Council of Alexandria*, 24 U. S. (11 Wheat.) 320, 6 L. Ed. 484; (1830) *Thornton v. Bank of Washington*, 28 U. S. (3 Pet.) 36, 7 L. Ed. 594; (Ala. 1829) *Carrington v. Caller*, 2 Stew. 175; (1855) *Bryan v. State*, 26 Ala. 65; (Fla. 1852) *Higgs v. Shehee*, 4 Fla. 382; (1887) *Hanover Fire Ins. Co. v. Lewis*, 23 Fla. 193, 1 South. 863; (Ill. 1871) *Fent v. Toledo, P. & W. Ry. Co.*, 59 Ill. 349, 14 Am. Rep. 13; (1881) *Pennsylvania Co. v. Conlan*, 101 Ill. 93; (1882) *Morris v. Indianapolis & St. L. R. Co.*, 10 Ill. App. (10 Bradw.) 389; (Ind. 1871) *City of Indianapolis v. Lawyer*, 38 Ind. 348; (1874) *Strough v. Gear*, 48 Ind. 100; (1877) *Bailey v. Boyd*, 59 Ind. 292; (1877) *Peabody v. Peabody*, Id. 556; (1877) *Fouch v. Wilson*, 60 Ind. 64, 28 Am. Rep. 651; (1877) *Indianapolis, P. & C. Ry. Co. v. Caudle*, 60 Ind. 112; (1877) *Newhouse v. Clark*, Id. 172; (1878) *Indianapolis, P. & C. Ry. Co. v. Goar*, 62 Ind. 411; (1879) *Atherton v. Sugar Creek & P. Turnpike Co.*, 67 Ind. 334; (1881) *Trimble v. Pollock*, 77 Ind. 576; (1882) *Indianapolis & V. R. Co. v. McLin*, 82 Ind. 435; (1884) *Bethell v. Bethell*, 92 Ind. 318; (1885) *Lake Shore & M. S. Ry. Co. v. Foster*, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; (1886) *North British Mercantile Ins. Co. v. Crutchfield*, 108 Ind. 518, 9 N. E. 458; (Iowa, 1853) *Stanchfield v. Palmer*, 4 G. Greene, 23; (1856) *Jones v. Ireland*, 4 Iowa (4 Clarke) 63; (Ky. 1822) *Middleton v. Commonwealth*, 11 Ky. (1 Litt.) 347; (Miss. 1841) *Chewning v. Gatewood*, 6 Miss. (5 How.) 552; (1870) *Mobile & O. R. Co. v. McArthur*, 43 Miss. 180; (1870) *Raiford v. Mississippi Cent. R. Co.*, Id. 233; (Mo. 1890) *George v. Wabash Western Ry. Co.*, 40 Mo. App. 433; *Davis v. Clark*, Id. 515; (N. Y. 1802) *Forbes v. Church*, 3 Johns. Cas. 159; (1806) *Patrick v. Hallett*, 1 Johns. 241; (N. C. 1892) *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1; (Or. 1888) *Hawley v. Dawson*, 16 Or. 344, 18 Pac. 592; (Pa. 1804) *Peaceable v. Eason*, 4 Yeates, 54; (1817) *Dickey v. Schreider*, 3 Serg. & R. 413; (1859) *Tucker v. Bitting*, 32 Pa. (8 Casey) 428; (1863) *McKowen v. McDonald*, 43 Pa. (7 Wright) 441, 82 Am. Dec. 576; (Tex. 1855) *Booth v. Cotton*, 13 Tex. 359; (1894) *Galveston, H. & S. A. Ry. Co. v. Templeton* (Civ. App.) 25 S. W. 135;

(Va. 1827) *Green v. Judith*, 5 Rand. 1; (W. Va. 1875) *Miller v. Franklin Ins. Co.*, 8 W. Va. 515; (1881) *Lee's Ex'rs v. Virginia & M. Bridge Co.*, 18 W. Va. 299; (1881) *Fowler v. Baltimore & O. R. Co.*, Id. 579.

[b] On a demurrer to evidence, the party who demurs is held to admit every fact which a jury, in the exercise of a fair and reasonable discretion, could infer from the evidence; but he is not bound to admit forced and violent inferences.

—(U. S. 1821) *Jacob v. United States*, Fed. Cas. No. 7,157 [1 Brock. 520]; (1830) *United States v. Williams*, Fed. Cas. No. 16,724 [1 Ware (175) 173]; (1842) *Jones v. Vanzandt*, Fed. Cas. No. 7,501 [2 McLean, 596];

(Ind. 1836) *Wilkins v. Rue*, 4 Blackf. 263, 29 Am. Dec. 368; (1883) *Talkington v. Parish*, 89 Ind. 202; (1885) *Lake Shore & M. S. Ry. Co. v. Foster*, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; (Mass. 1839) *Copeland v. New England Ins. Co.*, 39 Mass. (22 Pick.) 135; (N. Y. 1841) *People v. Roe*, 1 Hill, 470; (Tex. 1859) *Bradbury v. Reed*, 23 Tex. 258; (Va. 1831) *Hansborough's Ex'rs v. Thom*, 3 Leigh, 147; (1835) *Clopton's Adm'r v. Morris*, 6 Leigh, 278.

[c] A demurrer to the evidence will be considered as admitting the truth of all introduced, and all fair inferences therefrom, and as waiving all the evidence of the opposite party which contradicts it, or the credit of which is impeached, and all inferences which do not necessarily flow from it.

—(Va. 1849) *Tutt v. Slaughter's Adm'r*, 5 Grat. 364; (1877) *Gillett v. American Stove & Hollow Ware Co.*, 29 Grat. 565; (1877) *Backhouse's Ex'r v. Selden*, Id. 581; (1879) *Richmond & D. R. Co. v. Anderson's Adm'r*, 31 Grat. 812, 31 Am. Rep. 750; (1881) *Creekmur v. Creekmur*, 75 Va. 430; (1882) *Orange, A. & M. R. Co. v. Miles*, 78 Va. 773; (1895) *Johnson's Adm'r v. Chesapeake & O. Ry. Co.*, 91 Va. 171, 21 S. E. 238; (W. Va. 1877) *Stolle v. Aetna Fire & Marine Ins. Co.*, 10 W. Va. 546, 27 Am. Rep. 593; (1877) *Levy v. Peabody Ins. Co.*, 10 W. Va. 560, 27 Am. Rep. 598; (1885) *Garrett v. Ramsey*, 28 W. Va. 345; (1887) *Nuzum v. Pittsburgh, C. & St. L. Ry. Co.*, 30 W. Va. 228, 4 S. E. 242.

[d] (U. S. 1842) A demurrer to evidence waives all objections to its admissibility, and admits every conclusion that may be fairly deduced from it.—*Jones v. Vanzandt* (C. C.) Fed. Cas. No. 7,501 [2 McLean, 596].

[e] (U. S. 1876) Upon a demurrer to evidence, every fact which can be reasonably inferred from the evidence is taken as admitted, and a demurrer is allowed in no case where there are facts and circumstances which tend to establish the issues.—*Miller v. Baltimore & O. R. Co.* (C. C.) Fed. Cas. No. 9,560.

[f] (Ala. 1842) On demurrer to evidence, all reasonable presumptions are to be made against the party demurring, and the court is not bound to render judgment in conformity with what should have been the verdict of the jury, but with what it legally could have been.—*Dearing v. Smith*, 4 Ala. 432.

[g] (Ala. 1842) Two persons by the name of D. were sued as partners with S., who, with one named D., suffered judgment by nil dicit, and the other denied making the note, and, on trial of the issue, a witness stated that "he had always understood that Mr. D. was a member of the firm," held, on a demurrer to the evidence, that the court was authorized to infer that the Mr. D. who pleaded was referred to by the witness.—*Dearing v. Smith*, 4 Ala. 432.

[h] (Ala. 1851) On a demurrer to evidence, the court must assume as true every fact which a jury could, with any propriety, according to the evidence, find to be true.—*Holman v. Whiting*, 19 Ala. 703.

[i] (Ala. 1858) A demurrer to evidence raises the question whether a verdict, with every inference a jury could legally draw, could be sustained.—*Bates' Adm'r v. Bates*, 33 Ala. 102.

[j] (Ind. 1872) A demurrer to evidence admits all facts and conclusions which the evidence conduces to prove. In considering a demurrer, the court must be liberal in its inferences in favor of the plaintiff, and consider every fact as proved which a jury might legally and reasonably have inferred in his favor, avoiding, however, all forced or violent inferences.—*Smock v. Henderson*, 1 Wils. 241.

[k] (Ind. 1882) A demurrer to evidence withdraws from consideration whatever in the evidence favors the demurrant, and allows all reasonable inferences to be taken against him.—*Ruff v. Ruff*, 85 Ind. 431.

[l] (Ind. 1884) On a demurrer to evidence, all intendments are against the party demurring.—*Nordyke & Marmon Co. v. Van Sant*, 99 Ind. 188.

[m] (Ind. 1884) A demurrer to the evidence is a waiver of all objections to its admissibility, and the court will infer from the evidence every conclusion that could reasonably have been inferred by a jury.—*Stockwell v. State*, 101 Ind. 1.

[n] (Ind. 1887) In considering a demurrer to the evidence the court must accept as true all facts which the evidence tends to prove, together with all such reasonable inferences as a jury might draw therefrom, and, in case there is a conflict in the evidence, only such evidence as is favorable to the party against whom the demurrer is directed can be regarded.—*Palmer v. Chicago, St. L. & P. R. Co.*, 112 Ind. 250, 14 N. E. 70.

[o] (Ind. 1892) Where, in an action against a carrier for delivering property to a person other than the consignee, the evidence tends to show that plaintiff owned the property; that the carrier, without authority, delivered it to a person other than the consignee; and that such person converted it to his own use and was insolvent—a demurrer to the evidence should be overruled, since such demurrer concedes the truth of all the facts favorable to plaintiff which the evidence tends to prove.—*Hartman v. Cincinnati, I., St. L. & C. Ry. Co.*, 4 Ind. App. 370, 30 N. E. 930.

[p] (Ind. 1894) On demurrer to the evidence, the court must accept as true all the facts which the evidence, however slight, tends to prove, and, as against the party demurring, all such reasonable inferences as the jury might have drawn from the evidence.—*Shearer v. R. S. Peale & Co.*, 9 Ind. App. 282, 36 N. E. 455.

[q] (Kan. 1885) A demurrer to evidence admits every fact and conclusion which the evidence most favorable to the other party tends to prove.—*Christie v. Barnes*, 33 Kan. 317, 6 Pac. 599.

[r] (Miss. 1873) In deciding upon a demurrer to evidence, everything which a jury might reasonably infer from the evidence demurred to is to be considered as admitted; and, when the demurrer is uncertain as to the facts proved, the court, instead of giving judgment upon it, will award a venire de novo.—*Hicks v. Steigleman*, 49 Miss. 377.

[s] (Mo. 1865) When an instruction which was asked by plaintiff in error, and was refused, is in the nature of a demurrer to evidence, every inference is to be taken most strongly against him.—*Boland v. Missouri R. Co.*, 36 Mo. 484.

[t] (Mo. 1880) Plaintiff fell into an excavation which had been maintained in front of defendant's premises for many years. Plaintiff lived on the same street. *Held*, that the inference that plaintiff knew of the excavation was not to be indulged in, on defendant's demurrer to the evidence.—*Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503.

[u] (Mo. 1886) A demurrer to the evidence admits every fact which the evidence tends to prove, or which the jurors might with propriety infer from it; and the demurrer should be allowed only when the evidence, so considered, wholly fails to prove some essential allegation.—*Noeninger v. Vogt*, 88 Mo. 589.

[v] (Mo. 1892) A demurrer to evidence in an equity case has the same effect as in a law case, and concedes every fact which such evidence tends to prove, and every inference fairly deducible from the facts proved.—*Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881.

[w] (Mo. 1893) On a demurrer to the evidence, the party on whom the burden of proof rested is entitled to the benefit of all the facts before the court at the time the instruction is given, as well as to all reasonable inferences therefrom, whether those facts were developed by plaintiff or by defendant.—*City of St. Louis v. Missouri Pac. Ry. Co.*, 114 Mo. 13, 21 S. W. 202.

[x] (Pa. 1826) On demurrer to evidence, the court are to take all the facts sworn against the demurring party as true.—*Feay v. Decamp*, 15 Serg. & R. 227.

[xx] (Pa. 1850) Where evidence is demurred to, the truth of all the evidence and all inferences which may be legally drawn from it is admitted, and the party demurring cannot impugn their truth; but the evidence must be left to the jury as in other cases, for the demurrer does not substitute the court in place of the jury.—*Davis v. Steiner*, 14 Pa. (2 Harris) 275, 53 Am. Dec. 547.

[y] (Tex. 1873) Where the plaintiff's evidence is verbal, the defendant, by demurring thereto, not only admits the facts proved, but also every material fact which the evidence tends to prove, such demurrer going to the competency, and not to sufficiency of the evidence; and the judge is to decide whether or not any competent evidence has been offered.—*Hollimon v. Griffin*, 37 Tex. 453.

[yy] (Va. 1857) On a demurrer to evidence, the court is to consider all the demurrant's evidence in conflict with that of the demurree withdrawn, the credibility of the latter's witnesses admitted, and all the facts admitted which the demurree's evidence, thus considered, proves or conduces to prove, or which may be reasonably inferred from his whole evidence, both direct and circumstantial; and if several inferences may be drawn from that evidence, differing in degrees of probability, the court must adopt those most favorable to the demurree, provided they be not forced, strained, or manifestly repugnant to reason.—*Horner v. Speed*, 2 Pat. & H. 618.

[z] (Va. 1887) In an action to recover for injuries sustained through the negligence of defendant, a motion by defendant to exclude relevant and material evidence offered by the plaintiff, on the ground that it does not establish a case of negligence against the defendant, is not an admission by defendant of the facts; but it leaves them a disputed question for the jury, and it is error for the court to exclude such evidence.—*Roberts v. Alexandria & F. R. Co.*, 83 Va. 312, 2 S. E. 518.

[zz] (W. Va. 1883) Where a party withholds evidence under his control, which would render certain a fact material to his success, the presumption is against him, on a demurrer to the evidence introduced by the adverse party.—*Heflebower v. Detrick*, 27 W. Va. 16.

III. ADMISSIONS AND INFERENCES FROM EVIDENCE.

[a] Upon a demurrer to evidence, it is to be taken most strongly against the party demurring.

—(U. S. 1808) *Pawling v. United States*, 8 U. S. (4 Cranch) 219, 2 L. Ed. 601;

(Iowa, 1853) *Stanchfield v. Palmer*, 4 G. Greene, 23.

[b] Where a party demurs to the evidence of his adversary, his own evidence, or evidence favorable to him, is not to be considered upon such demurrer.

—(Ind. 1881) *Fritz v. Clark*, 80 Ind. 591; (1882) *Ruddell v. Tyner*, 87 Ind. 529; (1882) *Adams v. Slate*, 87 Ind. 573; (1884) *Wright v. Julian*, 97 Ind. 109; (1885) *Lake Shore & M. S. Ry. Co. v. Foster*, 4 N. E. 20, 104 Ind. 293;

(Mass. 1839) *Copeland v. New England Ins. Co.*, 39 Mass. (22 Pick.) 135;

(Mo. 1888) *St. Clair v. Missouri Pac. Ry. Co.*, 29 Mo. App. 76.

[c] (Ill. 1902) A motion to instruct the jury to find the defendant not guilty is in the nature of a demurrer to the evidence, and the court, in passing on that motion, is limited to determining whether there was, or not, evidence which, if true, reasonably tended to support the plaintiff's case.—*O'Donnell v. Lake Shore & M. S. Ry. Co.*, 100 Ill. App. 424.

[d] (Ind. 1879) When either party demurs to the evidence, the demurrer must be ruled on in view of all the evidence which has been given at the time the demurrer is filed.—*Thomas v. Ruddell*, 66 Ind. 326.

[e] (Ind. 1887) Where there is a conflict in the evidence, only such evidence as is favorable to the party against whom the demurrer is directed can be considered, and that which is favorable to the demurring party is deemed to be withdrawn.—*Palmer v. Chicago, St. L. & P. R. Co.*, 14 N. E. 70, 112 Ind. 250.

[f] (Kan.) Upon a demurrer to evidence, the court cannot weigh conflicting evidence, but must assume that all the evidence demurred to is true, unless there may be some which should be excluded altogether. The sufficiency of the evidence, in law, is the only question.—(1877) *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120; (1884) *Wolf v. Washer*, 32 Kan. 533, 4 Pac. 1036.

[g] (Kan. 1894) On demurrer to the evidence, the court may strike out or disregard incompetent testimony.—*Gillett v. Burlington Ins. Co.*, 53 Kan. 108, 36 Pac. 52.

[h] (Kan. 1899) On demurrer to evidence, the court can consider only that portion which tends to prove the case of the party resisting the demurrer.—*Fuller v. Torson*, 8 Kan. App. 652, 56 Pac. 512.

[i] (Kan. 1904) When considering a demurrer to the evidence the court should not weigh the evidence to settle conflicts in it, and should not allow the motion unless it was able to say that, admitting every fact proven which was favorable to plaintiff, and everything inferable from the evidence which was favorable to plaintiff, yet he failed to make out some material fact of his case.—*Buoy v. Clyde Milling & Elevator Co.*, 68 Kan. 436, 75 Pac. 466.

[j] (Kan. 1905) On a demurrer to plaintiff's evidence, the court can take into consideration only those facts and those inferences of fact which are favorable to the plaintiff, and cannot consider defendant's evidence which tends to break down plaintiff's case.—*Missouri Can Co. v. Ross*, 72 Kan. 669, 83 Pac. 616.

[k] (Miss. 1852) Where a plaintiff, who has introduced proof on his part, demurs to the evidence of defendant, the court cannot invade the province of the jury, and find the facts

which the evidence of plaintiff conduces to prove, or institute a comparison between the facts admitted by the demurrer and those proved by the testimony of plaintiff.—*Goodman v. Ford*, 23 Miss. (1 Cushm.) 592.

[l] (N. C. 1903) In an action for the seduction of plaintiff's daughter, a demurrer to plaintiff's evidence presents the question whether the plaintiff's testimony is sufficient to sustain a finding of such loss of service as is necessary to maintain the action.—*Snider v. Newell*, 132 N. C. 614, 44 S. E. 354.

[m] (Okl. 1896) Under the provisions of St. 1890 relative to procedure, where defendant demurs to the evidence, only such evidence as tends to make out plaintiff's case can be considered, and defendant's evidence must be regarded as withdrawn.—*Jaffrey v. Wolf*, 4 Okl. 303, 47 Pac. 496.

[n] (Okl. 1903) On demurrer to the evidence, the court cannot weigh conflicting evidence.—*Edmisson v. Drumm-Flato Commission Co.*, 13 Okl. 440, 73 Pac. 958.

[o] (Tenn. 1898) Evidence unfavorable to a plaintiff will be considered on a demurrer to his evidence, if it is not shown by the other evidence to be incorrect.—*Corbett v. J. Allen Smith & Co.*, 101 Tenn. 368, 47 S. W. 694.

[p] (Va. 1839) On a demurrer by defendant to plaintiff's evidence, the court may consider, in ascertaining the facts established by any one witness, everything stated by him, as well on his cross-examination as on his examination in chief, and facts imperfectly stated in answer to one question may be supported by the answer to another.—*Ware v. Stephenson*, 10 Leigh, 155.

[q] (Va. 1839) Where defendant demurs to plaintiff's evidence, the court must look to the whole of it, to ascertain what facts the evidence establishes.—*Ware v. Stephenson*, 10 Leigh, 155.

[r] (Va. 1898) Where plaintiff's testimony was positive respecting a material fact, testimony introduced by defendant, tending to disprove the fact, will be disregarded on demurrer to the evidence.—*Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366.

[s] (Va. 1901) Where, in an action for personal injuries, the defendant demurs to the evidence, the circumstance that the evidence adduced on his behalf is in serious conflict with that of plaintiff must be disregarded.—*Watts v. Southern Bell Telephone & Telegraph Co.*, 100 Va. 45, 40 S. E. 107, 3 Va. Sup. Ct. Rep. 577.

[t] (Va. 1902) On a demurrer to evidence, demurrant is entitled to the benefit of all of his unimpeached evidence not in conflict with that of his adversary, and of all inferences that necessarily follow therefrom.—*Bowers v. Bristol Gas & Electric Co.*, 100 Va. 533, 42 S. E. 296.

[u] (Va. 1906) Under the rule applicable to a demurrer to the evidence, the testimony of a witness discredited by two witnesses to whom he had made contradictory statements, and the testimony of a witness inconsistent in itself and in conflict with his testimony before a coroner's jury should be disregarded.—*Poplin's Adm'r v. Southern Ry. Co.*, 105 Va. 514, 54 S. E. 45.

[v] W. Va. 1883) On a demurrer to evidence, the only question for the consideration of the court is whether the evidence supports the issue.—*Riddle v. Core*, 21 W. Va. 530.

[w] (W. Va. 1896) By demurrer to evidence, the demurrant does not waive any of his evidence which is competent; but where it conflicts with that of the demurree it will be regarded as overcome unless decidedly preponderant.—*Talbot v. West Virginia C. & P. Ry. Co.*, 42 W. Va. 560, 26 S. E. 311.

[x] (W. Va. 1901) On demurrer to evidence, the rule is to certify and consider the whole ev-

idence as though on motion to set aside a verdict in favor of the demurree.—*Bowman v. Dewing*, 50 W. Va. 445, 40 S. E. 576.

[y] (W. Va. 1902) On a demurrer to the evidence the demurree is not entitled to the benefit of evidence offered by him, nor to any inference to be drawn therefrom, where the evidence is incompetent, but has been improperly admitted over the objections of the demurrant.—*Huntington Nat. Bank v. Loar*, 51 W. Va. 540, 41 S. E. 901.

[z] (W. Va. 1903) Where there is a demurrer to the evidence, the court must consider the evidence on both sides as if there were a motion to set aside a verdict for the demurree, that is, discard all evidence of the demurrant conflicting with that of the demurree, or the credit of which is impeached, and all inferences which do not fairly arise from his own evidence, and as admitting all that may be fairly and reasonably inferred from the evidence of the demurree.—*Stewart v. Lyons*, 54 W. Va. 665, 47 S. E. 442.

[zz] (W. Va. 1906) On demurrer to the evidence by defendant, if the plaintiff's evidence is sufficient to sustain his case, oral evidence by defendant conflicting with that of plaintiff is ignored and the demurrer overruled, unless the oral evidence of defendant so clearly preponderate over that of plaintiff that a verdict for plaintiff would be set aside.—*Kelley v. Ohio River R. Co.*, 58 W. Va. 216, 52 S. E. 520.

(39 S. C. 41)

STATE v. JONES.

(Supreme Court of South Carolina. May 17, 1911.)

1. CRIMINAL LAW (§ 958*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—COUNTER AFFIDAVITS.

On motion for new trial for newly discovered evidence, the state may introduce counter affidavits disproving the grounds for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2402; Dec. Dig. § 958.*]

2. CRIMINAL LAW (§ 945*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—HEARING BEFORE COURT.

The court, on motion for new trial for newly discovered evidence, may relax the rules of evidence applicable to trials, leaving it to its discretion to be governed in reaching its conclusions by such evidence as legitimately should have that effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327; Dec. Dig. § 945.*]

3. CRIMINAL LAW (§ 959*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—HEARING BEFORE COURT.

The court, on motion for new trial for newly discovered evidence, is not restricted to a consideration only of the grounds brought to its attention by accused, but he must ascertain if injustice has been done, and exclude nothing which can legitimately aid it in guarding the rights of accused and the interests of the state.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 959.*]

4. CRIMINAL LAW (§ 958*)—NEW TRIAL—GROUNDS—OPPOSING AFFIDAVITS.

Where accused, convicted of the murder of his wife by strychnine poisoning, sought a new trial on the ground of newly discovered evidence, disclosing that his wife had been addicted to taking strychnine to allay nervousness, and for other specified purposes, affidavits offered

by the state to the contrary were properly considered by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2402; Dec. Dig. § 958.*]

5. CRIMINAL LAW (§ 958*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

The act of the court, on motion for new trial on the ground of newly discovered evidence, in admitting in evidence the recognizance of witnesses for accused, who will give the newly discovered evidence, is within its discretion, as bearing on accused's diligence in procuring the testimony of such witnesses at the trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 958.*]

6. CRIMINAL LAW (§ 956*)—NEW TRIAL—GROUNDS—AFFIDAVITS.

Where, on a motion for new trial on the ground of prejudice of jurors, an affiant averred that he was in the courthouse at the time of the impaneling of the jury and heard a juror express his hostility to accused, an affidavit that the affiant was absent from the courthouse at the time was properly received by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2375; Dec. Dig. § 956.*]

7. CRIMINAL LAW (§ 956*)—NEW TRIAL—GROUNDS.

On motion for new trial on the grounds of newly discovered evidence and prejudice of jurors, evidence of what occurred prior to the trial, as to remarks of counsel protesting against delay and urging a speedy trial, was properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 956.*]

8. CRIMINAL LAW (§ 940*)—NEW TRIAL—GROUNDS—AFFIDAVITS.

Where accused, convicted of the murder of his wife by strychnine poisoning, sought a new trial on the ground of newly discovered evidence that she had been addicted to taking strychnine for specified purposes, evidence of the wife's use of ergot and coppers was properly disregarded.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 940.*]

9. CRIMINAL LAW (§ 939*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE OF ACCUSED.

Where accused had witnesses present at the trial, but neglected to use them, he is not entitled to a new trial to have another opportunity to use such witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2318; Dec. Dig. § 939.*]

10. CRIMINAL LAW (§§ 938, 939, 945*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

To justify a new trial on the ground of newly discovered evidence, accused must show that the newly discovered evidence would probably have changed the result, if it had been presented to the jury; that it was not known at the time of the trial; and that by due diligence it could not have been ascertained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2308, 2318, 2324; Dec. Dig. §§ 938, 939, 945.*]

11. CRIMINAL LAW (§ 923*)—NEW TRIAL—BIAS OF JURY.

One on trial will be deemed to know whether the jurors were prejudiced against him, because he has ample opportunity to test the impartiality of the jurors, and because he knows that under Civ. Code 1902, § 2946, all objections to jurors, if not made before the jury is impaneled, are waived, and hence cannot be made ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2225; Dec. Dig. § 923.*]

and relied upon were bound over by the prisoner, and were in attendance upon the court at the time of his trial. He did not have them sworn and examined. Indeed, he put up no testimony. If they had been sworn to tell the truth, and examined, would not this secret habit of the deceased, of which they now swear that they then had knowledge, have been brought out, and the prisoner received the benefit of it? Having them present as witnesses and neglecting to make use of them, must the judgment of the court be set aside, in order that he may be offered another opportunity? To do so would be to encourage the withholding of testimony, in order that applications of this character may be made when the judgment is unfavorable. This the court ought carefully to refrain from doing." This, we think, a complete answer to this exception.

The elaborate and able arguments of the zealous counsel for the appellant deal principally with three features of the case, upon which the motion for a new trial was based, and upon which the decision of the circuit judge is assailed: (1) That the charge against the defendant being that he caused the death of the deceased, who was his wife, by administering or causing to be administered to her strychnine poison, and that he is now able and does produce a large array of witnesses who swear that to their knowledge the deceased was addicted to the habit of taking strychnine to allay nervousness, caused by her taking ergot and copperas to prevent conception and to produce miscarriages, and that she took in this way a sufficient quantity of strychnine to account for the appearance of that poison in her stomach after death. (2) The bias and prejudice of certain jurors who had formed and expressed opinions adverse to the prisoner before the trial. Incidentally the decision of the circuit judge is attacked upon other grounds, such as the admission of irrelevant testimony and the exclusion of relevant testimony, but principally upon the two grounds named.

[10] The grounds upon which new trials are granted after conviction and upon after-discovered evidence are that the said evidence must be such as would probably have changed the result, if it had been before the jury, second, that it was not known to the accused at the time of his trial, and, third, that by due diligence it could not have been ascertained. *Sams v. Hoover*, 33 S. C. 403, 12 S. E. 8.

As to the first position, is it likely or probable that the testimony contained in these affidavits on the part of the prisoner, when refuted by that embraced in the affidavits on the part of the state, would have produced a different result? It should be kept in view at all times that this, as well as other questions of a like nature, is primarily for the circuit judge, who held that the evidence would not, or at least that it

was not sufficiently strong to, justify a reversal of the judgment upon this ground. It should also be borne in mind that this evidence, if the witnesses had been interrogated, would have become known to the counsel for the defendant, who have conducted the case with unusual zeal and conspicuous ability from the beginning even unto the end. To permit one on trial to hold back evidence which he may have in his possession, or which he failed to use due diligence to obtain, and then use it as the grounds of a motion for a new trial in the event of an adverse verdict, would be destructive of the efficient administration of justice, and subversive of the rule that it is to the interest of society to have an end to litigation. For these reasons, and in obedience to the rules of law we shall refer to, we cannot do otherwise than sustain the circuit decision.

[11] We come now to the attack upon the jury—that certain jurors had formed and expressed opinions adverse to the defendant, before they were sworn upon the trial. Nothing is of more frequent occurrence than for men, upon sudden impulse or upon ex parte representations of a case, to give expression to their opinions in reference thereto, often in the most violent and feeling manner, and yet these same men, when sworn as jurors and given the opportunity to make up their minds from the evidence adduced, the arguments of counsel and the charge of the judge, and forced to act upon the solemnity of their oaths and the responsibility of their office, make the most exemplary jurors, and frequently decide in opposition to their preconceived opinions. Be this as it may, the law gives an ample opportunity to one on trial to test the impartiality of jurors by swearing them upon their voir dire, when they are invariably asked "if they have formed or expressed opinions as to the guilt or innocence of the accused"; and the accused has the opportunity of examining them upon any other matter. One upon trial is not only deemed to know everything which, by the exercise of due diligence, he might discover, but he is informed by our statute (section 2946, Code of Laws) that all objections to jurors, if not made before the jury is impaneled or charged with the trial, shall be deemed waived, and if made thereafter shall be of non effect.

[12] It must be borne in mind that the evidence on this point is not after-discovered with respect to this motion. The defendant not only knew of the objections to these jurors at the former motion for a new trial, but made it the ground of his former motion for a new trial before the judge who tried the case, excepted to his decision on this, as well as upon other, grounds, and made it the subject of appeal to the Supreme Court. As well said by the circuit judge, it is now res judicata.

[13] This rule is too well settled to be

disturbed at this late day, even if we felt inclined to do so, which we do not, that such motion, i. e., for new trial on after-discovered evidence, rests exclusively in the discretion of the circuit judge, and no appeal lies from his decision, except in the case stated below. We quote from the decision in the case of *State v. Workman*, 15 S. C. 547: "This motion was addressed to the discretion of the circuit judge, and, unless his discretion was abused, or some rule of law was violated, we have no authority to interfere," and we can also adopt the expression of the view of the court in that case as our own in this. "In this case, so far from their having been any abuse of discretion, or any violation of the rules of law, we agree fully with the circuit judge that the showing upon which the motion was based was altogether insufficient, both in form and substance." The same rule is indorsed in *State v. Nance*, 25 S. C. 174; *State v. Sweat*, 16 S. C. 624.

In the case of *State v. Don Carlos*, 38 S. C. 226, 16 S. E. 832, we have this subject very fully and very ably discussed, and feel that we cannot do better than to restate what is there set forth, reaffirm and adopt it for the purpose of this decision. Mr. Chief Justice McIver says: "In the early judicial history of this state, such motions as this seem to have been very rarely, if ever, granted, for the reason given in *State v. Harding*, 2 Bay, 268: 'That it might have a very mischievous tendency to establish a precedent of this kind, after a trial and conviction and after all the evidence on the part of the state had been fully disclosed, as it was easy to foresee that a man whose life was in danger would, in every case, even to gain time, make use of a pretext of this kind to create delay; but more especially, by the assistance of confederates, he might be enabled to procure unprincipled men to be witnesses, to contradict the evidence on the part of the state, and thereby defeat the ends of justice.' See, also, *Faber v. Baldrick*, 1 Tread. Const. 374; *Ecfer v. Des Condres*, 1 Mill, Const. 69 [12 Am. Dec. 609]; *Evans v. Rogers*, 2 Nott & McC. 563, and other authorities cited by the solicitor. Now, however, when such motions seem to be received with more favor, it is still the well-settled rule that motions of this kind should be entertained with the utmost caution, 'because, as is said by a learned judge, there are but few cases tried in which something new may not be hunted up, and also because it tends to perjury.' Per Simpson, C. J., in *State v. David*, 14 S. C. 432, citing with approval *State v. Harding*, *supra*.

"It is also well settled that a motion for a new trial upon the ground of after-discovered evidence is addressed to the discretion of the circuit judge, and unless his discretion was abused, or some rule of law was violated, this court has no authority to interfere in a case like this. *State v. Workman*, 15 S. C. 547; *State v. Nance*, 25 S. C. 174. As

was said by Mr. Justice McGowan, in the case last cited: 'In the class of cases to which this belongs (law cases), this is only a court for the correction of errors of law, and has no power to hear an original motion for a new trial upon the ground of subsequently discovered evidence, or to review the order of a circuit judge refusing such a motion, except in the single case where the circuit judge refuses to grant such a motion upon the ground that he has not the power to do so. The power to grant or refuse a motion for a new trial belongs exclusively to the circuit judge, and from his decision on the subject there is no appeal to this court.' To the same effect, see *State v. Sweat*, 16 S. C. 624, and *Hyrne v. Erwin*, 23 S. C. 231 [55 Am. Rep. 15].

[14] "The circuit judge seems to have refused this motion upon two grounds: (1) Because it was not shown to his satisfaction that the newly discovered evidence could not, by the use of due diligence, have been discovered in time to be used on the trial. (2) Because he did not think that the new evidence, if offered at the trial, could or should have influenced the result, or made it different from what it was. If the circuit judge was right in either of these conclusions, he was entirely justified in refusing a new trial, as shown by the case of *Sams v. Hoover*, 33 S. C. 403, 404 [12 S. E. 8]. Both of these grounds rest upon conclusions of fact, and therefore, under the authorities above cited, are not reviewable here. As was said in *Durant v. Philpot*, 16 S. C. 124, 'the question of diligence is one of fact,' and whether the new evidence was material was so likewise; and certainly the circuit judge, who had just heard the whole case, was much more competent to determine the question of materiality than this court could possibly be."

In the recent case of *State v. Harvey Bradford*, 87 S. C. 546, 70 S. E. 308, it is said by Mr. Justice Woods: "We are deeply impressed with the force of the affidavits made on those and other points on behalf of the defendant. Yet it cannot be doubted that some of the affidavits are cumulative, and that, if the statements contained in all of them had been admitted in evidence at the trial, there would have remained a sharp issue of fact, which might have been decided for or against the defendant according to the view taken by the jury of the credibility of the witnesses." It cannot be said, therefore, that the affidavits must necessarily lead any reasonable mind to the inference that the newly discovered evidence would probably change the result. Nothing short of this would justify the conclusion that the circuit court abused its discretion in refusing the motion. This being so, the law does not allow this court to reverse the decision of the circuit court that a new trial should not be granted. In the recent case of *Mills v. Atlantic C. L. R. Co.*, 87 S. C. 152, 69 S. E. 97, it is said: "The rule is well settled that a motion for a new

trial on after-discovered evidence is addressed to the discretion of the circuit court, and the refusal of such motion will not be reviewed, unless it appears that there was abuse of discretion, or that the exercise of discretion was controlled by some error of law. *State v. David*, 14 S. C. 432; *State v. Workman*, 15 S. C. 547; *Sams v. Hoover*, 33 S. C. 404 [12 S. E. 8]; *Seegers v. McCreery*, 41 S. C. 549 [19 S. E. 696]; *Peeples v. Werner & Co.*, 51 S. C. 405 [29 S. E. 2]. Such a motion must generally depend on matters of fact, over which this court has no jurisdiction in actions at law." The motion for a new trial was based, also, upon the alleged misconduct of the jurors in the trial of the case.

It is the judgment of this court that the decision of the circuit judge be affirmed, and the appeal dismissed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(39 S. C. 15)

MURPHY v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of South Carolina. May 11, 1911.)

APPEAL AND ERROR (§ 1123*)—AFFIRMANCE—DIVIDED COURT.

In an action against a railroad for injuries to a yard conductor crushed between cars through alleged negligent switching of other cars, held, by a divided court, that a judgment of nonsuit was proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4421-4427; Dec. Dig. § 1123.*]

Appeal from Common Pleas Circuit Court of Greenville County; Robt. Aldrich, Judge. "To be officially reported."

Action by J. P. Murphy against the Atlanta & Charlotte Air Line Railway Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Jas. A. McCullough, for appellant. Cothran, Dean & Cothran, for respondent.

WOODS, J. Under the facts set out in the opinion of Mr. Justice HYDRICK, I think the judgment of nonsuit was proper for these reasons:

First. There was no evidence whatever that Corn, plaintiff's subordinate, had any reason whatever to even suspect that the plaintiff or any one else would be between the cars on track No. 3, or that any injury would result from running the cars on that track, and it was therefore not negligence toward the plaintiff or any one choosing to take a position between the cars for Corn, who was temporarily in charge of the train, to treat the instruction to enter track No. 2 first and track No. 3 afterwards as a di-

rection allowing him discretion in handling the cars.

According to the well-established rule as to negligence and proximate cause, the test was whether by the exercise of ordinary care Corn ought to have foreseen that any injury might reasonably be anticipated from his act of backing the train on track No. 3. *Harrison v. Berkeley*, 1 Strob. 550, 47 Am. Dec. 578; *Mack v. South Bound R. R. Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; *Hale v. Columbia, etc., Ry.*, 34 S. C. 293, 13 S. E. 537; 29 Cyc. 495. There are vital differences between this case and *Trimmer v. Atlanta & C. A. L. Ry.*, 81 S. C. 203, 62 S. E. 209. In that case there was evidence of a switch negligently left open, and the backing of the cars on a track where the conductor Allison was walking in the discharge of his duty with his back to the car that ran on him. Those in charge of shifting cars always have reason to suspect that other employes may be on or near the tracks in the yards of a railroad company, and for that reason must be on the lookout for such persons. So it was held in that case that there was some evidence of negligence to go to the jury. On the contrary, in this case there was no reason whatever for Corn to suppose that Murphy or any one else was between the cars. Surely it cannot be that a railroad company before moving the cars must be on the lookout for persons who choose to go between its cars entirely out of sight of its employes operating the train. This conclusion that there was no negligence on the part of Corn makes testimony as to his competency irrelevant.

Second. Even if negligence towards the plaintiff could be attributed to Corn, the evidence admitted of no other inference than that the plaintiff was guilty of contributory negligence in that he undertook to cross between the cars on track No. 3, knowing that they were likely to be struck and moved by other cars at any moment, and did not look nor take any other precaution for his own safety. According to the plaintiff's own testimony, if he had looked, he could not have failed to see the approaching cars.

The court being equally divided, the judgment of this court is that the judgment of the circuit court be affirmed.

HYDRICK, J. On September 11, 1907, plaintiff was a yard conductor in defendant's employ at Greenville. It was his duty, with the aid of a switching crew, to make up trains. There were four side tracks connecting the main line and what is called the lead track. These were numbered 1, 2, 3, and 4, counting from the main line toward the lead track. The train being made up stood on the lead track, and the cars were being placed in the side tracks for the purpose of assembling them together according

to their destination, and so arranging them in the train. Seven or eight cars had been placed on No. 3, and some on No. 2. There were none on Nos. 1 and 4. Plaintiff was on the lead track, and had cut loose some cars from the train, preparatory to placing them on the side tracks, but having a call of nature, he handed his switch list to the head brakeman, C. K. Corn, the man next under him in authority, and told him to switch the cars for track No. 2 to that track first, and then switch those for No. 3 to that track. Having given those orders, he proceeded across track 4 and was climbing over the bumpers between two cars about midway the seven or eight standing on track No. 3, when they were struck by cars which were run in on that track, and plaintiff was knocked down, and his leg was run over and crushed, so that it had to be cut off. Plaintiff's purpose was to get between tracks 2 and 3, where he would be hid from view by the cars on those two tracks. That was the nearest and most convenient place for him to get out of sight of people passing along the main line. The nearest privy was something over a quarter of a mile away. By walking the length of three or four cars, he could have gone around the cars, instead of climbing over the bumpers between them. He said, however, that he thought it perfectly safe to go between them, because he expected Corn to obey his instructions and switch the cars for No. 2 to that track first; and, if he had done so, it would have been safe, and he would not have been hurt. He said, also, that was the proper way for the switching to be done.

Plaintiff proved that Corn had been discharged from the service of the company twice, in March and October, 1903, for carelessness, and that he had the reputation of being careless. He proved also by F. C. Worley, a former general yardmaster, that some time in 1904 he was short of hands and wanted to employ Corn; that his superior officer objected to his doing so, and he carried the matter to the trainmaster, who had authority over him in such matters; that he, too, disapproved of his employing Corn. Upon objection of defendant's attorneys, the court refused to allow Worley to state the reasons given by the trainmaster for his disapproval. This witness also said that Corn had the reputation of being a dangerous man when drunk, but all right when sober.

The specifications of negligence are: (1) In backing the cars on track No. 3 first, contrary to plaintiff's instructions. (2) In backing the cars on track No. 3, without warning or signal to plaintiff. (3) In employing an incompetent fellow servant. (4) In failing to provide a suitable privy. At the close of plaintiff's testimony, defendant moved for a nonsuit on the following grounds: "(1) There is no testimony tending to establish the negligence alleged in the

complaint as the proximate cause of plaintiff's injury. (2) The evidence shows that the cause of plaintiff's injury was his own negligence. (3) The evidence shows that the cause of plaintiff's injury was the negligence of a fellow servant. (4) The evidence shows that plaintiff's injury was due to his own contributory negligence. (5) The evidence fails to show that plaintiff's injury was due to the actionable negligence of the defendant." The court granted the motion, holding: (1) That there was no evidence of negligence, because there was no evidence that Corn knew or had any reason to believe that his changing the order of shifting the cars on tracks 2 and 3 would probably result in injury to any one; (2) that, if there was, it was the negligence of a fellow servant, for which the master was not liable; (3) that the evidence as to the incompetency of Corn related to his discharge from the service of the company six years ago, but that he was afterwards employed and there was no evidence of any complaint after the last employment; furthermore, that plaintiff's witness had testified that he was competent when he was sober, and there was no evidence that he was drunk on the occasion in question; (4) that plaintiff was guilty of contributory negligence in going between the cars on track No. 3, when he knew that cars were likely to be backed in on that track at any moment, and because plaintiff said he could have seen the engine and cars coming in on that track, if he had looked, but that he did not look.

The first assignment of error is in refusing to allow the witness Worley to say what reasons were assigned by defendant's trainmaster for his refusing to allow him to employ Corn. The contention of respondent that this exception cannot avail appellant, because it does not appear what the witness would have said is untenable, because, on respondent's objection, the court would not allow him to say anything as to the reasons assigned. The master owes a duty to each of his servants to exercise reasonable care in the selection of all other servants for their mutual protection. If he fails to discharge that duty, and a servant is injured as a proximate result, the master is liable, unless the injured servant waived his right to hold the master liable by continuing in the service after knowledge of the failure. Where the master is charged with negligence in the employment of an incompetent servant, the inquiry whether the master knew, or ought from the circumstances to have known, of the servant's incompetency, is one of vital importance. It was therefore relevant to the issue to show that defendant knew through its trainmaster, the person who had authority to employ him, of Corn's incompetency, or of his reputation for carelessness, and the declaration of the trainmaster was competent to prove the fact, first, because it

showed knowledge on the part of the company; and, second, because the declaration was made in the act of refusing him employment. It was therefore made within the scope of the trainmaster's authority, gave character to his act, and was admissible as part of the *res gestæ*. *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661.

The most important question, however, is whether there was any evidence tending to prove the specifications of negligence alleged; for it matters not what Corn's reputation was and had been, if he was careful on the occasion in question. So the real question is: Could more than one inference have been drawn from the testimony as to Corn's conduct on this occasion? If so, then the question should have been submitted to the jury. It would not be proper to intimate any opinion as to what the proper inference should be, for that is exclusively the province of the jury; but clearly the evidence is such that more than one inference can be reasonably drawn from it, and therefore the jury should have been allowed to say what the proper inference was. In *Trimmier v. Ry. Co.*, 81 S. C. 203, 62 S. E. 209, Allison, a freight conductor, carried his train into the yard at Spartanburg. He heard orders given that a certain train in the yard should be placed on track No. 4. In the discharge of his duties, he was either standing or walking on track No. 1, when he was struck and killed by the train which, according to the orders given, should have been switched to track No. 4. The court held that the question of negligence was properly submitted to the jury. In this case, it may have been reasonably inferred from the testimony that Corn knew where plaintiff was going and for what purpose; at any rate, that he knew that plaintiff was only temporarily absent, and that he was somewhere on the yard. Therefore, in view of the circumstances and of the instructions given Corn by the plaintiff, it should have been left to the jury to say whether plaintiff had the right to assume that his orders would be obeyed, and that the cars would be placed on track No. 2 before any were placed on track No. 3, and therefore whether he had a right to assume that it would be safe for him to climb over the bumpers between the cars on track No. 3; in other words, whether plaintiff and Corn acted as ordinarily prudent persons would have acted under the circumstances. It is not necessary that Corn should have reasonably foreseen the consequences of his act. *Bodie v. Railway*, 66 S. C. 302, 44 S. E. 943; *Pickens v. Railway*, 54 S. C. 503, 32 S. E. 567; *Harrison v. Berkley*, 1 Strob. 525, 47 Am. Dec. 578.

This being so, the next question is: Whether, if Corn was guilty of negligence, his relation to plaintiff was such as to prevent a

recovery on the ground that plaintiff was injured by the negligence of a fellow servant. When it appears that the offending servant was incompetent, and that his incompetency was known, or ought, by the exercise of due diligence, to have been known to the master, and that his incompetency was the proximate cause of injury to another servant, a prima facie case of liability is made out against the master. In *Hicks v. Railway*, 63 S. C. 559, 575, 41 S. E. 753, the court said: "We see no reason why it should not be prima facie evidence of negligence to employ an incompetent servant as well as to furnish defective machinery. Nor do we see why a servant should be held to assume the risk of negligence on the part of an incompetent fellow servant when he does not assume the risk arising from defective machinery, especially since it has been decided that the word 'appliances' includes the persons necessary to operate the machinery." Whether Corn was in fact incompetent, and, if so, whether his incompetency was the proximate cause of plaintiff's injury, were questions which should have been left to the jury.

But it is argued that Corn's reputation in 1903 and 1904 ought not to have been admitted upon the question of his competency in 1907—three years later. Why not? The testimony was competent. Its weight and sufficiency were for the jury, not the court. Moreover, the plaintiff did not confine his testimony to Corn's reputation in 1903 and 1904; but said generally that he had the reputation of being careless, without saying to what particular time he referred. The testimony was therefore competent, and it was for the jury to say to what time the plaintiff referred; and, even if they found that he referred to his reputation in 1903 and 1904, still it was for them to say what weight it should have.

Reversed.

GARY, A. J., concurs with HYDRICK, J.

JONES, C. J. I favor affirmance for the reasons stated by the circuit court in granting nonsuit, and because there was no prejudicial error in ruling as to admissibility of testimony.

(39 S. C. 11)

TIMMONS et al. v. BOYD et al.

(Supreme Court of South Carolina. May 11, 1911.)

1. CONTRACTS (§ 68*)—PURCHASE BY JUDGMENT CREDITOR FOR BENEFIT OF DEBTOR—CONSIDERATION.

The withdrawal of an answer alleging payment of a judgment interposed by an heir of the judgment debtor in a suit to revive the judgment and the allowance of the revival of the judgment are a sufficient consideration to support the judgment creditor's promise to pur-

chase the land under the judgment, and allow the heir to pay the price and receive a conveyance for life, and, after her death, to any other heirs of the judgment debtor.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 68.*]

2. CONTRACTS (§ 187*)—AGREEMENT BY JUDGMENT CREDITOR TO PURCHASE FOR THE BENEFIT OF THE DEBTOR—ENFORCEMENT—RIGHTS OF THIRD PERSONS.

Under the rule that a third person may enforce a valid contract made for his benefit, the coheirs on the heir's death could enforce the judgment creditor's agreement.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

3. CONTRACTS (§ 187*)—AGREEMENT BY JUDGMENT CREDITOR TO PURCHASE FOR THE BENEFIT OF THE DEBTOR—ENFORCEMENT—RIGHTS OF THIRD PERSONS.

Where a judgment creditor purchased the land under the judgment, pursuant to an agreement to allow an heir of the deceased judgment debtor to pay the price and receive a conveyance for life and after her death to other heirs of the debtor, a tender by the heir of the amount due fixed her rights and the rights of the coheirs, and the coheirs on her death, being ready and willing to make good the tender, could enforce the contract made for their benefit by the heir, and a failure to enforce the contract while the heir remained in possession did not defeat an action by the coheirs.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

Appeal from Common Pleas Circuit Court of Williamsburg County; R. W. Memmlinger, Judge.

Action by Mary J. S. Timmons and another against M. L. Boyd and another. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

Kelley & Hinds, for appellants. Gilland & Gilland and Lee & Fishburne, for respondents.

HYDRICK, J. This appeal is from an order sustaining a demurrer to the complaint herein, which, omitting unnecessary details, alleges: That S. B. Green died in 1832 seised of a certain tract of land in Williamsburg, containing 1,300 acres. That judgment had been rendered against him in the court of common pleas for said county in 1837 in favor of Sarah A. Steele for \$285. That D. Z. Martin became the owner of said judgment, and in 1885 caused a summons to be issued out of said court, directed to the heirs of S. B. Green, requiring them to show cause why said judgment should not be revived. That issue was thereupon joined by the filing of an answer by Margaret Julia Green, one of the heirs, pleading payment among other things. That said issue was pending until February, 1887, when, in consideration of the withdrawal of her answer and of her consenting to the revival of said judgment, said Martin agreed, in writing, with said Margaret Julia Green as follows: That said tract should be sold under said judgment and bought by him for the amount due thereon, and he would allow her to pay him the

purchase money, with interest, and convey the same to her for life, and after her death to any child or children of said S. B. Green living at the time of her death, but, if there were none such, then said tract should revert to said Martin. That, pursuant to the agreement, the land was sold in December, 1887, and bought by Martin for \$455, the amount then due on the judgment, and said Margaret Julia Green remained in possession thereof until her death in 1905. That in June, 1885, she tendered Martin the amount due him under the contract in compliance therewith, but the tender was refused. That plaintiffs are and have ever been ready and willing to make good said tender. That at the death of Margaret Julia Green, the plaintiff Mary J. S. Timmons and Annie E. Skinner, who has since died, leaving the other plaintiffs as her heirs, were the only living children of S. B. Green. That Martin died in 1908, leaving a will of which the defendants Boyd and Tisdale are executors, and by which he devised all his real estate to the defendants. Judgment for specific performance of the contract was prayed for. The defendants demurred to the complaint for insufficiency, on the ground that it appears therein: (1) That said agreement was without consideration. (2) That plaintiffs were not parties to the agreement or privies to the consideration thereof, and have no right to enforce it, there being no mutuality therein. (3) That plaintiffs are barred by laches. (4) Because it does not appear that plaintiffs are or have been in possession of said land and have themselves offered to comply with said contract, and their offer has been refused. The demurrer was sustained on all the grounds stated.

[1] The withdrawal of her answer and allowing the judgment to be revived without further contest was sufficient consideration to support the agreement alleged to have been made by Martin with Margaret Julia Green. In *Corbett v. Cochran*, 3 Hill, 41, 30 Am. Dec. 348, the court said: "The consideration to support an agreement need not of necessity be a pecuniary one, nor even a beneficial one, to the person promising. If it be a loss, or even an inconvenience to the promisee, the relinquishment of a right as the discharge of a debt, or the postponement of a remedy, as the discontinuance of a suit, or a forbearance to sue, it is enough."

[2] A third person may enforce a valid contract made for his benefit. *Duncan v. Moon*, Dud. 332; *Brown v. O'Brien*, 1 Rich. 270, 44 Am. Dec. 254; *Harris v. Railroad Co.*, 31 S. C. 87, 9 S. E. 690.

[3] When Margaret Julia Green tendered Martin the amount due him, she did all that the agreement or law required her to do to fix her rights and those of the plaintiffs thereunder. From that time she could safely rest upon her possession of the land, and

was bound to do nothing more, until some attempt was made by Martin or those claiming under him to disturb her possession. Why should she have incurred the trouble and expense of a litigation with Martin so long as he refrained from interfering with her right to the possession during her life? 22 A. & E. Ency. L. 1059 et seq.; 16 Cyc. 174; Orthwein v. Thomas, 127 Ill. 554, 21 N. E. 430, 4 L. R. A. 434, 11 Am. St. Rep. 159. Her continued possession under the contract in the face of Martin's legal title was ripening and strengthening her claim to the land, and his acquiescence therein was correspondingly weakening his. There was therefore as much if not more reason for him to act than for her. Until her death, the other parties for whose benefit the contract was made could take no steps to enforce it, because, until that event occurred, it was not certain who would be entitled to the benefit of the contract. The tender made by Margaret Julia Green inured to the benefit of all parties who were or might be interested in the contract. Therefore it was not necessary for plaintiffs to make another tender. They allege that they are and have ever been ready and willing to make good the tender which was made for their benefit as well as for that of Margaret Julia Green, and that is enough.

Reversed.

JONES, C. J., WOODS, J., and GARY, A. J., concur.

(28 S. C. 576)

STONE v. MAHON.

(Supreme Court of South Carolina. May 9, 1911.)

1. QUO WARRANTO (§ 54*)—PROCEEDINGS—PLEADINGS—ADMISSIONS.

Where the return is not traversed in proceedings to require cause to be shown why one occupies a public office, the facts alleged therein must be taken as true.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 61; Dec. Dig. § 54.*]

2. JUDGES (§ 2*)—CREATION AND ABOLITION OF OFFICE—POWERS OF CITY—ABOLITION OF MUNICIPAL COURT.

A city can repeal an ordinance enacted pursuant to statute establishing a municipal court, though an officer of such court was thereby ousted from office before the expiration of the term for which he was elected.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 2.*]

Appeal from Common Pleas Circuit Court of Greenville County; S. W. G. Shipp, Judge.

Proceeding by Richard G. Stone against G. H. Mahon to require cause to be shown why defendant occupies a public office. Order discharging the rule to show cause, and plaintiff appeals. Appeal dismissed.

The following is the opinion of Shipp, J., of the court below:

"On the 25th day of March, 1909, upon affidavit of Richard G. Stone, hereto attached, I issued the rule against G. H. Mahon, requiring him to show cause before me at my chambers at the courthouse at Greenville, S. C., on the 30th day of March, 1909, by what authority he exercises and enjoys the office of recorder of the police or municipal court of the city of Greenville, reference to which affidavit and rule is hereby craved.

"It will be observed that in his affidavit said Richard G. Stone states that he was elected by the city council of Greenville on the 21st day of September, 1907, to the office of recorder of the police or municipal court for the city of Greenville for a term of four (4) years, in accordance with the provisions of an act of the General Assembly of said state, entitled 'An act to establish municipal courts, to define the powers and jurisdiction of such courts and to provide for the conduct of business thereof in cities over twenty thousand and not exceeding fifty thousand inhabitants,' approved on the 26th day of February, A. D. 1902; that he duly qualified and was duly commissioned and entered upon the duties of said office, etc. He further charges that the said G. H. Mahon thereafter 'usurped said office of recorder and claims to exercise the duties thereof.'

"Said G. H. Mahon answered said rule, and, among other things, denies that he is now exercising the duties of the office of recorder, and states that he is mayor of the city of Greenville, and as such presides over the police or municipal court, without compensation, at the request of the council.

"He further alleges that the office of recorder or municipal court of Greenville was abolished by an ordinance of the city council of Greenville on the 22d day of September, 1908, which ordinance repealed the ordinance of August 8, 1907, establishing said municipal court, which said ordinance, it is alleged, was passed in pursuance of an act of the Legislature, approved on the 19th day of February, 1904, authorizing the establishment of a municipal court in cities whose population is not less than 4,000 and no more than 20,000.

"The return further states that the city of Greenville obtained its charter under the general law providing for incorporation of a city under 20,000 inhabitants, and that, as a matter of fact, at the time the ordinance was passed, establishing the municipal court for the city of Greenville, and now, the said city has less than 20,000 inhabitants.

[1] "The return further alleges that after the ordinance was passed, repealing the ordinance establishing said court, the plaintiff, without protest, vacated his office and has since appeared before the said mayor's court in several cases, representing the defendant, and has never objected to the jurisdiction of said court. There is no tra-

verse of the return of the mayor, and the facts alleged must therefore be considered as true.

"Counsel for respondent concedes that if the said Richard G. Stone held his office under the act of 1902, by which the Legislature itself established municipal courts in cities of over 20,000 people, that the city council of Greenville had no authority, by ordinance or otherwise, to interfere with the provisions of said act. They contend, however, that the said municipal court was not established by the Legislature under that act, but was established by ordinance in pursuance of the act of 1904, and which declared that: 'It shall be lawful for the city council of any city in this state whose population by the last census is not less than four thousand and not more than twenty thousand, * * * by an ordinance duly enacted, to establish in such city a municipal court for the trial and determination of all cases arising under the ordinances of such city.'

"They further contend that, inasmuch as the Legislature does not itself establish the court or create the office, but has delegated the power to certain municipalities therein mentioned, the Legislature impliedly recognizes the general right of a municipality to repeal all ordinances enacted by it, and that in this case the said ordinance was repealed.

"It is my opinion that the ordinance establishing the municipal court for the city of Greenville and creating the office of recorder was passed in pursuance of the provisions of the act of 1904, and the said Richard G. Stone did not, therefore, hold his office under the act of 1902, as contended for by him.

[2] "I am further of the opinion that the municipal authorities of Greenville, having by ordinance established said court, had the right to repeal said ordinance, if in their judgment the public interest so demanded.

"The fact that the effect of this ordinance was to oust the plaintiff from the office which he held before the expiration of the term for which he was elected does not render this legislation on the part of the city council invalid.

"The rule is thus concisely stated in *Mechem on Public Officers*, page 467: 'Where the Legislature has conferred upon a municipal board the authority to create offices, the board may abolish the offices so created, though the term of the incumbent has not expired.' See, also, *Cyc.* 28, page 401, and *Cooley's Constitutional Law*, page 332.

"In the case of *Councilmen v. Brawner*, 100 Ky. 70, 37 S. W. 951, the Supreme Court of Kentucky uses this language: 'And we know no reason why the municipal legislature that has, in the exercise of discretion given by the General Assembly, established a city office, may not, at will and at its pleasure, abolish it.'

"To sustain the same position, see *Abbott on Municipal Corporations*, page 1532; *State*

v. Jennings, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 725; *Downey v. State*, 160 Ind. 578, 67 N. E. 450; *Mechem on Public Officers*, pages 296, 297; *Cooley's Constitutional Law*, pages 53, 332; *Ford v. Board of Commissioners*, 81 Cal. 28, 22 Pac. 280, where the following language may be found: 'So when the people directly, or through the Legislature, clothe any department of the government, or any of its boards or officers, with power, at discretion, to create an office, they clothe it with the like power to abolish the same office. The counsel for the defendant have cited cases from more than half of the states in the Union in support of this proposition that the power which creates an office may abolish it, without regard to the expiration of the term of the incumbent.'

"It is contended, however, that under the Constitution of 1895, delegating to the Legislature the authority to create inferior courts, the Legislature had no power to delegate this duty to a municipal corporation. If this contention be correct, then the act of 1904, conferring upon municipalities under 20,000 the right, by ordinance, to establish said court, was unconstitutional, and the ordinance passed in pursuance thereof was unconstitutional, and there has never been a municipal court for the city of Greenville, and the said Richard G. Stone has never held the office of recorder.

"The rule further alleges that the said Richard G. Stone, after the passage of the ordinance of September 22, 1908, repealing the ordinance of August 8, 1907, which established the municipal court for the city of Greenville, vacated said office without protest, and has since acquiesced by practicing in the mayor's court or the police court, presided over by the defendant, and without objecting to its jurisdiction. There seems to be authority for this position, but the views herein above expressed render it unnecessary to consider this question.

"It is therefore ordered that the rule heretofore issued by me be discharged."

Croft, Aiken & Croft and Cothran, Dean & Cothran, for appellant. Jos. A. McCullough, for respondent.

GARY, A. J. This is a proceeding in which a rule was issued, requiring the defendant to show by what authority he discharged the duties of the office of recorder, in the city of Greenville.

The facts are fully stated in the order of his honor, the presiding judge, discharging the rule to show cause, and his conclusion is fully sustained by the authorities which he cites. The authorities cited by his honor, the circuit judge, are not in conflict with the case of *Hardy v. Reamer*, 84 S. C. 487, 68 S. E. 678.

Appeal dismissed.

WOODS, J., did not sit in this case.

(155 N. C. 205)

BROWN v. HUTCHISON et al.

(Supreme Court of North Carolina. May 11, 1911.)

1. BOUNDARIES (§ 39*)—ASCERTAINMENT—TRIAL—TRANSFER.

Where an action to ascertain a boundary is brought before the clerk under the direct provisions of Revisal 1905, § 326, and the issue of title is raised, the cause should be transferred to the superior court.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 39.*]

2. EVIDENCE (§ 353*)—DEEDS—ADMISSIBILITY.

While an unregistered deed is not competent evidence of title, yet it passes title which will be completed by registration, and as Revisal 1905, § 980, contains no limitation as to when a deed shall be registered, simply invalidating it against purchasers or creditors until registered, a deed, not registered until after the commencement of an action, is competent evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404-1431; Dec. Dig. § 353.*]

3. EJECTMENT (§ 9*)—TITLE OF PLAINTIFF.

To maintain an action involving the title of land, plaintiff must have title at the commencement of the action, as well as at trial.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

4. EJECTMENT (§ 13*)—TITLE TO SUPPORT—EQUITABLE TITLE.

An equitable title will support an action of ejectment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 56-58; Dec. Dig. § 13.*]

5. ADVERSE POSSESSION (§ 73*)—NATURE—COLOR OF TITLE.

One not the grantee may show color of title to land under a registered deed validly conveying title from the state.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 73.*]

6. ADVERSE POSSESSION (§ 82*)—COLOR OF TITLE—DEEDS—RECORD.

Under Revisal 1905, § 980, providing for the registration of deeds, a plaintiff who has introduced a registered deed under which he may show color of title can introduce unregistered deeds to show color of title, where they are foreign to the title under which the opposite party claims.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 468-471; Dec. Dig. § 82.*]

7. EVIDENCE (§ 82*)—REGISTRATION—SUFFICIENCY.

The certificate of a justice appended to a certain deed was not signed by him, though in the following form: "I, F. M. Adams, a justice of the peace, do certify," etc. The certificate of the registration clerk recited that the certificate of the justice was correct, and that the deed should be registered. Revisal 1905, § 1002, does not expressly require the certificate of the justice to be subscribed by him, but merely prescribes that a certain form shall be followed in substance. *Held*, that under the maxim, "Omnia presumuntur rite esse acta," the certificate of the justice will be presumed to be correct, for the probate of a deed is a judicial act, and the presumption is that the probate and registration are correct.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. § 82.*]

8. REGISTERS OF DEEDS (§ 5*)—PERFORMANCE OF DUTIES.

An order by the clerk for the registration of a deed is a continuous order, and it is the

duty of the register to act at any time until the deed shall have been fully recorded.

[Ed. Note.—For other cases, see Registers of Deeds, Dec. Dig. § 5.*]

9. EVIDENCE (§ 353*)—DEEDS—ADMISSIBILITY.

An original deed which purports to have been registered and properly certified by a justice of the peace is admissible in evidence to show that the certificate was in fact duly signed by the justice, and that the omission of the justice's name from the record was an error.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 353.*]

Appeal from Superior Court, Wilkes County; Long, Judge.

Action by A. B. Brown against J. F. Hutchison and others. From a judgment for defendants, plaintiff appeals. Error.

Finley & Hendren and W. W. Barber, for appellant. F. D. Hackett, Hayes & Jones, and Hackett & Gilreath, for appellees.

CLARK, C. J. [1] This was an action brought originally before the clerk under the processioning act (Revisal 1905, § 326), to establish a boundary line. The issue of title being raised by the answer, the cause was properly transferred for trial to the superior court at term. *Smith v. Johnson*, 137 N. C. 43, 49 S. E. 62; *Stanaland v. Rabon*, 140 N. C. 202, 52 S. E. 417; *Davis v. Wall*, 142 N. C. 452, 55 S. E. 350; *Woody v. Fountain*, 143 N. C. 69, 55 S. E. 425; *Green v. Williams*, 144 N. C. 63, 56 S. E. 549.

[2] The first exception is that the judge refused to permit the plaintiff to introduce in evidence a deed from Absher to Brown, executed in December 1859, as a part of the plaintiff's chain of title, on the ground that it was not recorded till after the commencement of the action. The exception is well taken.

[3] While it is unquestionably true that the plaintiff must have title at the commencement of the action, as well as at the time of the trial (*Burnett v. Lyman*, 141 N. C. 501, 54 S. E. 412, 115 Am. St. Rep. 691), it is not indispensable that the deed should be recorded at the commencement of the action. The delivery of the deed conveys the title which will be perfected by registration.

[4] It is well settled that the plaintiff in ejectment may recover upon an equitable title, though it was otherwise on the law side of the docket under the former system of procedure. *Condry v. Cheshire*, 88 N. C. 375, and numerous cases approving that case cited in the annotated edition, among them *Taylor v. Eatman*, 92 N. C. 610; *Geer v. Geer*, 109 N. C. 682, 14 S. E. 297; *Arrington v. Arrington*, 114 N. C. 118, 19 S. E. 278. In *Respaw v. Jones*, 102 N. C. 11, 8 S. E. 770, the court says (citing *Condry v. Cheshire*, supra): "After the execution and delivery of a deed, the estate passes out of the grantor and vests in the grantee, to be legally perfected by registration. If, before registration, the deed is lawfully destroyed, such

loss or destruction does not restore the estate to the grantor (*Dugger v. McKesson*, 100 N. C. 1 [6 S. E. 746])—adding that, though “the legal estate is not perfected till registration, when registered it relates back to its date of execution,” citing *McMillan v. Edwards*, 75 N. C. 81, and other cases. See, also, *Phillips v. Hodges*, 109 N. C. 251, 13 S. E. 769.

Chapter 147, Laws 1885, now Revisal, § 980, contains no limitation as to the time when a deed shall be registered. It simply provides that it shall not be valid against purchasers or creditors, except from the registration thereof. *Cozad v. McAden*, 148 N. C. 11, 61 S. E. 633; *Hallyburton v. Slagle*, 130 N. C. 484, 41 S. E. 877.

It is true that the instrument must be probated and registered to be competent as evidence of title. *Jennings v. Reeves*, 101 N. C. 450, 7 S. E. 897, which quotes with approval *Phifer v. Barnhardt*, 88 N. C. 333, and *Walker v. Coltraine*, 41 N. C. 79, that “it is an error to say that an unregistered deed conveys only an equity. It is a legal conveyance, which, although it cannot be given in evidence until it is registered, and is therefore not a perfect legal title, yet has an operation as a deed from its delivery.” The doctrine laid down in *Phifer v. Barnhardt*, supra, is affected by the act of 1885, c. 147, now Revisal, § 980, to this extent only, that a junior registered deed is valid from its registration in priority to a senior deed which is registered later.

His honor's action was based upon the ruling in *Morehead v. Hall*, 132 N. C. 122, 43 S. E. 542, which is not in point. In that case, when the action was begun, the grant from the state, issued in 1765, through which the plaintiff claimed, not only had not been registered, but could not have been legally registered at that time. Therefore the plaintiff could have had no title when he began his action. A subsequent act authorized the registration of the grant which at the time of the trial had been registered, but the court held that the registration could not relate back prior to the passage of the act, and validate a cause of action which did not exist when summons issued. Here the deed from Absher to Brown was valid as between them without registration, and could have been recorded at the time the action was begun. When it was registered, it related back to the delivery of the deed. The only exception to the effect of such relation back would be as to purchasers claiming under the same chain of title, or creditors.

It has been not uncommon practice, as the profession knows, that when a deed offered in a chain of title has not been registered, and therefore cannot be admitted in proof, for the parties to probate it then, and have it registered during the trial. Among many cases in which this has been recognized are *Cawfield v. Owens*, 129 N. C. 236, 40 S. E. 62; *Cook v. Pittman*, 144 N. C. 531, 57 S. E.

219, 119 Am. St. Rep. 985. This is sometimes done during a recess of the court, and there have been instances where the presiding judge, to prevent a defect of justice, in his discretion, has granted the parties time to go down to the clerk's office to probate the deed and have it registered that it may be offered in evidence.

[5] In this case the plaintiff had already introduced a grant from the state to Eli Brown, dated October, 1846, and duly registered. He could therefore have shown seven years possession under color. *Gilchrist v. Middleton*, 107 N. C. 663, 12 S. E. 85.

[6] The deeds from Eli Brown to Absher in 1855 and of Absher to Elijah Brown in 1859, and the deed from the latter's executors in 1862, recorded in 1885, were competent to show color of title. In *Janney v. Robbins*, 141 N. C. 400, 53 S. E. 863, it is held that the principle under our present registration law of 1885, c. 147, now Revisal, § 980, that an unregistered deed does not constitute color of title, does not extend to a claim by adverse possession, held for the requisite time under a deed foreign to the title, under which the opposite party claims. It is true that the plaintiff did not offer proof of possession; but he was excluded from offering the above deeds and from showing that they covered the locus in quo.

[7] The plaintiff offered to introduce in evidence a deed from the executors of Elijah Brown to himself for the locus in quo, executed in 1862 and registered in 1885. The court refused to admit the same, because the record of the certificate of the justice of the peace had omitted the signature of the justice. The certificate as recorded was as follows:

“I, F. M. Adams, a justice of the peace, do certify that James W. Brown, the subscribing witness to the foregoing deed of conveyance, came before me this day and maketh oath in due form of law that he saw the foregoing deed signed and delivered in his presence. Given under my hand and private seal this 15th April, 1885.

“North Carolina, Wilkes County.

“The foregoing certificate of F. M. Adams, a justice of the peace of Wilkes, is adjudged to be correct. Let the said deed with these certificates be registered.

“Filed 15 April, 1885, and registered.”

The plaintiff then offered the deed itself, to show that the justice had actually signed the certificate, and insisted that the register of deeds should then and there make the correction in the record. His honor refused to admit the record, or the deed itself, though he inspected the deed and saw that the justice of the peace had signed the certificate of probate.

The exceptions to the above refusals constitute the second and third assignments of error, and we think are well taken. The

name "F. M. Adams, a justice of the peace," is written in the certificate, though it is not subscribed at the end thereof, and the certificate of the clerk adjudges that the certificate of "F. M. Adams, a justice of the peace," is correct. Under the maxim, "*Omnia præsuntur rite esse acta*," the certificate is valid. *Kidd v. Venable*, 111 N. C. 535, 16 S. E. 317; *Etheridge v. Ferebee*, 81 N. C. 312. Revisal, § 1002, does not expressly require the certificate by the justice to be subscribed by him, but provides that the form therein given shall be "in substance." The justice's name is written in the first line, and the clerk has duly adjudged the certificate to be correct. It has been often held that a will need not be subscribed by the testator, but it is sufficient if his name is written in the body thereof in his own hand; the execution in other respects being duly proven. The probate of a deed is a judicial act, and the presumption is that the probate and registration are correct. *Cochran v. Improvement Co.*, 127 N. C. 386, 37 S. E. 496.

In *Heath v. Cotton Mills*, 115 N. C. 202, 20 S. E. 369, the certificate recited that the deed had been duly proven, and the attestation clause recited that the deed was duly signed, sealed, and delivered. The registration thereof did not show a copy of the seal, nor any device representing it; but the court held that if the record represented on its face in another way, as by recitals or otherwise, that the deed was sealed, and it was in fact duly sealed, this was sufficient.

[8] Besides, the order of the clerk for the registration of the deed was a continuous order, and it was the duty of the register to act at any time till the deed should be fully recorded. *Sellers v. Sellers*, 98 N. C. 13, 3

S. E. 917, in which Merrimon, J., says that "a reregistration of the deed was unnecessary. If the register fails at first to completely execute the order of registration, it continues in force and is mandatory until it is completely executed, and it continues to be the register's duty to execute it until he has completely done so. If he finds he has by inadvertence omitted a word, a sentence, a paragraph, or a scroll representing a seal, we think he might, in good faith, complete the registration in these respects. Of course, he could not have authority to *interpolate* anything that was not in the deed, or other instrument, at the time the probate was made."

[9] The court further erred in excluding the original deed when offered to show that the certificate was in fact duly signed by the justice of the peace. *Strain v. Fitzgerald*, 130 N. C. 600, 41 S. E. 872; *Smith v. Lumber Co.*, 144 N. C. 47, 56 S. E. 555; *Edwards v. Supply Co.*, 150 N. C. 175, 63 S. E. 740; *Royster v. Lane*, 118 N. C. 156, 24 S. E. 796.

The fourth exception is to the refusal of the court to permit the plaintiff to show that the locus in quo was embraced in the grant and in the deeds above shown. Upon this refusal the plaintiff excepted and took a nonsuit. The validity of the last exception depends, of course, upon the other three. The defendant moved to dismiss the appeal upon the ground that the nonsuit was not justified in that state of the case; that the plaintiff should have gone on and offered evidence of possession under the deed. But as his chain of title and proof that his deeds covered the locus in quo had been rejected, evidence to show possession would have been useless.

Error.

(155 N. C. 473)

STATE v. SMITH et al.

(Supreme Court of North Carolina. May 26, 1911.)

1. LIBEL AND SLANDER (§ 154*)—CRIMINAL PROSECUTION—BURDEN OF PROOF—INSTRUCTIONS.

The charge on prosecution under Revisal 1905, § 3640, for slander of an "innocent woman," by a charge of incontinency, when considered as a whole, held to place on defendants the burden of disproving prosecutrix's innocence, or at least to leave in doubt and uncertainty who has the burden, though it stated that the burden of proving the charge was on the state, where it also stated that the law presumes that a woman is of good character for virtue till the contrary appears, but that, evidence having been offered of impeachment of the character of the prosecutrix, the burden was cast on the state to prove that she was an innocent woman within the purview of the statute.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 428, 429; Dec. Dig. § 154.*]

2. LIBEL AND SLANDER (§ 154*)—SLANDER OF INNOCENT WOMAN—BURDEN OF PROOF.

On a prosecution under Revisal 1905, § 3640, declaring guilty one who shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman by words charging incontinency, the innocence of the woman is one of the facts essential to the commission of the offense, which the state has the burden of showing.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 428, 429; Dec. Dig. § 154.*]

Appeal from Superior Court, Polk County; Webb, Judge.

Elsie Smith and another were convicted of slander, and appeal. Reversed, and new trial ordered.

This is an indictment for the slander of an innocent woman under Revisal, § 3640. The exceptions are to the charge of the judge. He correctly defined the term "innocent woman" as used in the statute, and then charged upon the burden of proof as follows:

"(1) The burden of proving the charge is upon the state, and it must satisfy you beyond a reasonable doubt, and, if it fails to offer evidence which will establish the uttering of the slanderous words beyond a reasonable doubt, the offense is not made out, but, the defendants having admitted uttering the slanderous words, proof of that fact is dispensed with, and you will find that they were uttered.

"(2) The law presumes that all witnesses are of good character till same is impeached, and it likewise presumes that a woman is of good character for virtue till the contrary appears; but evidence having been offered in impeachment of the character of the woman, May Liles, the court charges you that the burden is cast upon the state to prove that she is a woman innocent within the purview of the statute, and, if you find that she is not an innocent and virtuous woman as explained to you above, then you will not convict, but

will return a verdict of 'not guilty' as to both the defendants.

"(3) The court further charges you that the defendants do not have to satisfy you beyond a reasonable doubt as to the truth of the slanderous language used, but only have to offer such evidence as will cause you to entertain a reasonable doubt as to their truth, because, if you have a reasonable doubt as to the virtue of the prosecuting witness, you cannot convict, and the court so charges you.

"(4) The only question for you to determine in this case is whether the statement of the defendants that they both had had criminal intercourse with the prosecuting witness, May Liles, is true, and, if you have a reasonable doubt of this testimony, then you will not convict. The defendants testify that they have had intercourse with May Liles, and she denies it and offers evidence of her good character. All this you will consider, but, as stated above, the only question in the case is whether these statements of the defendants are true, and your verdict will turn upon your finding in this particular.

"(5) The statute was passed to protect and preserve the character of innocent women as already explained to you, and, before you can convict, it must appear that the woman is innocent and virtuous. The court has told you where the burden of proof rests, and calls the matter again to your attention to impress it upon your minds.

"(6) You will consider the evidence offered by the state as to the character of the prosecuting witness May Liles, and if you find upon the evidence and from the presumptions as explained to you beyond a reasonable doubt that said prosecuting witness, May Liles, is an innocent and virtuous woman, then you will return a verdict of 'guilty.'

The jury returned a verdict of guilty. The defendants, after moving unsuccessfully for a new trial, appealed from the judgment rendered upon the verdict.

Attorney General Bickett and Assistant Attorney General, Geo. L. Jones, for the State.

WALKER, J. [1] When the charge of the court is analyzed and its several parts compared, and after giving it a fair and reasonable construction, as a whole, which we are required to do in all cases, we are driven to the conclusion that the judge virtually told the jury that the burden was on the defendants to disprove the innocence of the prosecutrix. It may well be inferred from one or two sentences of the charge that his honor thought the burden as to this ingredient of the offense was upon the state, and this was the correct view; but, when he said that there was a presumption of law in favor of the innocence and virtue of the prosecutrix, until the contrary appears, he might as well have gone further and instructed the jury, in so many words, that, unless the defendants

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 71 S.E.—20

had satisfied them she was not an innocent woman, the presumption should prevail, and they would find the fact accordingly. A similar charge was condemned by this court in *State v. McDaniel*, 84 N. C. 803. We reproduce the syllabus of the case: "On trial of an indictment for slander under Act 1879, c. 156, the admission of the defendant that he spoke the words charged does not shift the burden of proof upon him to show he had not slandered an innocent woman. Her innocence is a question for the jury upon the evidence, and no presumption of her innocence should be allowed to weigh against the defendant." It will be seen at once that it decides the very point presented in this case. Instead of placing the burden by explicit words upon the state, where it belonged, the court used language which was certainly calculated, whether intended or not, to impress the contrary view upon the jury. It could make no difference what the judge intended to charge. We must deal with the charge as it is; for the jury cannot see or understand his unexpressed intention, but only what he said. This error was not cured by anything said afterwards, or by any previous utterance of the judge. On the contrary, it was, if possible, emphasized in one or two instances. What could the jury have understood the learned judge to have meant when he told them that the law presumes a woman is innocent and virtuous until the contrary appears? It could not be expected that the state would make it appear otherwise than that she was innocent, or, in other words, to defend the prisoners. Well, then, who must make this appear? Why, of course, the defendant. The court further charged that the case turned upon the truth of the charge made by defendants, leaving out of consideration the question of the woman's innocence. And again the court charged: "But, evidence having been offered in impeachment of the character of the woman May Liles, the burden is then cast upon the state to prove her to be an innocent woman." What does this mean? That the defendant must first attack the prosecutrix by evidence showing her lascivious nature and guilt of actual sexual intercourse before the burden of proof shifts to the state. This is not the law, as we understand it to be.

[2] The burden is upon the state to show every fact essential to the commission of the crime, and we cannot doubt that the innocence of the woman is one of those facts. Without it, to show that her virtue and chastity have been impeached by a charge of sexual intercourse is not sufficient. It tends to prove no criminal offense, and in proving, we may say, but one-half of the offense, when the state is required to prove the whole of it. In *State v. McDaniel*, supra, Justice Ruffin thus clearly explains the law as to the burden of proof in prosecutions of this kind:

"As we construe it, the offense defined consists, not in the slander of a woman by falsely charging her with incontinency, but in the attempt to destroy the reputation of an innocent woman by such means. * * * The innocence, then, of the woman who is the subject of the attempt, lies at the very foundation of the offense, and constitutes its most essential element—its very sine qua non, and must of necessity be distinctly averred in the indictment. If necessary to be averred, then, under the principle declared in the cases of *State v. Woodly*, 47 N. C. 276, and *State v. Evans*, 50 N. C. 250, the burden of proof devolved upon the state, even though it involved the necessity of its proving a negative." The decision in that case was approved in *State v. Mitchell*, 132 N. C. 1033, 43 S. E. 938, and the general rule is fully and ably discussed by Justice Hoke in *State v. Connor*, 142 N. C. 700, 55 S. E. 787, where it is held that the burden of showing the innocence of the woman is upon the state. In the most favorable view we can take of the charge for the state upon this appeal, the jury were, at least, left in doubt and uncertainty as to the burden of proof, whether it rested upon the state or the defendants. The Attorney General admits in his brief that in this respect the charge was erroneous.

New trial.

(155 N. C. 326)

WRIGHT v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 28, 1911.)

1. NEGLIGENCE (§ 117*)—ACTIONS—PLEADING—CONTRIBUTORY NEGLIGENCE.

A plea of contributory negligence is not good when it does no more than deny the negligence of the defendant, and allege that the plaintiff was injured by his own negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 195-197; Dec. Dig. § 117.*]

2. RAILROADS (§ 344*)—OPERATION—INJURIES AT CROSSING—PLEADING—CONTRIBUTORY NEGLIGENCE.

Where defendant in an action against a railroad for injuries received at a railroad crossing alleged in its plea of contributory negligence that the plaintiff entered upon the track of the defendant without looking and listening, and that he recklessly attempted to cross the track in front of an approaching train, it was sufficient.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 344.*]

3. TRIAL (§ 139*)—TAKING CASE FROM JURY—WEIGHT AND SUFFICIENCY OF EVIDENCE.

It is a preliminary question in an action for the court to decide whether as matter of law there is any legal evidence to be submitted to the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. § 139.*]

4. TRIAL (§ 139*)—TAKING CASE FROM JURY—QUESTIONS OF LAW OR FACT—INFERENCES FROM EVIDENCE.

The court in determining the preliminary question whether there is any legal evidence to be submitted to the jury should adopt that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

construction of the evidence most favorable to the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 338-341; Dec. Dig. § 189.*]

5. RAILROADS (§ 348*)—OPERATION—INJURIES AT CROSSING—ACTION—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for injuries at a crossing alleged to have been caused by defendant's negligence, evidence for plaintiff held sufficient to show his contributory negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 348.*]

6. TRIAL (§ 165*)—TAKING CASE FROM JURY—MOTION FOR NONSUIT—PLEA OF CONTRIBUTORY NEGLIGENCE.

On a motion to nonsuit, the defendant may avail itself of the plea of contributory negligence, if it is disclosed by the evidence of the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

Appeal from Superior Court, Buncombe County; Council, Judge.

Action by Wm. M. Wright against the Southern Railway Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

This is an action to recover damages for personal injury, on the ground of negligence.

The defendant denies that it was negligent, and among other things alleges: "That the plaintiff's injuries were caused by his own negligence and want of due care in attempting to drive across defendant's railroad at its crossing, without looking or listening for defendant's approaching train, as it was his duty to do for his own safety. The defendant says that the plaintiff did not look or listen for the approach of defendant's engine or train, as it was his duty under the circumstances to do, and that he could, had he looked and listened, have seen and heard the approach of defendant's engine in time to have placed himself out of danger; in fact, the defendant alleges that it did blow its whistle at the usual place for blowing for said crossing, about 300 yards from said crossing, while approaching the same, and that the plaintiff, as well as other persons, heard the same, and instead of remaining in a place of safety until after defendant's engine would pass said crossing, as it was his duty to do, he carelessly, recklessly, and negligently, without due care for his own safety, violently whipped his horse, driving him and the buggy drawn by said horse across defendant's railroad track in front of defendant's approaching engine to a place of safety beyond, after which he recklessly and carelessly so drove said horse that said buggy in which the plaintiff was driving, at a distance of about 36 feet from the defendant's said railway and the crossing, struck a post, injuring said buggy and throwing the plaintiff therefrom, injuring the plaintiff thereby, without any fault or negligence on the part of the defendant or its employees, who were running said engine very slowly,

not exceeding 12 miles an hour, its engineer and fireman all the while fully complying with their duty by keeping a constant lookout ahead, and who did, as soon as the plaintiff approached said railroad track or crossing near enough to become dangerous, apply the emergency brake and all the other appliances at hand and stopped said engine before reaching said crossing, or just as it reached the same, without striking said horse and buggy of the plaintiff or the plaintiff himself. Had the plaintiff looked or listened before attempting to drive across said crossing, as it was his duty to do, he could have seen and heard said east-bound engine in ample time to have avoided the accident, but, in total disregard of his own duty, he carelessly and negligently attempted to drive his horse and buggy across defendant's railroad at said crossing, and in doing so struck his horse violently with the whip, thereby frightening him and causing him to run against the said post, injuring the plaintiff, if he was injured at all."

The plaintiff introduced a rule of the defendant, which reads: "Passenger trains in the same direction must keep at least ten minutes apart; freight trains fifteen minutes apart, except when closing up at stations or at meeting or crossing points, except where block signals are used."

The following is the statement of facts and the evidence, taken from the brief of the plaintiff: "The defendant admits that on the 6th day of September, 1909, the plaintiff was injured in attempting to cross its track with his buggy, that plaintiff's horse became frightened by an approaching train, and plaintiff was thrown out against a post and injured. The plaintiff testified in his own behalf that on September 6, 1909, he was going towards Canton and had just passed a little branch and a freight train hove in sight coming from Canton; that he drove on, his mare in a slow trot, kind of cantering along. He did not see anything to stop for, as the train had just passed. He thought everything was clear, and, when he got to the railroad crossing, Hall, the man in the buggy with him, said: 'There is another train coming up there.' And plaintiff said: 'It is that train down there.' And Hall jumped out of the buggy right at the track, and said: 'Whip up your mare, or you will be caught.' And plaintiff turned his head and looked up the track and the train was about 40 or 60 feet from him, coming backwards down the track, and he struck his mare, and the smoke and steam coming out scared the mare, and she threw him against the signpost and injured him. Just before coming to the crossing where he was injured, he saw a freight train go beyond the crossing 150 yards and stop, and this led him to believe there was nothing else behind. He was pretty close to the railroad, and did not hur-

ry, let his mare go, did not hurry her, but just as he got to the track the man that was in the buggy with him (had not quite got to the track, maybe 16 or 17 feet from it) said: 'I believe I hear another train.' Plaintiff did not stop, and he jumped out of the buggy at the railroad, and, when he jumped out and said, 'Whip up your mare or you'll get caught,' plaintiff turned his head and saw the train was coming two or three rail lengths from him and whipped his mare, and just then the steam came out, causing the mare to shy to the left. Between the little branch and the crossing is over 100 yards. It is 150 to the place. It would take two or three minutes to go from the little branch to the crossing; could walk it in two or three minutes or less time. 'It was just all right now.' Plaintiff could see nothing till he got on the track, when right at the railroad could not see 100 feet, could see about two or three rail lengths—no top on the buggy; it was open; no curtains. The embankment at the crossing comes right down to it. Just before getting to the railroad that hill makes off and makes a kind of bend."

Hall testified: "We crossed the branch, and, after we crossed it, there was a freight train coming down from Canton, and, after coming on past us, it stopped over the trestle, and we drove on to the next crossing, and there was a very high bank there that you can't see up the railroad any, and, just before we got to the crossing, I thought I heard a train blow and said, 'I believe there is a train coming'; and, as I said that, I put my hand on the side of the buggy and jumped, and when I turned my face, his mare's foot was on the track and buggy very close, and I hollered to him to whip the mare, and he crossed the track, and I saw he was going to hit the signpost, and I saw him hit the signpost and make a summer-sault. The distance from the little branch to the railroad crossing is 148 yards. I walked it in 1¼ minutes."

Thomas Wright testified that he was within 150 or 175 yards of plaintiff when the accident occurred, that he did not hear any bell ring or whistle blow, thought he could have heard.

There was a judgment of nonsuit, from which the plaintiff appealed.

Jas. H. Merrimon, and Bourne, Parker & Morrison for appellant. Moore & Rollins and W. B. Rodman, for appellee.

ALLEN, J. (after stating the facts as above). [1] It is true, as contended by the learned counsel for the plaintiff, that the defendant must plead contributory negligence, and that the plea is not good when it does no more than deny the negligence of the defendant, and allege that the plaintiff was injured by his own negligence. Revisal 1905, §

483; Cogdell v. Railroad, 132 N. C. 855, 44 S. E. 618.

[2] The defendant, as appears from the answer, has done more than this, and we think it is entitled to avail itself of the defense. It has alleged that the plaintiff entered upon the track of the defendant without looking and listening, and that he recklessly attempted to cross the track in front of an approaching train.

[3] We also concur in the interesting and able discussion of the relative functions of the judge and jury, and of the importance of preventing encroachment by one on the powers of the other, but we must recognize the principle, firmly established, that the judge must decide as matter of law the preliminary question whether there is any legal evidence to be submitted to the jury.

[4] In the determination of this question, caution should be observed, and the construction of the evidence most favorable to the plaintiff should be adopted.

[5] Considering the evidence in this light, we must sustain the ruling of the judge, as it appears clear to us that the plaintiff was guilty of contributory negligence on his own evidence.

[6] There was much controversy at one time as to the right of the defendant to avail itself of the plea of contributory negligence on a motion to nonsuit, but it is now the accepted doctrine with us that it can do so, if it is disclosed by the evidence of the plaintiff. If the plaintiff entered on the track without looking and listening, or if he looked and listened and attempted to drive in front of the train, in either case he would be guilty of contributory negligence. He says that, when he was 16 or 17 feet from the track, Hall, who was in the buggy with him, told him he heard another train and jumped out and told him to whip up or he would be caught; that he turned and saw the train two or three rail lengths from him; and that he whipped his mare to force her across. It is true he was not injured on the crossing, but he would not have been injured at all if he had not negligently placed himself in a position of danger.

The citation of authority is needless, as there is no controversy between the plaintiff and the defendant as to what the law is, but as to its application.

Affirmed.

(155 N. C. 341)

STEWART v. STEWART.

(Supreme Court of North Carolina. May 26, 1911.)

1. EVIDENCE (§ 474*)—OPINIONS—TESTAMENTARY CAPACITY.

In a will contest, a statement of a witness who had known testator for 25 years, and who had had numerous business transactions with him, the last about three months before his

death, that he retained his mental faculties to the last, was competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2199; Dec. Dig. § 474.*]

2. WITNESSES (§ 372*)—IMPEACHMENT—CROSS-EXAMINATION.

In a will contest, it was competent to ask a witness on cross-examination if he had not gone to the home of testator and removed some of its contents to the house of the caveator to impeach the witness, and to show his feelings in the case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.*]

3. WILLS (§ 164*)—PROBATE—EVIDENCE—ADMISSIBILITY.

The question was competent to show the state of feeling between testator and the caveator, a son, which might have influenced testator in the disposition of his property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 406; Dec. Dig. § 164.*]

4. EVIDENCE (§ 472*)—CONCLUSION—WITNESSES.

In a will contest, a question asked a witness as to what influence testator's wife seemed to exert over him was improper as calling for a conclusion of the witness on a question which was for the jury on the facts proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

5. EVIDENCE (§ 474*)—OPINIONS—TESTAMENTARY CAPACITY—KNOWLEDGE OF WITNESS.

The condition of testator's mind may be shown by any one having an opportunity for observation, subject to cross-examination to test the value of the opinion expressed by the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2199; Dec. Dig. § 474.*]

Appeal from Superior Court, Macon County; Ferguson, Judge.

Proceedings by Henry Stewart to contest the probate of a will propounded by Cassie Stewart. From a judgment probating the will, the caveator appeals. Affirmed.

R. D. Sisk, Robertson & Benbow, A. M. Fry, and G. L. Jones, for appellant. A. W. Horn and J. Frank Ray, for appellee.

CLARK, C. J. This is an issue of devisavit vel non.

[1] The caveator is the son by the first marriage. The propounder is the second wife and the chief beneficiary under the will. Dobson, a witness for the propounder, testified that he had been acquainted with the testator for 25 years; was at one time his neighbor for 7 years; had numerous transactions with him, mostly in land deals, the last being about three months before his death; had seen him frequently, had never detected anything wrong with his mind, was acquainted with his handwriting; that his mental condition was good so far as he knew, and "that he still retained his mental faculties to the last." The caveator excepted to the last expression, but we think it competent. *Smith v. Smith*, 117 N. C. 326, 23 S. E. 270.

The exceptions as to the identification of the will were properly withdrawn in this court.

[2, 3] As to exception 7, it was competent upon cross-examination to ask the witness Webb if he had not gone to the home of the testator and removed some of its contents to the house of the caveator. This was competent to impeach the witness, and tended to show his feelings in the case and a state of feeling between the father and son which might have influenced the testator in the disposal of his property. The caveator introduced the deposition of Mrs. Durgin, and the court refused to permit the following question and answer: "Q. What influence did Cassie Stewart seem to exert over Henry Stewart, Sr.? A. She certainly seemed to do most of the talking, and he seemed to be under her thumb a good deal." The question was excluded upon the ground that it was leading.

[4] We also think that it was incompetent as the expression of a conclusion which it was the province of the jury to draw upon facts placed before them. *Smith v. Smith*, 117 N. C. 326, 23 S. E. 270.

[5] The condition of the testator's mind was a matter as to which any one having opportunity for observation can testify, subject to cross-examination to test the value of the opinion expressed by the witness (*Clary v. Clary*, 24 N. C. 78), but whether there was undue influence is a question for the jury to decide from the facts and circumstances placed in evidence. *Lewis v. Mason*, 109 Mass. 169, though relied upon by the appellant, sustains this view. There it was held proper to show that the person charged with the exercise of undue influence commanded the testator in an angry voice to "shut up," and that testator obeyed him. This was a fact tending to show that such person had power and inclination to exert a controlling influence over the testator, and was competent for the jury to consider. But it would not have been competent for the witness in that case, or in this, to testify that such person had a controlling influence over the testator.

The other exceptions do not require discussion.

We find no error.

(155 N. C. 344)

LANNING v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. May 26, 1911.)

TELEGRAPHS AND TELEPHONES (§ 66*)—MESSAGES—DELAY IN DELIVERY—BURDEN OF PROOF.

In an action for delay in delivering a telegram, it was error to refuse a charge that the burden was on plaintiff to show the negligence alleged, and that it was the proximate cause of the injury.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Superior Court, Swain County; Ferguson, Judge.

Action by C. N. Lanning against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

G. O. H. Fearons and A. S. Barnard, for appellant.

WALKER, J. This action was brought to recover damages for mental anguish suffered by reason of the negligent failure of the defendant to transmit and deliver to the plaintiff a telegram sent by his father, who lived near Asheville, N. C., to Bryson City, N. C., near which place the plaintiff lived. The message was delivered to the defendant for transmission on Sunday, March 15, 1908, after office hours of defendant at Bryson City, and for that reason was not forwarded on Sunday, but the operator at Asheville, the next morning at 5 minutes after 8 o'clock, when his office was opened, called up the operator at Bryson City, whose office should also have been open, but failed to get any response until at 8:28 o'clock. The message was received at Bryson City at 8:30 o'clock, and prepared for delivery. It was handed to the messenger, who carried it to plaintiff's house. He was not at home, but in the field, about one quarter of a mile away. The message was delivered to him there, but not in time, as he contended, to catch the train at Governor's Island, the nearest station, and about one mile from his residence. The defendant contended that he had sufficient time, after the delivery of the message, to take the next train for Asheville at that station. The messenger went to the station and waited there 10 minutes for the train, which arrived on schedule time. The message announced the sudden and serious illness of the plaintiff's mother, and plaintiff alleged that he was delayed in reaching his mother's bedside nearly a day. We need not state any more of the facts, as our decision turns upon the refusal of the court to instruct the jury, as requested by the defendant, that the burden was upon the plaintiff to show the alleged negligence, and that it was the proximate cause of his injury. After a careful reading of the instructions of the court, we have been unable to find any response to this prayer. The defendant was entitled to the instruction. *Hauser v. Telegraph Co.*, 150 N. C. 557, 64 S. E. 503; *Shepard v. Telegraph Co.*, 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796; *Loyd v. Loyd*, 113 N. C. 186, 18 S. E. 200; *Hocutt v. Telegraph Co.*, 147 N. C. 186, 60 S. E. 980. The refusal to give the instruction was perhaps inadvertent, but it nevertheless requires that a new trial be ordered. It is not necessary to consider the other exceptions.

New trial.

(156 N. C. 296)

SIRCEY v. HANS REES SONS.

(Supreme Court of North Carolina. May 24, 1911.)

1. JUDGMENT (§ 113*)—DEFAULT JUDGMENT—RIGHT TO ENTER.

Where the court makes a general order extending the time to file answers due at the term of court for 30 days after final adjournment it is error to render a default judgment without notice.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 207; Dec. Dig. § 113.*]

2. JUDGMENT (§ 143*)—DEFAULT JUDGMENT—RIGHT TO OPEN—EXCUSABLE NEGLIGENCE.

Where a default judgment was entered without announcement in open court, or without notice to defendant, or its counsel who relied on the order extending the time to file answers due at the term of court for 30 days after final adjournment, and who, present in court at the time, did not know of the rendition of the judgment, and was not called on to take notice of it, the neglect of defendant, if any, was excusable, justifying the setting aside of the judgment on presenting a meritorious defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 289-291; Dec. Dig. § 143.*]

3. JUDGMENT (§ 145*)—DEFAULT JUDGMENT—RIGHT TO OPEN—MERITORIOUS DEFENSE.

A plea of release is a meritorious defense, justifying the setting aside of a default judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 292-295; Dec. Dig. § 145.*]

4. RELEASE (§ 29*) — OPERATION — JOINT WRONGDOERS.

Where a servant was injured through the joint negligence of the master and a stranger, a valid release given to the master bars an action against the stranger for the injury, under the rule that a release of one tort-feasor discharges the other, though the tort of the master grew out of contract.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. § 29.*]

Appeal from Superior Court, Buncombe County; Council, Judge.

Action by W. R. Sircey against the Hans Rees Sons. From a judgment for defendant, plaintiff appeals. Affirmed.

Fortune & Roberts and Chas. E. Jones, for appellant. Bourne, Parker & Morrison, for appellee.

WALKER, J. This action was brought to recover damages for an injury received by plaintiff, who was employed by the Southern Railway Company as a switchman, while moving a car of coal along a side track laid on defendant's premises for its accommodation. The particular allegation is that the plaintiff was required to mount the car while in motion, in order to perform his duties, and that in doing so he was caught between the side of the moving car and a pile of tan bark which had been placed so near the track as to endanger the employees of the railway company when moving cars on the siding. Plaintiff did not know the bark was there at the time he was hurt. He alleges that he was injured by the negligence of the de-

fendant, though the facts stated in the complaint are also sufficient to show a case of negligence against the railway company as well, or, in other words, that the injury resulted from the joint negligence of the two companies.

[1] It appears that at February Term, 1909, which was the return term, judgment by default and inquiry was entered, but after an order had been made extending the time to file answers due at that term for 30 days after the final adjournment of the court. The judgment was handed to the judge and signed by him without any notice to defendant or its counsel of the same, and the latter relied upon the order of the court extending the time for filing answers, and therefore made no inquiry as to the order, as they were ignorant that one had been made. Defendant's counsel, as soon as they were notified of the judgment, moved to set it aside, upon the ground that the court had no power to make it without notice to defendant; and, secondly, because of excusable neglect. The judge set aside the judgment, and we think very properly. It should not have been applied for or entered without notice. It was competent for the court to have excepted this or any other case from the general order, but, having made a general order, counsel could not be expected to anticipate that it would be violated in this way, or that judgment would be entered without notice to them.

[2] The rendition of the judgment was not even announced in open court, but the judgment was merely delivered to the judge and signed by him. Calling out the defendant, when his counsel did not hear the call, is not sufficient to withdraw the protection of the law from him. Such a thing was not looked for. One of defendant's counsel was in court, but did not know of the judgment, and was not called upon to take notice of it, under the circumstances. If there was any neglect at all, and we think there was not, it was certainly excusable. *Branch v. Walker*, 92 N. C. 87; *Griel v. Vernon*, 65 N. C. 76 (Anno. Ed. and cases cited); *Long v. Cole*, 74 N. C. 267; *Wynne v. Prairie*, 86 N. C. 73; *Taylor v. Pope*, 106 N. C. 267, 11 S. E. 257, 19 Am. St. Rep. 530; *Clark's Code* (3d Ed.) § 274, and note, especially page 312 et seq. We are satisfied the judge would not have signed the judgment had he known the facts. The defendant had a meritorious defense, because he defeated the plaintiff in the trial of the case. This is a very fair test of a good defense. Cases cited by plaintiff's counsel are not in point. In all of them the facts were different.

[3] We cannot agree with the learned counsel that the plea of a release is technical, and does not present a meritorious defense. Plaintiff thereby acknowledged full satisfaction of his claim, and he is entitled to have no more. Nor can we assent to the suggestion that a plaintiff should be allowed two

satisfactions for one and the same demand. Such a doctrine would shock the moral sense and violate a cardinal maxim of the law, if not the defendant's constitutional right. Plaintiff excepted to the order setting aside the judgment by default, and appealed from the final judgment dismissing the action. We have treated the case as if he had preserved his exception, and it is not necessary to decide whether he should have appealed at once from the order of vacation. At the trial the defendant relied on a release given by the plaintiff to the Southern Railway Company. The execution and validity of the release were admitted, and thereupon the court, on motion of the defendant, dismissed the action and plaintiff appealed.

[4] There was no error in the judgment. With reference to the plaintiff, the defendant and the railway company were joint tortfeasors, and, besides, the evidence shows that they jointly participated in the wrong and were co-delinquents. Even if the tort of the railway company was one growing out of contract for the plaintiff's services, the rule that the release of one tort-feasor will discharge the other will nevertheless apply. Whether the plaintiff had sued in tort, or had waived the tort and sued on the contract, if he could do so, can make no difference. He has received what he regarded as full compensation for his injury, and the law will not give him more than he said was enough, whatever may be the technical form of the action he might have brought against the railway company. *Hale on Torts*, pp. 195, 196; *Eastman v. Grant*, 34 Vt. 387.

We have had occasion to consider this rule as to the effect of a release at the present term. *Howard v. Plumbing Co.*, 70 S. E. 285; *Gregg v. Wilmington*, 70 S. E. 1070. It is true that in the case last cited the release was alleged to have been given by the plaintiff to *Wolvin*, who as between himself and the city was primarily liable, but in the former case Justice Brown says: "Assuming that this defendant is jointly liable with *Ayers* to the plaintiff, she has released *Ayers* for a valuable consideration paid to her by him, and that releases this defendant. She cannot be allowed to recover two compensations for the one injury. If she recovers of one, she cannot recover of the other. It is immaterial, so far as plaintiff is concerned, to consider which joint tort-feasor is primarily liable. The question of primary and secondary liability is for the offending parties to adjust between themselves. The injured party has his remedy against either. *Dillon v. Raleigh*, 124 N. C. 188, 32 S. E. 548; *Buswell on Personal Injuries*, § 190. It is well settled that a release of one or more joint tort-feasors, executed in satisfaction for an injury, is a discharge of them all on the ground that the party can have but one satisfaction for his injury. 24 Am. & Eng. Enc. of Law, 306, where cases from nearly all the American courts are collected.

Brown v. Louisville, 126 N. C. 701, 36 S. E. 166, 78 Am. St. Rep. 677; *Burns v. Womble*, 131 N. C. 173, 42 S. E. 573." For a general discussion of the liability of tort-feasors, see *Raleigh v. Railroad*, 129 N. C. 265, 40 S. E. 2, and *Lexington v. Indemnity Co.*, 71 S. E. 214, at this term. Judge Cooley, in his treatise on Torts, relying on many English and American authorities, thus states the rule: "It is to be observed in respect to the point above considered, where the bar accrues in favor of some of the wrongdoers by reason of what has been received from or done in respect to one or more others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar to all. And so a release of one releases all, although the release expressly stipulates that the other defendants shall not be released. And this rule is held to apply, even though the one released was not in fact liable. It does not lie in the mouth of such a plaintiff to say that he had no cause of action against one who paid him for his injuries, for the law presumes that the one who paid committed the trespass and occasioned the whole injury." 1 Cooley on torts (3d Ed.) p. 234 et seq. While separate suits may be brought against the wrongdoers, the plaintiff having the right of election as to whether he will sue them separately or jointly, the liability being joint and several, and while there may be recovery against each, there can be but one satisfaction. It is immaterial whether the satisfaction is obtained by judgment and final process in execution of it, or by amicable adjustment without any litigation of the claim for damages. The essential thing is satisfaction. Hale on Torts, 195. The wronged party may elect whom he will sue or *de melioribus damnis*, but the full payment of one judgment satisfies the cause of action, for it is the same cause against all the tort-feasors, so far as he is concerned. Hale on Torts, p. 192; *Babcock v. Pioneer Iron Works* (C. C.) 34 Fed. 338. Coke (section 376) thus states the principle, as laid down by Littleton, in his quaint language: "Also if two men doe trespassse to another, who releases to one of them by his deeds all actions personalls, and notwithstanding sueth an action of trespassse against the other, the defendant may well shew that the trespassse was done by him, and by another, his fellow, and that the plaintife by his deed (which he sheweth forth) released to his fellow all actions personalls, and demand the judgment (in his favor) and yet such deed belongeth to his fellow, and not to him. But because hee may have advantage by the deed, if he will shew the deed to the court, he may well plead this." Coke, in commenting on this passage, says: "If two men doe trespassse to another,"

etc. Here by this section it is to be understood that when divers doe a trespassse, the same is joynt or severall at the will of him to whom the wrong is done, yet if he release to one of them, all are discharged, because his own deed shall be taken most strongly against himself, but otherwise it is in case of appeals of death, etc. As if two men bee joyntly and severally bounden in an obligation, if the obligee release to one of them, both are discharged; and seeing the trespassers are parties and privies in wrong, the one shall not plead a release to the other without shewing of it forth, albeit the deede appertaine to the other." Referring to Coke's statement, it is said in *Babcock v. Pioneer Iron Works*, supra: "This seems to be good law to this day. 2 Greenl. Ev. § 30; *Eastman v. Grant*, 34 Vt. 387. A plaintiff is entitled to but one satisfaction of his cause of action, whether but one or many may be liable, or whatever the form of action may be. *Fowell v. Forrest*, 2 Saund. 48a; *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129. If the damages are actually paid by one, that is a sufficient satisfaction for all. If such payment is acknowledged by deed, the actual consideration cannot be inquired into. If the plaintiff had brought suit against the Pioneer Iron Works alone, on the proofs in this case, as here understood and considered, judgment would have been recovered for all the infringement involved. After the satisfaction of such judgment, no action could be maintained against the Safety Steam Generator Company for the same infringement, because the plaintiff would be fully satisfied for that. The infringement by one is the same as that by the other; and, when satisfaction is made for that, the whole is satisfied." The idea is well expressed in the leading case of *Eastman v. Green*, 34 Vt. 387: "The principle is well settled, and is not controverted by counsel in this case, that a release of one of two or more joint trespassers is a release of all, but, to have such effect, it must be a technical release; that is, by an instrument under seal. The reason why a release of one discharges all is that it legally imports full payment, and, being under seal, its consideration cannot be inquired into, so that it is conclusive, even though it was given without consideration in fact. The rule is the same whether the claim is based upon a tort or a contract. Indeed, the rule as to the effect of a release, is but another method of stating the universal rule that full payment by one who is jointly liable with others is a discharge of all. In the one case the law regards the claim as paid, and will not allow the party to deny it by proof. In the other it is paid in fact. The effect upon the rights of all is the same in both cases." And again at page 390, 34 Vt.: "The plaintiff's claim rested solely in damages. There was no criterion by which the amount could be definitely determined. It was a matter of mere estimation, based

on opinion and judgment, not of computation based on any fixed data. If the question were submitted to a jury, they could determine it only by estimation. Here the plaintiff and the BOWENS got together and determined the matter for themselves. They estimated the damages and fixed upon the amount of the plaintiff's claim against them, and they paid it, and were discharged. What further claim could the plaintiff have upon them, even though no discharge had been given them? Clearly not any. There is nothing in the case to indicate that the amount paid was not the full amount of the damages and the extent of the plaintiff's claim upon them. If the plaintiff had brought his action against the BOWENS, and had received two hundred dollars damages, and they had paid the judgment, that clearly would have discharged all. If these parties agree upon the amount without the intervention of a court or jury, and the amount is paid, the effect we apprehend must be the same. The plaintiff's claim is the same against all the parties engaged in the trespass. He may pursue them jointly or severally to enforce it, but, when that claim is once paid, it is canceled as to all the parties." The rule has been approved in the following well-considered cases: *Tompkins v. Railroad*, 66 Cal. 165, 4 Pac. 1165; *Seither v. Phila. Traction Co.*, 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905; *City of Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271. In *Seither's Case*, supra, the court, referring to the allegation of the plaintiff that the party to whom he gave the release was not really in fault, and therefore it did not affect his right to recover against the defendant, says: "A case so unique as this might be supposed to stand alone in the books. *Tompkins v. Railroad Co.*, 66 Cal. 165, 4 Pac. 1165, is, however, its exact counterpart. There a woman was injured by a collision of street railway cars. She received compensation from the carrying company and executed a release. She then sued the other railway company, contending that her release was not intended as a satisfaction, but because the carrier was without fault, and the existing defendant was the real wrongdoer. The court held in a vigorous opinion that she could not recover. So we say here. The plaintiff was not entitled to recover, and the learned court below was entirely right in directing a verdict for the defendant." Satisfaction by one joint tort-feasor, or whatever is equivalent to it, will therefore release the others. 1 *Jaggard on Torts*, p. 344, § 117.

The case was ably and learnedly argued, with well-prepared briefs, but upon a review of it, in the light of the facts it discloses and the law, as we understand it, the plaintiff is not entitled to recover, and the judge was right in so directing.

Affirmed.

(155 N. C. 304)

WHITMIRE v. HEATH.

(Supreme Court of North Carolina. May 24, 1911.)

1. TRIAL (§ 46*)—RECEPTION OF EVIDENCE—OFFER OF PROOF—NECESSITY.

Where the original defendant died, the exclusion of testimony as to what he said on a former trial was proper when it did not appear what was expected to be proven by this testimony, for the court must pass upon the competency and materiality of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 115-117; Dec. Dig. § 46.*]

2. EVIDENCE (§ 582*)—TESTIMONY AT FORMER TRIAL.

A witness cannot testify as to what another witness, now deceased, said at a former trial, unless he can state the substance of all his testimony.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2420; Dec. Dig. § 582.*]

3. SALES (§ 53*)—FRAUDULENT REPRESENTATIONS—QUESTIONS FOR JURY.

In an action upon a note for the price of a horse, where the defense was that the seller had made false representations, evidence of false representations held to raise a question for the jury.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 53.*]

4. SALES (§ 52*)—FRAUDULENT REPRESENTATIONS—EVIDENCE—ADMISSIBILITY.

Where the maker of a note, defended on the ground that it was given for the price of a horse which was sold with fraudulent representations, a postal written by the seller to the purchaser, telling him that he had a horse, a little thin, but mending fast, was admissible on the question of fraudulent representations.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 129; Dec. Dig. § 52.*]

5. APPEAL AND ERROR (§ 837*)—REVIEW—FINDINGS OF FACT—EVIDENCE.

Where written evidence was improperly excluded, the appellate court in reviewing the propriety of taking an affirmative defense from the jury for lack of proof will consider this writing as if it were a part of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3262; Dec. Dig. § 837.*]

6. FRAUD (§§ 13, 20*)—DECEIT—CAUSE OF ACTION—REQUISITES.

To create a right of action for deceit by false representations, there must be a false representation, which the party making knows to be false, and it must have misled the other party and induced him to enter the contract.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 3, 17; Dec. Dig. §§ 13, 20.*]

Appeal from Superior Court, Transylvania County; Justice, Judge.

Action by T. T. Whitmire against J. N. Heath, as administrator of A. N. Heath. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. W. Zachary, for appellant. Geo. A. Shuford, for appellee.

WALKER, J. This action was brought to recover the amount of certain notes given to the defendant for the price of a horse and other articles of personal property, and secured by a mortgage upon the property sold. The defendant in his answer alleged that

the plaintiff, at the time he sold the horse to him, had made false, fraudulent, and deceitful representations as to his age and qualities, stating that the horse was seven years old, when he was much older, and that he was sound and in good condition, except that he had distemper, but was better, though he still had a little of it. There was evidence for the defendant that the horse had a bad case of glanders, his nose sloughed, lumps appeared on him, and at times the odor emitted from his body and nose was very offensive. He was also lame and was gradually weakened by his disease, so that he became worthless. Without entering more into particulars, we may safely say that there was sufficient evidence to show the falsity of the warranty and the deceit, provided the plaintiff made the alleged representations, and the case turns upon the sufficiency of the evidence to establish this fact. The defendant introduced the written "recommendation" of the horse by the plaintiff, which was given to A. N. Heath, dated May 26, 1910, at the time of the sale, and which reads as follows: "I have owned the horse six months. He has been at home during that time about four weeks. He has had the distemper during that time, and appears to have it a little yet. As to his eyes, they are good so far as I know. His working qualities are good, and if wind-broken he has never shown it in the least; and if affected with any internal disease I do not know it. I bought the horse from Hawe Galloway, and he recommended him to be sound except the distemper. T. W. Whitmire. Witness: D. L. English." Defendant then introduced a postal card, mailed to A. N. Heath by the plaintiff, of which the following is a copy: "Brevard, 5-25-1905. Dear Sir: Your card received. Will say in reply that I have a black horse 7 years old, a little thin, but mending fast. I would sell, but you will have to come and look at him before I would make you a price. T. W. Whitmire." The court, upon objection by the plaintiff, excluded the card, and defendant excepted. The original defendant, A. N. Heath, having died, the present defendant, J. N. Heath, his father and administrator, was made a defendant. The execution of the notes being admitted, the court held that the defense had not been made out by the evidence, and gave judgment for the plaintiff. Defendant appealed.

[1] The defendant proposed to prove by a witness what A. N. Heath had testified at a former trial of the case, which was excluded by the court, and exception again taken. It did not appear what he expected to prove by this witness was said by A. N. Heath—that is, the nature or substance of the evidence—so that the court could see that it was relevant to the case, and for this

reason the ruling was proper. A court can never pass intelligently upon evidence, unless it knows what the evidence is, in order that its bearing upon the issue may be determined. The defendant should have stated what he intended to prove was said by A. N. Heath, otherwise the evidence should be excluded, not because it is incompetent, but because it cannot be seen to be competent. The court must judge of its materiality—not the witness. This is the settled rule, and is also the "rule of reason." *Overman v. Coble*, 35 N. C. 1; *State v. Pierce*, 91 N. C. 606.

[2] Besides, a witness cannot testify to what another witness, the deceased, said at a former trial, unless he can state the substance of all his testimony. *Bule v. Carver*, 73 N. C. 264; *Paine v. Roberts*, 82 N. C. 451.

[3-5] But we think the court erred in holding that there was no evidence of the representation. There was also error in excluding the postal, and we must consider the case as if it were a part of the evidence. It is perfectly manifest that what the plaintiff intended, by the written "recommendation" and the postal, the defendant should believe, was that the horse was in good condition excepting a slight attack of distemper, and in the postal he stated that he was seven years old (which was untrue), and "a little thin, but mending fast," implying that otherwise he was sound. If these statements were knowingly false and misled the defendant to his prejudice, they were such fraudulent representations as constituted actionable deceit.

[6] The three constituent elements of a deceit by false representation are: (1) The representation must be false. (2) The party making it must know that it is false, commonly called the "scienter." (3) It must have misled the other party and induced him to contract upon the faith of the representation as true. *Lunn v. Shermer*, 93 N. C. 164; *Ferebee v. Gordon*, 35 N. C. 350; *Ashe v. Gray*, 88 N. C. 190 (s. c. on rehearing 90 N. C. 137); *Black v. Black*, 110 N. C. 398, 14 S. E. 971; *Unitype Co. v. Ashcraft*, 71 S. E. 61, at this term. There was evidence of a false and fraudulent representation. The jury might well have inferred from all the facts and circumstances that the plaintiff made a representation as to the age and qualities of the horse, which he knew to be false and which were calculated to mislead, and did actually deceive A. N. Heath, the purchaser. We do not mean to say that the evidence is conclusive, or even strong, against the plaintiff, but merely that there is some evidence. The jury must pass upon its weight. They may find that the plaintiff did not know the condition of the horse, but acted honestly throughout the transaction and without any intent to deceive, or that he did not make any false representation.

New trial.

(155 N. C. 230)

REID v. HANS REES' SONS CO., Inc.
(Supreme Court of North Carolina. May 17, 1911.)

1. MASTER AND SERVANT (§ 288*)—TANNERIES—DEFECTIVE LADDER—ASSUMPTION OF RISK—JURY QUESTION.

Whether a tannery employé assumed the risk of being injured through a ladder slipping as he was climbing from a vat *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 288.*]

2. MASTER AND SERVANT (§ 289*)—TANNERIES—DEFECTIVE LADDERS—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Whether a tannery employé injured by slipping off a ladder as he climbed from a vat was guilty of contributory negligence *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

3. MASTER AND SERVANT (§§ 101, 102*)—SAFE APPLIANCES—DUTY TO PROVIDE.

While one does not insure the safety of his employés, he must use ordinary care to furnish proper tools and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 173, 174; Dec. Dig. §§ 101, 102.*]

4. MASTER AND SERVANT (§ 103*)—SAFE APPLIANCES—NONDELEGABLE DUTY OF EMPLOYER.

A tannery company's duty to an employé to use reasonable care in furnishing an employé a ladder suitable and safe for his use in cleaning a vat was not delegable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

5. MASTER AND SERVANT (§ 229*)—INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE.

An employé's failure to use ordinary care to prevent injury to himself precludes recovery against his employer, if the proximate cause of injury complained of.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 674; Dec. Dig. § 229.*]

Appeal from Superior Court, McDowell County; Lane, Judge.

Action by J. W. Reid against the Hans Rees' Sons Company, Incorporated. Judgment of nonsuit, and plaintiff appeals. Reversed, and new trial ordered.

Hudgins, Watson & Johnston, for appellant. Bourne, Parker & Morrison, for appellee.

WALKER, J. Plaintiff brought this action to recover damages for injuries received while working in the defendant's tannery in Asheville. His duty was to clean out the vats, and in the performance of this duty he was required to go into the vat and throw out the ginned bark, which was placed between the hides for the purpose of tanning them. In order to go into and come out of the vats, it was necessary to use a ladder which was furnished by the defendant. This ladder had become worn at the ends which rested on the floor, so that they had a round, instead of a flat, surface, and, as the bottom of the vat was oozy and slick, the ladder was

liable to slip when plaintiff was using it. The top ends of the ladder rested against the wall of the vat. Ladders used for this purpose in tanneries have spikes at the bottom to prevent slipping, but this one had no spikes, nor were there any slats or stops on the floor to brace or prop the ladder. The defective condition of the ladder was called to the attention of T. E. Brice, the foreman of defendant, by the plaintiff, and he promised to have it remedied, but failed to do so, when he was again requested to have the ladder spiked so as to make it safe for the plaintiff in doing his work, and he promised to do so, but again failed to keep his promise, and the plaintiff while using the ladder in cleaning out the vat was seriously injured by the fall of the ladder, due to its said defective condition. The court entered judgment of nonsuit upon the evidence, and plaintiff appealed.

[1-3] The case should have gone to the jury. It is true that the master does not insure the safety of his servant in the performance of his work; but it is a familiar and an elementary doctrine in the law of negligence, with reference to this relation, that he owes a duty which he neglects at his peril to furnish proper tools and appliances to his servant with which to do his work. We said as much in *Marks v. Cotton Mills*, 135 N. C. 287, 47 S. E. 432, and added: "He meets the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable." The rule as thus stated was approved in *Avery v. Lumber Co.*, 146 N. C. 595, 60 S. E. 646; *Cotton v. Railroad*, 149 N. C. 227, 62 S. E. 1093; *Nail v. Brown*, 150 N. C. 533, 64 S. E. 434; *West v. Tannin Co.*, 154 N. C. 44, 69 S. E. 687; *Mercer v. Railroad* (at this term) 70 S. E. 742. The case of *West v. Tannin Co.*, supra, involved the same principle and substantially the same facts as does this case, and we there held that there was evidence of negligence. In *Mercer's Case*, there is a distinction made with reference to the duty of inspection between simple and complicated tools and implements, but we need not consider it, as it appears that the plaintiff in this case gave the defendant notice of the defect in the ladder and the latter promised to remedy it.

As to the duty of the employer, which requires him to furnish to his employé reasonably safe and suitable tools and appliances with which to perform his work, even though they may be simple in their construction, we need only refer to the cases of *Orr v. Telephone Co.*, 130 N. C. 627, 41 S. E. 880; a. c. on rehearing 132 N. C. 691, 44 S. E. 401; and *Cotton v. Railroad*, 149 N. C. 227, 62 S. E.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1093, both decided in favor of plaintiffs. In the former case the plaintiff was hurt by the failure of the defendant to see that he used the proper implements in doing his work, lowering a telephone pole for the purpose of removing it, the implements required for the purpose being "spiked poles" and "dead men," and in the latter the servant was furnished with a defective truck for transferring baggage, the pin, which kept the wheel on the spindle, having been bent so that the wheel fell from the spindle on which it revolved while the plaintiff was trucking baggage, and he was injured.

Plaintiff testified that the foreman told him the ladder had been used for some time and was safe, and that in reliance upon this assurance and the promise to repair it, which was once repeated, he continued to use the ladder. The plaintiff remained in the service a little longer, expecting daily a compliance with the promise. We cannot say as matter of law upon the evidence as it now appears that the plaintiff continued in the service for an unreasonable time after the promise to repair had been broken (*Pleasants v. Railroad*, 95 N. C. 195), or that the danger in using the ladder was so obvious or imminent as to charge him with having assumed the risk or with contributory negligence. *Pressly v. Yarn Mills*, 138 N. C. 410, 51 S. E. 69. The evidence must be construed most favorably for the plaintiff in considering a nonsuit, and whether he acted as a prudent man would have done under the circumstances is a question which is peculiarly for the jury to decide.

[4] The duty to exercise reasonable care in furnishing a ladder suitable and safe for the servant's use in cleaning the vat was a primary and absolute one, and was therefore not delegable. If the master leaves the performance of this duty to another who takes his place, he must be held liable for any negligence on his part, as much so as if he had undertaken himself to perform it. He cannot thus shift his responsibility. The plaintiff had no choice in the selection of ladders, but could only use the particular one furnished. The defendant had been told of the defect and the danger attending the use of this ladder and it was its duty to provide one reasonably safe, which it neglected to do. *Mercer v. Railroad*, supra. It would be going beyond the decisions of this court to hold that the plaintiff was guilty of negligence in law because he continued to use the ladder for a short time, when the defendant had promised to put it in safe condition, but failed to do so, and he had the right to rely upon this promise being kept. It was at least a question for the jury.

[5] If the plaintiff could have prevented the injury by the exercise of ordinary care, he was obliged to do so, and his negligence,

if there was any, would bar his recovery, if it was the proximate cause of the injury. In *Pressly v. Yarn Mills*, supra, Justice Hoke said: "The employé is not in such instances absolved from all obligation to act with reasonable care and prudence, and if there is negligence on his part, concurring as the proximate cause of the injury, he cannot recover." But, to avail itself of this principle, the defendant must upon evidence show that there has been such negligence as bars the action. The defendant argues that the plaintiff is a very tall man, and should have climbed out of the vat. But the ladder was supplied by the defendant for going into and coming out of the vat and it had been safely used for this purpose, with the assurance that it was still safe and would be made safer, upon which the plaintiff relied. We cannot say upon this evidence that the plaintiff was required to climb out of the vat, even if the other method in the single instance proved to be dangerous, and for that reason the nonsuit was proper.

Our conclusion is that the case should have been submitted to the jury, with proper instructions as to the law, and there was error in dismissing the action.

New trial.

(155 N. C. 229)

HOLLAR v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

(Supreme Court of North Carolina. May 17, 1911.)

LANDLORD AND TENANT (§ 55*)—INJURY TO—REVERSION—NEGLIGENCE OF TENANT—EVIDENCE.

In an action against a tenant for negligently burning a building, the landlord could show that three months before the fire the tenant used a large kerosene lamp on a shelf near a low pine ceiling.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 55.*]

Appeal from Superior Court, Alexander County; Long, Judge.

Action by O. L. Hollar against the Southern Bell Telephone & Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

These issues were submitted: "(1) Was the plaintiff's building destroyed by fire by the negligence of the defendant, as alleged in the complaint? Answer: Yes. (2) What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: One thousand dollars."

From the judgment rendered, the defendant appealed.

W. D. Turner, for appellant. J. H. Burke and L. C. Caldwell, for appellee.

PER CURIAM. The record presents only two assignments of error:

(1) A witness, Linto Lyon, former manager

for defendant, was permitted to testify that in August preceding the burning of the house on November 13th a large kerosene lamp was used by the defendant on a bracket shelf on the wall, close to a low pine ceiling; that it made the wall dangerously hot, and that he had instructed the operators not to use it there, but place it on the table. We think this evidence was competent upon the first issue to prove negligence, and to fix defendant with knowledge of the careless manner in which the lamp was used by its employees.

(2) The other assignment of error is as to refusal to allow motion to nonsuit, upon the ground that there is no sufficient evidence of the origin of the fire. While the proof is not direct and positive that the fire originated from the negligent placing of the lamp on the shelf, and so close that it set the ceiling and wall on fire, yet there is circumstantial proof of that fact of sufficient probative force to fully justify the judge in submitting the question to the jury.

No error.

(155 N. C. 450)

STATE v. YATES.

(Supreme Court of North Carolina. May 17, 1911.)

1. HOMICIDE (§ 250*)—MANSLAUGHTER—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of manslaughter.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 250.*]

2. HOMICIDE (§ 151*)—SELF-DEFENSE—BURDEN OF PROOF.

One tried for a homicide has the burden to establish self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 278; Dec. Dig. § 151.*]

3. CRIMINAL LAW (§ 825*)—INSTRUCTIONS—REQUISITES—NECESSITY.

Accused must ask for special instructions if those given are not as full as he desires.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.*]

4. CRIMINAL LAW (§ 1038*)—INSTRUCTIONS—ERRORS—DUTY OF ACCUSED.

If instructions state a contention incorrectly to accused's disadvantage, he should call the trial judge's attention to it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

5. HOMICIDE (§ 340*)—INSTRUCTIONS—REVIEW.

One convicted of manslaughter is not entitled to review of an instruction on murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 717; Dec. Dig. § 340.*]

6. HOMICIDE (§ 118*)—MANSLAUGHTER—CONDUCT CONSTITUTING.

One assaulted must abandon the difficulty and avoid killing his assailant if he can do so with reasonable safety, and one who enters a fight willingly, and continues in it though able to abandon it, is guilty of manslaughter at least if he kills.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 168-171; Dec. Dig. § 118.*]

Appeal from Superior Court, Watauga County; Pell, Judge.

Daniel Yates was convicted of manslaughter, and he appeals. Affirmed.

This is an indictment against Daniel Yates for murder. The jury returned a verdict of "guilty of manslaughter," and from the judgment of imprisonment for seven years in the state's prison pronounced thereon the defendant appealed.

There was evidence upon the part of the state tending to show that on the morning of 16th November, 1909, the defendant, his wife, Bettie Yates, and her two daughters, met with Mrs. Liddy McGuire, wife of the deceased, Jack McGuire, and Mrs. Nancy Ward, her daughter, in a galax patch in the woods near a disputed line of their respective lands. After a conversation between the defendant and Mrs. Liddy McGuire in regard to the manner of settlement as to the disputed line, the defendant and his wife, Bettie Yates, passed on up the hill in the direction of the defendant's home, and also in the direction of Sam Hicks', where the defendant claims that he had started to have a tooth extracted. After traveling a distance of from 100 to 150 yards, they passed within a few steps of the deceased, who was coming down the ridge with a rifle gun on his shoulder; while the defendant was armed with a 16-gauge shotgun, and immediately after meeting the trouble commenced.

Mrs. Liddy McGuire, witness for the state, testified, in part, as follows: That she, her two daughters, the defendant, his wife, and her two daughters were in the woods the morning of the difficulty; that she and the defendant had a conversation about the land in dispute; that, after defendant and his wife had passed on, she heard a dispute between the defendant and the deceased some distance away in the woods; that they were disputing about the line; that she heard curse words pass; that witness asked her husband if that was he talking, and he said, "Yes." Yates said: "Yes, and by G—, I am up here too." They kept adding words back and forth. "I cannot recollect how they were spoken. Dan started off like he was going home, and my husband started down like he was going home, and Dan said: 'G— d— you, I will shoot you.' He was talking loud. He had walked between 15 and 20 steps from where I was—from McGuire—after they spoke and had this talk together. When he said that, my husband turned, and the gun fired in his face. At the time my husband was shot he had his gun on his shoulder, and when he was shot it fell breech foremost in front of him."

Mrs. Nancy Ward, daughter of deceased, corroborated the statement made by Mrs. Liddy McGuire in most essential parts.

Dr. H. B. Perry, witness for the state, said, on cross-examination, that the range of the shot in the head and face indicated that the deceased and defendant were standing face to face when the gun was fired; that there were 37 shots from the middle of the neck to just above the forehead.

The defendant, Daniel Yates, testified in his own behalf, in part: That on the day of the difficulty he started to Sam Hicks' to have a tooth extracted; that he took his wife along to show her where the line in dispute was; that in going around the line they met Liddy McGuire, wife of deceased; that, after talking to Mrs. McGuire for some time as to the location of the line in dispute, he proposed to leave the matter to disinterested parties, to which proposition she seemed to assent; that, after talking over the matter, he and his wife started up the ridge, and, after going from 100 to 150 yards, they passed the deceased coming and within eight or ten steps of him; that he spoke to deceased, and deceased muttered something which defendant did not understand; that deceased appeared to be mad. After passing deceased, the deceased called to defendant, and said: "Dan Yates I want you to get out of here. Get out of these woods, and take your G— d— set with you." Defendant told him he had a right there, and he was not going. "He said: 'Yes; G— d— you, you will leave.' I said, 'I am not going.' He said, 'Yes; you are. I will make you.' I said to him, 'D— you, show me your authority.' And he said, 'G— d— you, I can shoot you and drag you out.' And he cocked his gun and started to shoot me. The first thought that entered my mind was to ask him not to shoot. I said, 'Jack, don't draw that gun.' The next thought that run through my mind was to shoot, and I shot. He cocked his gun first and had it up. I had my gun on my shoulder when we first met and he did too. (Here witness indicated position in which the guns were held by the parties.) After he cocked his gun and had it up, then I raised mine as quick as I could and shot. * * * I shot McGuire because I thought he was going to shoot me. I thought to save myself I would shoot. In the beginning I was walking away from him. I saw he was very mad, and, when I passed, I turned facing him for fear he would shoot me, and I thought, if I should face him, we would have a few words, and he would go off, and there would be nothing of it. Before I would have shot him, I would have turned; but I was afraid he would shoot me if I turned my back. I wasn't thinking about any trouble. I knew it was his mail day. I just saw him a day or two before that and he was perfectly friendly. He proposed to sell me some hay, and I said I guessed I would buy it." Witness said he had known deceased nearly all his life; knew the general character of the deceased as being a dangerous, violent fighting

man; a bad man, overbearing man, wanted everything his own way; that his wife, Bettie Yates, had told him the evening before that he aimed to kill him, and said, "By G—, he had enough money to burn him up"; that his wife told defendant deceased made that threat in the galax patch. There was evidence in corroboration of the evidence of the defendant.

T. A. Love and L. D. Lowe, for appellant. Attorney General Bickett and G. L. Jones, for the State.

ALLEN, J. [1] The evidence offered on the part of the state tended to show that the defendant was guilty of murder in the second degree, at least, while the evidence of the defendant and of the witnesses introduced to corroborate him, if believed by the jury, would have justified a verdict of not guilty. It is evident that the jury did not accept in its entirety the evidence of the state or of the defendant, and that the verdict—guilty of manslaughter—was rendered upon the theory that the defendant and the deceased fought willingly, of which there was ample evidence.

The only exceptions appearing in the record are to parts of the charge of the judge presiding, as follows:

"Now, gentlemen, did he do it in self-defense? The burden is upon him to satisfy you of the facts and circumstances constituting self-defense. Now the defendant contends that he had great fear of his life when he shot the deceased, that he did not intend to shoot him, nor did he willingly shoot him, but that it was only through dire necessity; that is, only through the fear that he would lose his own life or have serious bodily harm inflicted upon him if he did not shoot. The defendant contends that he said to the deceased man, 'If you draw that gun on me, I will shoot you'; and the defendant contends, further, that he calculated that when he did tell him, 'Not to point your gun at me, I will shoot you,' that by that expression the deceased man should have understood that, if he did not point his gun at him, he would not shoot. The defendant contends that on that occasion he was not at fault; that there was no reasonably safe way for him to escape; that he was afraid if he turned his back, and went towards his home, he would be shot in the back; that he was afraid of his life, and that it was through dire necessity that he shot him." Defendant excepts.

"Now, gentlemen, if you should find from the evidence that McGuire and Yates each held malice towards the other, and they each armed themselves with a gun for the purpose of fighting it out when they met, and they met accidentally and a quarrel ensued in which both engaged, and Yates killed McGuire, it was at least murder in the second degree, and it makes no difference whether

Yates was on his own land or not; it appearing in this case that the land upon which the difficulty took place was in dispute." Defendant excepts.

"If you shall find from the evidence that McGuire sent word to Yates or told Mrs. Yates, who communicated it to her husband, that he was going to kill Yates, and Yates, for the purpose of defending himself and not for the purpose of venting his malice and satisfying his revenge upon McGuire, armed himself with a gun and met McGuire accidentally, and engaged in a dispute with McGuire, but not with unfriendliness upon his part, and McGuire attempted to shoot Yates, or acted in such manner with his gun as to cause Yates to have reasonably grounded fear that, unless he shot McGuire, McGuire would shoot him, and, acting under this apparent necessity, Yates shot McGuire, Yates would not be guilty, unless at some time before the fatal moment and after Yates had seen the danger of continuing the dispute with McGuire, and had observed McGuire's evil disposition to engage in a gun fight, Yates could have, with reasonable safety, abandoned the difficulty, and avoided the necessity of shooting McGuire; for if, after the two entered into the dispute, both having deadly weapons in their hands, Yates perceived that McGuire was going to shoot if he did not desist from the dispute, and Yates did not desist, but preferred to continue the dispute, and kept his gun in a position on equal terms with McGuire in order to get the drop on him when the dispute had gotten to such fever heat that McGuire would attempt to shoot him, then the defendant, Yates, would be guilty, at least, of manslaughter; he not being allowed, under the law in such case, to plead self-defense." Defendant excepts.

"If you shall find from the evidence that when on meeting up with McGuire the defendant, Yates, willingly entered into a dispute with McGuire, and if you shall further find that the defendant, Yates, willingly stood his ground and engaged in the quarrel with McGuire, both having deadly weapons in their hands, and if you shall further find that Yates, willing to stand his ground and willing to engage in the fight, raised his weapon every time McGuire raised his, in order that he might not let McGuire get the drop on him, and that in such fight the defendant killed McGuire, Yates would not be allowed to interpose the plea of self-defense, but would be guilty of manslaughter." Defendant excepts.

"If you shall find from the evidence that the defendant, Yates, met up with McGuire by accident, and shall find also that he did not have his deadly weapon with him for an unlawful purpose, and also find that said Yates endeavored to make peace with McGuire, but should further find that during

the conversation defendant Yates got mad with McGuire, and in the heat of an ungovernable temper decided he would shoot it out with McGuire, and did shoot and kill McGuire in this heat of passion, the defendant, Yates, would be guilty of manslaughter, and you should so find, and would be so even though McGuire was in the act of drawing his own weapon upon him." Defendant excepts.

None of these exceptions can be sustained.

[2] His honor properly instructed the jury that the burden of proof was on the defendant to satisfy them of the facts and circumstances constituting self-defense, and the remaining part of the charge covered by the first exception consists of a statement of the contentions of the defendant.

[3, 4] If not as full as the defendant desired, it was his duty to ask for specific instructions, and, if the judge inadvertently stated a contention incorrectly, it ought to have been called to his attention. *Simmons v. Davenport*, 140 N. C. 411, 53 S. E. 225; *Davis v. Keen*, 142 N. C. 502, 55 S. E. 359.

[5] It is not necessary to consider the second exception, as the charge excepted to relates to murder in the second degree, and the defendant was convicted of manslaughter.

The third and fourth exceptions are to parts of the charge, which embody well-settled principles.

[6] It is the duty of one who is assaulted to abandon the difficulty and to avoid the necessity of killing, if he can do so with reasonable safety, and one who enters into a fight willingly and does not abandon it, but prefers to stand his ground and continue in the fight, is guilty of manslaughter at least if he kills.

The charge is set out in full in the record, and it shows that all phases of the evidence favorable to the defendant were presented to the jury.

No error.

(155 N. C. 276)

ROBERTS v. BALDWIN.

(Supreme Court of North Carolina. May 24, 1911.)

1. APPEAL AND ERROR (§ 1097*)—LAW OF THE CASE—SUBSEQUENT APPEALS.

A decision of the Supreme Court on appeal cannot be reviewed on a second appeal in the same case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4358; Dec. Dig. § 1097.*]

2. PLEADING (§ 345*)—MOTION FOR JUDGMENT—GROUNDS.

Where the complaint alleged that defendant some five years previously dug a ditch, whereby much water was cast on plaintiff's land, and that this had been done continuously up to the time of suit, and the answer denied a continuous trespass, and pleaded the three-year statute of limitations, defendant's motion for judgment on the pleadings, based on the statute and the theory of a continuous trespass, was prop-

erly refused, in view of the answer's denial of a continuous trespass.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 845.*]

3. WATERS AND WATER COURSES (§ 126*)—DIVERTING SURFACE WATER—ISSUES.

Where, in an action for diverting surface water by means of a ditch dug by defendant, the complaint alleged that the ditch was cut about five years before the commencement of the action, and that thereby a large quantity of water was collected and thrown on plaintiff's land, and that that had continued until the commencement of the action, and defendant denied that he had committed a continuous trespass, and pleaded limitations of three years, and the case was tried on the theory that plaintiff could only recover for injuries sustained within three years, issues: "Was the ditch * * * dug by defendant more than three years before the commencement of this action? Was the ditch * * * used continuously to carry the surface water from defendant's land for more than three years before the commencement of this action?"—were properly refused because not embodying sufficient facts on the issue of limitations, since the ditch might have been dug and used continuously for more than three years before the commencement of the action, and the injury complained of might have occurred within the three years.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 126.*]

4. WATERS AND WATER COURSES (§ 126*)—DIVERTING SURFACE WATER—ISSUES.

The issues: "Did the defendant by the use of the ditch * * * divert the natural flow of the water on the lands of plaintiff? What damage has plaintiff sustained by reason of such diversion"—were sufficient to enable defendant to present his claims.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 126.*]

5. TRIAL (§ 352*)—ISSUES—DISCRETION OF COURT.

The form of the issues submitted to the jury is within the discretion of the presiding judge, provided they are sufficient to determine the rights of the parties and to support the judgment.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 352.*]

6. WATERS AND WATER COURSES (§ 125*)—DIVERTING SURFACE WATER—DAMAGES.

One suing for the wrongful diversion of surface water collected and thrown on his land may recover for loss of crops in addition to the injury to the land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 140; Dec. Dig. § 125.*]

7. DAMAGES (§ 62*)—DUTY OF PERSON INJURED—WRONGFUL DIVERSION OF SURFACE WATER.

The rule requiring one injured by the wrongful act of another to do what he reasonably can to decrease the damages does not require an owner of land injured by surface water wrongfully diverted, collected, and thrown on his land by means of a ditch cut by another, to cut a ditch to take care of the water, and, where he fails to do so, his damages cannot be limited to the expenses incurred in cutting such ditch.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-132; Dec. Dig. § 62.*]

8. WATERS AND WATER COURSES (§ 126*)—DIVERTING SURFACE WATER—EVIDENCE—INSTRUCTIONS.

Where, in an action for diverting surface water and throwing the same on the land of

plaintiff, the evidence showed that defendant had cut a ditch and thereby collected surface water and caused the same to flow on the land of plaintiff, and that the effect of keeping open a ditch to take care of such water would be to fill up ditches on the land of plaintiff, a charge, that the measure of damages was the amount that it would cost plaintiff to dig a ditch to carry off the water from defendant's ditch, was properly refused.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 141; Dec. Dig. § 126.*]

9. TRIAL (§ 251*)—INSTRUCTIONS—ISSUES.

Where issues are submitted to the jury, an instruction not directed to the issues, and asserting that plaintiff cannot recover, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

10. TRIAL (§ 278*)—INSTRUCTIONS—EXCEPTIONS—SUFFICIENCY.

An exception to the charge as a whole is untenable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 689; Dec. Dig. § 278.*]

Appeal from Superior Court, Henderson County; Council, Judge.

Action by H. M. Roberts against John J. Baldwin. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for the wrongful diversion of rain or surface water from the lands of the defendant to the lands of plaintiffs, by means of a ditch cut by the defendant. The cause was tried at a former term of the Henderson superior court, and the appeal, which was taken at that time, was heard and considered by this court at fall term, 1909. See *Roberts v. Baldwin*, 151 N. C. 407, 66 S. E. 346.

The plaintiffs allege that said ditch was cut about five years before the commencement of the action; that by means thereof a large quantity of surface water was collected and thrown on the lands of the plaintiffs; and that this had continued up to the commencement of the action. This is denied by the defendant. The defendant, among other things, pleads the statute of limitations of three years. The plaintiffs offered evidence to sustain the allegations of the complaint, and evidence to the contrary was offered by the defendant. The defendant moved for judgment on the pleadings before evidence was introduced, and for judgment of nonsuit at the conclusion of the evidence. Both motions were refused, and the defendant excepted as to each. The same reason was assigned in support of each of these motions, to wit: That the complaint alleged that the injury was continuous, and that it originated more than three years before the commencement of the action, and that therefore the action was barred by the statute of limitations.

The defendant tendered the following issues, which were refused, and the defendant excepted: (1) Was the ditch complained of

by plaintiff dug by defendant more than three years before the commencement of this action? (2) Was the ditch dug by defendant operated and used continuously to carry the surface water from defendant's land for more than three years before the commencement of this action? (3) Did the plaintiff by her negligence, or of those acting under or for her, contribute to the damage claimed by the plaintiff? (4) Was the negligence of plaintiff, or those acting under or for her, the proximate cause of damage to plaintiff's lands? (5) Have the lands of the plaintiff, described in the complaint, been damaged by the defendant by reason of the ditch cut by him, causing water on defendant's land to be diverted from their natural course and to overflow plaintiff's land, and, if so, how much?

The court submitted the following issues: (1) Did the defendant, by the use of the ditch cut by him, divert the natural flow of the water on the lands of the plaintiffs? Answer: Yes. (2) What damage has the plaintiff sustained by reason of such diversion of the water? Answer: \$150.

The defendant contended that the plaintiffs, if entitled to recover damages, could not recover for injury to crops in addition to injury to the land.

The defendant also requested the court to give the following instruction on the issue of damages, which was refused, and the defendant excepted: "In any event, if you should find all of the issues in favor of the plaintiffs, then in that case you are instructed that the measure of plaintiff's damages would be the amount that it would cost the plaintiffs to dig a ditch from B to C of sufficient capacity to carry off the water from B."

Shipp & Ewbank and Smith & Schenck, for appellant. Chas. F. Toms, Staton & Rector, O. V. F. Blythe, and J. W. Pless, for appellee.

ALLEN, J. (after stating the facts as above). 1. The first and second exceptions to the refusal to enter judgment for the defendant upon the pleadings, or to nonsuit on the evidence, cannot be sustained. The same question was presented and considered on the former appeal in this action (151 N. C. 408, 66 S. E. 346), and the court then said: "The defendant pleaded the three-year statute of limitations and relied upon Revisal 1908, § 395 (3): 'Action for trespass upon real property. When the trespass is a continuing one, such action shall be commenced within three years from the original trespass, and not thereafter.' His honor erred in sustaining the plea. This is not a continuing trespass. It is irregular, intermittent, and variable, dependent upon the rainfall as to quantity of water poured upon the plaintiff's land, and in frequency of occurrence. It is true the ditch, which was dug more than three years before suit brought, has been continuously

there; but that is on the defendant's land. The trespass is the pouring down of water upon the plaintiff's land, which comes down at irregular periods and in varying quantities, to the injury of his crops and land. The plaintiff can recover for any injury, caused by water diverted from its natural course, within three years before the action began."

[1] It has been repeatedly decided that a judgment of this court cannot be reviewed by a second appeal. Pretzfelder v. Insurance Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; Harris v. Quarry Co., 137 N. C. 204, 49 S. E. 95; Green v. Green, 143 N. C. 410, 55 S. E. 818.

[2] If, however, there was merit in the contention of the defendant, and it had not been heretofore considered, there are no facts appearing on the record, or admitted by the pleadings, on which the court can declare, as matter of law, that the cause of action is barred by the statute of limitations. The defendant denies the allegation that he had committed a continuous trespass, which commenced more than three years before the commencement of the action, and should not complain if the court declines to act upon the allegation as a fact in the case.

Oldham v. Rieger, 145 N. C. 258, 58 S. E. 1093, in which the distinction is clearly drawn between the cases in which the court may decide the plea of the statute of limitations, as matter of law, and when it cannot do so, is in point. Justice Walker, speaking for the court, says: "When the complaint sets out a cause of action which is clearly barred and the facts are admitted by the answer, and, in addition to the admission, the statute is pleaded or relied on, then the court may decide the question as a matter of law. This was the case, as will appear by reference to the statement of the facts, in Shackelford v. Staton, 117 N. C. 73 [23 S. E. 101], and Cherry v. Canal Co., 140 N. C. at page 426 [53 S. E. 139, 111 Am. St. Rep. 850], in the last of which cases Justice Hoke says: 'The facts are uncontroverted.' But when the complaint states a cause of action apparently barred, and the answer properly denies the facts or the cause of action, and then sets up the bar of the statute, the court cannot dismiss upon a demurrer *ore tenus* or a motion to nonsuit, for when such a motion is made it must be decided upon the pleadings of the plaintiff or of the adversary of the party who makes the motion, and the court has no right to look at the pleading of the opposing party, except to see if the facts are admitted, so as to present merely a question of law."

[3] The defendant did not ask that an issue be submitted on the plea of the statute. The first and second issues tendered may have been so intended; but they did not embody sufficient facts. The ditch may have been dug and used continuously for more than three years before the commencement of

the action, and the injury to the plaintiffs may have occurred within the three years.

In *Hocutt v. Railroad*, 124 N. C. 218, 32 S. E. 681, the ditches complained of had been cut and in use for more than 20 years; but it was held that the action was not barred because the right of action did not accrue until the plaintiff was injured.

The case seems to have been tried on this theory, as the plaintiffs confined their evidence to injuries sustained within three years, and the court charged the jury: "You cannot consider any damage either to crops or to the land of the plaintiffs prior to three years next before bringing this suit. You can go back three years from the time the summons was issued in this case and assess damages both to the land and the crops for that period. You cannot go beyond that in arriving at damages either as to the injury to the land or crops."

[4] 2. The issues adopted by the court were sufficient to enable the defendant to present his contentions, and to develop his case, and this is all he was entitled to.

[5] The form of the issues is within the discretion of the judge of the superior court, provided they are sufficient to determine the rights of the parties, and to support the judgment. *Kimberly v. Howland*, 143 N. C. 393, 55 S. E. 778, 7 L. R. A. (N. S.) 545; *Clark v. Guano Co.*, 144 N. C. 71, 56 S. E. 858, 119 Am. St. Rep. 931.

[6] 3. There was no error in allowing the plaintiff to recover damages for loss of crops in addition to injury to the land. *Ridley v. Railroad*, 124 N. C. 38, 32 S. E. 379; *Beasley v. Railroad*, 147 N. C. 366, 61 S. E. 453.

The action in *Ridley v. Railroad*, supra, was commenced in 1892, before the act providing for the assessment of permanent damages against railroads, and was decided under the general law, and it was there held that the plaintiff was entitled to a judgment of \$300, upon a verdict finding the damage of the land to be \$500 and the damage to the crops \$300, and it was approved in *Beasley v. Railroad*, supra.

[7] 4. We do not think the rule, requiring a party injured by the wrongful act of another to do what he reasonably can to decrease the damages, should be extended, as the defendant contends. To do so would set a premium on illegal conduct, and would render useless many of the drainage acts of our state. If the prayer for instruction refused by the court embodies a correct legal principle, it is unnecessary for the upper proprietor to institute legal proceedings to drain through the lands of the lower proprietor.

He may cut his ditches when and where he pleases, may collect and divert water and pour it on the lands of the lower proprietor, and then require him to cut ditches on his land to take care of this water, or, failing

to do so, his damages are limited to the expenses he would have incurred in cutting the ditches.

[8] But the instruction, as framed, could not have been given in any event. The instruction limits the recovery to the cost of digging a ditch from B to C, of sufficient capacity to carry off the water from B. There is evidence in the record that there are ditches on the lands of the plaintiffs between C and the creek, and that the effect of keeping open a ditch from B to C would be to fill up these ditches. One witness said: "Q. Wouldn't it be a good thing to keep the ditch BC open? A. I think it would be a big mistake; it would fill up all Roberts' ditches between there and the creek." If the law imposed on the plaintiffs the duty of taking care of the water, surely it would not deny to them the cost of enlarging the ditches from C to the creek, made necessary by the acts of the defendant. The instruction would do so, and, if given, this evidence referred to could not be considered.

[9] 5. There were several instructions prayed for that are not set out, because none of them were directed to the issues and conclude, "The plaintiffs cannot recover." *Bradley v. Railroad*, 126 N. C. 740, 36 S. E. 181; *Foy v. Winston*, 135 N. C. 440, 47 S. E. 466; *Earnhardt v. Clement*, 137 N. C. 93, 49 S. E. 49. We think, however, the substance of them, where pertinent, was embraced in the charge.

[10] 6. The exception to the charge as a whole is untenable. *Sigman v. Railroad*, 135 N. C. 181, 47 S. E. 420. The case is similar to the case of *Briscoe v. Parker*, 145 N. C. 14, 58 S. E. 443, and has been correctly tried.

No error.

(155 N. C. 287)

BERRY v. CAROLINA, C. & O. RY.

(Supreme Court of North Carolina. May 24, 1911.)

1. FALSE IMPRISONMENT (§ 15*)—INJURIES TO PASSENGERS—MISCONDUCT OF TRAINMEN—COMPLAINT.

A complaint in an action against a carrier, which alleges that while plaintiff was riding peaceably as a passenger on a train the agents of the carrier willfully and maliciously assaulted him, and committed a battery on him, and violently ejected him from the train, and caused his arrest on a criminal charge, and that he was discharged and the prosecution dismissed, charges a single continuing tort, for which the carrier is liable.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 15.*]

2. CORPORATIONS (§ 397*)—TORTS—LIABILITY. A corporation is liable for the acts of its servants committed while engaged in the business of the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 397.*]

3. CARRIERS (§ 360*)—PASSENGERS—EJECTION—GROUNDS.

A passenger may, by misconduct, justify his ejection from the train, and the conductor

need not wait until an act of violence has been committed by the passenger before ejecting him, but he may anticipate violent conduct when the condition of the passenger indicates that he will become offensive to the other passengers, and the conductor need only use reasonable care not to make a mistake.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1443; Dec. Dig. § 360.*]

4. FALSE IMPRISONMENT (§ 15*)—LIABILITY OF CARRIER—MISTREATMENT OF PASSENGERS.

A traveling passenger agent of a carrier who assists a conductor in running an excursion train, carrying numerous passengers, and who assumes authority in managing the train, acts presumably within the scope of his authority with the consent of the carrier, and has lawful authority to cause the arrest of a passenger on proper provocation, and, where he exercises his authority wrongfully and in disregard of a passenger's rights, the carrier is liable.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. §§ 5-67; Dec. Dig. § 15.*]

Appeal from Superior Court, McDowell County; Lane, Judge.

Action by O. C. Berry against the Carolina, Clinchfield & Ohio Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

"(1) Was the plaintiff arrested and prosecuted as alleged in the complaint. Ans. Yes.

"(2) Was the same done without probable cause? Ans. Yes.

"(3) Was the same done with malice? Ans. Yes.

"(4) Was the act of the agent of the defendant company as alleged in the complaint done willfully or wantonly or in utter disregard of the rights of the plaintiff? Ans. Yes.

"(5) Has the criminal action terminated? Ans. Yes.

"(6) What damage, if any, has plaintiff sustained thereby? Ans. \$350."

From the judgment rendered the defendant appealed.

J. Norment Powell and Jas. J. McLaughlin, for appellant. John Gary Evans and Pless & Winborne, for appellee.

BROWN, J. The defendant assigns as error: (1) Overruling defendant's demurrer *ore tenus* to the complaint. (2) Overruling defendant's motion to nonsuit at the close of the evidence.

[1] We are of opinion that the demurrer was properly overruled. The complaint alleges "that at or near the station of Marion, in the state of North Carolina, while plaintiff was riding peaceably as a passenger on said train, the agents of the defendants willfully, wantonly, carelessly, maliciously, negligently, and in utter disregard of the rights of the plaintiff assaulted the plaintiff and committed a battery upon his person, and with violence and a strong arm ejected the plaintiff from its car, where he had a right

to be, and caused the plaintiff to be arrested and charged as a criminal before a justice of the peace in the state of North Carolina." The complaint further avers that the plaintiff was discharged, and that the prosecution has terminated. It requires no citation of authority to prove that a cause of action is stated by those words, and one for which, if sustained, the plaintiff may recover damages. The complaint not only alleges the wrongful ejection of plaintiff, a passenger, from defendant's train, but that it was done willfully, wantonly, and in utter disregard of plaintiff's rights. *Holmes v. Railroad*, 94 N. C. 324.

The error of the learned counsel for defendant is in regarding this as an action for a prosecution solely for a supposed past offense as was the case in *Minter v. So. Express Co.*, 153 N. C. 507, 69 S. E. 497, and *Daniel v. Railway*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455. In the former case the complaint charged that the defendant's night watchman swore out a warrant against the plaintiff for the larceny of whisky from the express company. The complaint was held to be demurrable, in the absence of an allegation that the express company authorized or ratified the act of the night watchman; the act charged not being within the general scope of his authority. In the latter case the cashier in the local office of a railroad company caused the arrest of a person whom he suspected of having stolen money from the office of the company. In the absence of proof that the act of the cashier was authorized or ratified by the corporation, it was held that the plaintiff could not recover. The difference between those cases and the one at bar is obvious. In the two former the sole purpose was to punish the offender for a past unlawful act upon his part, and thus to vindicate justice. That was no part of the agent's business, and did not come within even an implied authority, much less the actual scope of his agency. "There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property; it is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company, which is a corporation, and a private individual." *Allen v. Railroad*, L. R. 6 Q. B. 65, quoted in *Daniel v. Railroad*, *supra*. In this case we have a very different state of facts stated in the complaint and admitted by demurrer. The tort consists, not in prosecuting the plaintiff for a past offense for the purpose of vindicating justice, but in having him illegally arrested, while a passenger on defendant's train and entitled to its protection, tak-

en from the car and delivered into custody, all of which is alleged to have been done by and at the instance of defendant's agent. The series of acts constituted one continued tort for which the defendant is responsible.

[2] It is well settled that corporations are liable for the acts of their servants while such servants are engaged in the business of their principals in the same manner and to the same extent that individuals are liable under like circumstances. *Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750. As to whether the arrest and ejection of the plaintiff was actually within the scope of Mandell's authority can best be considered in passing on the motion to nonsuit as the agency is alleged and, of course, admitted by demurrer. We are of opinion that the motion to nonsuit was properly overruled. The entire evidence was introduced by the plaintiff, the defendant offering none, and tends to prove these facts. There was an excursion train operated on December 28, 1909, from Spartanburg, S. C., beyond Spruce Pine, N. C., on defendant's road. Plaintiff, being a passenger thereon, was arrested in this state by two police officers of Spartanburg, who were on the train, at the direction and command of Chas. T. Mandell, the traveling passenger agent of the defendant, removed from the train and delivered into the custody of a constable and a justice of the peace at Spruce Pine, when a warrant was issued at instance of Mandell. The plaintiff was taken under arrest to Marion, in McDowell county, Mandell accompanying the officer, and tried by a justice of the peace and discharged. The evidence shows that Mandell prosecuted the case and insisted on plaintiff's being imprisoned without bail. The motion to nonsuit brings up two inquiries: Was the plaintiff wrongfully arrested, removed from the train, and prosecuted? If so, is the defendant liable for Mandell's acts?

[3] That a passenger may forfeit his rights as such by his misconduct, and that he may be lawfully ejected from the train on that account by the carrier, is undeniable. The conductor is responsible for his train, and it is not only his right, but it is his duty, to eject a drunken or disorderly passenger. In doing this, the conductor is necessarily bound to act upon appearances, and all that the law requires is that he shall use reasonable care and caution not to make a mistake. The conductor is not obliged to wait until some act of violence has been committed by the passenger before exerting his authority. He may anticipate violent and offensive conduct when the condition of the passenger is such as to indicate that he will become offensive to other passengers. 2 *Hutchinson on Carriers* (3d Ed.) § 978. The answer avers that the plaintiff was arrested in his car because of his violent threats and participation in an affray on the train which resulted in the serious wounding of one of the participants.

While there is evidence of a fight in one of the cars, there is no evidence that the plaintiff participated in it. We find nothing whatever in the record which justifies or even excuses the arrest and prosecution of the plaintiff. From the plaintiff's evidence and the other testimony offered by him, it is manifest that Mandell (who was not examined) acted with precipitation, violence, and an entire disregard of plaintiff's rights. In fact, it is not contended in defendant's brief or upon the argument that the arrest, expulsion, and prosecution of plaintiff is justified by any evidence in the record, but defendant's counsel rest their defense exclusively upon the contention that the defendant is not liable for Mandell's acts.

[4] We are of opinion that such contention cannot be sustained. The evidence discloses that this was a large excursion train carrying many passengers; that Mandell, admitted to be the traveling passenger agent of defendant, was on the train; that he was assisting the conductor to manage the train, which evidently needed more than one person to conduct it properly. The attitude of the conductor and all on the train towards Mandell shows that his authority was supreme and extended throughout the train. As Mandell, the passenger agent of defendant, was assuming this authority openly on the train, it must be presumed to have been within the scope of his temporary authority and with defendant's consent, especially when the defendant offers no evidence to the contrary. When Mandell ordered the arrest and expulsion of defendant from the train, and followed it up by delivering plaintiff into the custody of the law and prosecuting him, he committed a tort for which the defendant is liable. The prosecution was not for a past offense which plaintiff had committed, as in the cases we have quoted, but it was a continuation of the same tort committed by Mandell when he ordered the arrest on the train. As he had the legal authority to order the arrest of plaintiff upon proper provocation, the act was within the scope of his general authority, and, if he exercised such authority wrongfully, wantonly, and with utter disregard of plaintiff's rights, as is alleged in the complaint and found by the jury, the defendant is liable for his conduct. The act was committed in the course of Mandell's employment at the time, in furtherance of the defendant's business, and was apparently within the scope of his authority. The principle laid down in the *Daniels* and *Minter* Cases has no application to the facts of this case. It falls rather within the principle laid down in *Jackson v. Telegraph Co.*, 139 N. C. 354, 51 S. E. 1015, 70 L. R. A. 738; *Marlowe v. Bland*, 154 N. C. 140, 69 S. E. 752; *Hussey v. Railroad*, 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312; *Railroad v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1296, 30 L. Ed. 1146.

No error.

(155 N. C. 233)

EPLÉE v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 24, 1911.)

1. MASTER AND SERVANT (§§ 101, 102*)—SAFE APPLIANCES—OBLIGATION OF MASTER.

A master must furnish reasonably safe and suitable appliances and such as are in general use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 180-184; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES—QUESTION FOR JURY.

In an action for injuries to a servant operating an electric drill, caused by being caught by a projecting set screw, evidence held to require submission to the jury of the issue of the master's negligence in failing to cover or countersink the screw.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An operator of an electric drill, consisting of a vertical shaft at the lower end of which was a socket in which the drill was inserted and held in place by a projecting set screw, was injured by being caught by the screw. He had never operated the drill when the foreman directed him to do the work. He informed the foreman that he did not know how to adjust it; but the foreman did not instruct or warn him. While reaching for a can of water to pour water on the iron as needed, his coat was caught in the set screw, and he was injured. Held, that he was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 296*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An instruction, submitting the issue of contributory negligence under the test of what a reasonably prudent man would have done under the circumstances, was sufficiently favorable to the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

5. MASTER AND SERVANT (§ 262*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

The defense of assumption of risk, to be available, must be pleaded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 858; Dec. Dig. § 262.*]

Appeal from Superior Court, Buncombe County; Jas. L. Webb, Judge.

Action by Calvin Eplée against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action to recover damages for personal injury, alleged to have been caused by the negligence of the defendant.

These issues were submitted: "(1) Was the plaintiff, Calvin Eplée, injured by the negligence of the defendant, Southern Railway Company, as alleged in the complaint? (2) Did the plaintiff by his own negligence contribute to his injury as alleged in the answer? (3) What damage, if any, is the plaintiff entitled to recover?" The jury an-

swered the first issue, "Yes"; the second issue, "No"; and the third issue, "One thousand dollars."

Moore & Rollins and W. B. Rodman, for appellant. Craig, Martin & Thomason, for appellee.

BROWN, J. As the basis of his action, the plaintiff alleged that defendant furnished him, with which to do his work, a drill that was unsafe, and negligently constructed, in that from the upright revolving shaft thereof there projected a set screw, dangerous to the person operating the machine, and which the defendant negligently allowed to project from the shaft, instead of having covered or countersunk. Defendant denied that it was negligent, and pleaded contributory negligence. Defendant, in its shops at Asheville, operated an electric drill, which consisted of a vertical shaft, at the lower end of which was a head or socket, and into this socket a drill of the size and kind desired to be used was inserted and held in place by a set screw. This screw head projected three-quarters of an inch and was neither covered nor countersunk at time of the injury. The plaintiff was drilling a hole in a piece of iron, and, in order to keep the iron cool, from time to time water would have to be applied to the hole which was being drilled. The plaintiff was standing on the left side of the drill holding the iron, and there was a can of water near by, so that he could pour the water on the iron as needed. The plaintiff had put water on the iron twice before the accident happened, and, when last using the can of water, had set it on the table to the right of and near the drill. In reaching for the can of water, plaintiff's coat sleeve caught in the set screw, which held the drill in the socket, and he was seriously injured.

The assignments of error, relied upon and discussed in the defendant's brief, present three questions for determination:

[1] 1. Is there any evidence of negligence?

It was the duty of defendant to furnish plaintiff with a drill reasonably safe and suitable for the work in which he was engaged, and such as is in general use. *Hicks v. Manufacturing Company*, 138 N. C. 319, 50 S. E. 703; *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611.

[2] There is abundant evidence tending to prove that for the protection of the operator such set screws in drills are usually covered or countersunk. In answer to counsel for defendant upon cross-examination, plaintiff further testified that, two days after he was injured, he saw this drill, and defendant had drilled out the set screw hole and sunk the head flush with the drill shaft, so it could not injure any one.

That there is evidence of negligence to be submitted to the jury is settled by a multi-

tude of decisions. *Pressly v. Yarn Mills*, 138 N. C. 410, 51 S. E. 69, and cases cited.

[3] 2. Was the plaintiff, in any reasonable view of the evidence, guilty of contributory negligence?

The evidence tends to prove that in progress of plaintiff's work it was necessary to drill holes in an iron bar. He went to the foreman of the shop and asked where the man was that operated the drill. The foreman said he was not there, and that the plaintiff would have to do the work himself. The plaintiff stated to him that he did not want to take the responsibility of operating the drill. The foreman then went with him to the drill, adjusted it, started it running, and left him to operate it alone. The foreman told the plaintiff to hold the iron plate, and when it became hot to pour water on it. The plaintiff told him that he was unaccustomed to the machine and did not understand it. He had never operated the machine before and did not know how to adjust it. There is no evidence that the foreman called attention of plaintiff to the set screw or cautioned him.

It is manifest upon this evidence the court could not hold the defendant guilty of contributory negligence as matter of law.

[4] A man engaged in such work to which plaintiff was assigned, even if a skilled operator, cannot always be on guard against damage from exposed set screws and the like. His mind is concentrated on his work, and, when plaintiff reached for the water can, it was almost a mechanical act.

In submitting plaintiff's conduct to the judgment of the jury under the rule of the "reasonably prudent man," the court gave defendant all it was entitled to.

[5] 3. It is unnecessary to discuss the proposition contended for in defendant's brief that, owing to the character of the work in which plaintiff was engaged, the provisions of section 2646, Revisal 1905, do not apply, and that the defense of assumption of risk is open to defendant for the reason that such defense is not pleaded in the answer. *Dorsett v. Manufacturing Company*, 131 N. C. 254, 42 S. E. 612.

Had it been pleaded, the court could scarcely hold as matter of law that, in any view of the evidence, the plaintiff assumed the risk of the work at the drill in which he was temporarily engaged at the direction of the foreman. *Marks v. Cotton Mills*, 138 N. C. 401, 50 S. E. 769.

The brief of the learned counsel for defendant concludes as follows: "These several assignments of error are intended to raise and present to this court, for its decision, this question: Upon plaintiff's own evidence, is he entitled to maintain this action?"

We are of opinion that he is.

No error.

(155 N. C. 466)

STATE v. HAWKINS.

(Supreme Court of North Carolina. May 24, 1911.)

1. INDICTMENT AND INFORMATION (§ 75*)—CONSTRUCTION—CLERICAL ERROR.

Where an indictment alleged that defendant, on a date specified, in B. county with force and arms, "unlawfully, willfully, and feloniously break and enter" the town hall, etc., with intent to commit larceny therein, it was not fatally defective for failure to contain the word "did"; such omission being a clerical or grammatical error cured by Revisal 1905, § 3254.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 202-204; Dec. Dig. § 75.*]

2. BURGLARY (§ 41*)—EVIDENCE.

In a prosecution for burglary, evidence held to sustain a conviction.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103; Dec. Dig. § 41.*]

3. CRIMINAL LAW (§ 968*)—FAILURE OF PROOF—REMEDY.

On the state's failure to prove ownership of the building alleged to have been burglarized, defendant's remedy is by prayer for an instruction, and not by a motion in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2423-2444; Dec. Dig. § 968.*]

4. BURGLARY (§ 41*)—OWNERSHIP OF BUILDING—EVIDENCE.

Where, in a prosecution for burglary, a witness testified without objection that the building belonged to the town of M., and there was no evidence to the contrary, there was sufficient proof of ownership of the building to sustain a conviction.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103; Dec. Dig. § 41.*]

Appeal from Superior Court, Burke County; Allen, Judge.

Bob Hawkins was convicted of burglary, and he appeals. Affirmed.

The defendant was tried and convicted at March term, 1911, of the superior court of Burke county, under section 3333, Revisal of 1905, upon the following bill of indictment: "The jurors for the state upon their oaths do present that Bob Hawkins, late of the county of Burke, on the 31st day of October, in the year of our Lord one thousand, nine hundred and ten, with force and arms, at and in the county aforesaid, unlawfully, willfully, and feloniously break and enter the town hall in the town of Morganton, the property of said town of Morganton, then and there situate, in the nighttime, in which said town hall there was at the time goods, chattels, dishes and other merchandise and things of value, with intent, unlawfully, willfully, and feloniously to commit the crime of larceny, against the form of the statute in such case made and provided, and against the peace and dignity of the state." Upon the call of the case for trial, and before the jury was impaneled, the defendant moved the court to quash the bill of indictment on the ground that there was no allegation

in said bill that defendant did commit any crime, in that the word "did" nowhere appeared in said bill. Motion denied, and defendant excepted.

The state introduced the following evidence:

C. R. Gilbert testified as follows: "I am night policeman in the town of Morganton. On the night of October 31, 1910, the ladies of the town had a Halloween party in the town hall for the benefit of Grace Hospital. They left the hall some time between 10 and 11 o'clock that night, and left some dishes, cups, pots, pans, etc., in there. Some time that night, while the party was going on, the defendant Bob Hawkins came up there, and they told him to get out, and he went down the stairway and went away. When they all left, the hall door was locked with a padlock, with hasp and staple. That night some time between 1 and 2 o'clock I heard a noise like some one working at the lock at the door of the hall. I was in my room just across the aisle in the building. I heard something like a lock break. I got up and went to the door and looked in, and the defendant sat down by the side of the stove. I pulled the door shut, went back to my room, put on my clothes, and went in and arrested defendant and took him to the calaboose and locked him up. The lock was gone, and we haven't found it yet. He said that if I would turn him loose he would go home; that a wagon was coming for him in a few minutes. I heard the noise at the lock, I suppose about five minutes. It was continuous. I heard something like some one walking down the stairway just about the time the lock was broken, and while I heard the noise at the door like some one working with the lock. I sleep in the building across the hall. The building belongs to the town of Morganton." Cross-examination: "This was some time between 1 and 2 o'clock in the night. It was dark. The lights had gone out. I searched the defendant. He had nothing on his person. I will not swear Bob Hawkins broke the door open, or that he broke the lock to the door. I did not see any one break the door open. All that I know is that I heard a noise like some one working at the door and heard something like a lock break and found Hawkins in the hall. He told me that he was hunting for a place to sleep. I told him I would give him a place to sleep and took him to the calaboose." Here the state rested.

The defendant introduced the following testimony:

Bob Hawkins, defendant, testified as follows: "I am defendant. Live some six or eight miles from Morganton. Was in town the night the ladies had a Halloween party for the benefit of Grace Hospital. I was employed by Timothy Smith to take some vegetables and other things to the hall for Mrs. Walton. I was there most of the time

while the party was going on. They gave me my supper, and I stayed there until they all left. I went down street and met up with some of my friends and took a drink or two of liquor. I got cold and went back up there to get warm before starting home. Some of my friends had a wagon, and they were coming by the town hall to get me. I went up to the door, and it was standing partially open, so that I could see the glimmer of light from the stove in the dark room. I walked in and sat down by the stove, and directly the policeman came in and arrested me and took me down to the calaboose and locked me up. I did not break anything, neither did I attempt to take anything—only wanted to warm before starting for home."

Four witnesses testified to the good character of the defendant.

The defendant requested that the following instructions be given to the jury:

"(1) The court charges you that, upon all the testimony in this case, the jury should return a verdict of not guilty." Refused, and defendant excepted.

"(2) The court charges you that the fact that the prisoner was found in the building, as alleged, is not evidence that he entered it with the intent to commit any particular crime." Refused, and defendant excepted.

After the verdict the defendant moved in arrest of judgment upon the same grounds urged in support of his motion to quash, and upon the additional ground that there was no evidence that the hall was the property of the town of Morganton. Judgment was pronounced on the verdict, and the defendant appealed.

R. C. Huffman, for appellant. Attorney General Bickett and Geo. L. Jones, for the State.

ALLEN, J. (after stating the facts as above). [1] It is apparent that the failure to use the word "did" in the indictment is a clerical or grammatical error, which is cured by our statute. Revisal 1905, § 3254. The meaning of the bill is clear, and the defendant could not have been misled, nor could he have failed to understand the exact nature of the offense charged.

In Joyce on Indictments, § 201, it is said: "Though an indictment may be couched in ungrammatical language, this will not, of itself, render the indictment insufficient, provided the intention and meaning of the pleader is clearly apparent." And in section 202: "It is the general rule that an indictment is not vitiated by mistakes which are merely clerical, where they do not destroy the sense of the indictment and the meaning is apparent."

A case in point is Pond v. State, 55 Ala. 196, which holds an indictment sufficient which charged that "the defendant broke in to and entered a storehouse of R. D. with the intent to steal, in which there was at the

time of such breaking and entering, goods, merchandise or other valuable things, kept for use."

In *Com. v. Call*, 21 Pick. (Mass.) 515, Justice Morton says: "The grammatical and critical objection, however ingenious and acute it may be, cannot prevail. The age is gone by when bad Latin or even bad English, so it be sufficiently intelligible, can avail against the indictment, declaration, or plea."

The evidence for the state, when considered in connection with that of the defendant, and the evidence of his good character, would have fully justified a verdict of acquittal; but we cannot say there was no evidence fit to be submitted to the jury, and it was for them to determine its force and conclusiveness.

The controlling principle, in determining whether there is evidence which the jury ought to consider, is well stated in *State v. White*, 89 N. C. 464, and approved in *State v. Walker*, 149 N. C. 530, 63 S. E. 77, as follows: "It is well-settled law that the court must decide what is evidence, and whether there is any evidence to be submitted to the jury, pertinent to an issue submitted to them. It is as well settled that, if there is evidence to be submitted, the jury must determine its weight and effect. This, however, does not imply that the court must submit a scintilla, very slight evidence; on the contrary, it must be such as, in the judgment of the court, would reasonably warrant the jury in finding a verdict upon the issue submitted, affirmatively or negatively, accordingly as they might view it in one light or another, and give it more or less weight, or none at all. In a case like the present one, the evidence ought to be such as, if the whole were taken together and substantially as true, the jury might reasonably find the defendant guilty. A single isolated fact or circumstance might be no evidence, not even a scintilla; two, three or more, taken together, might not make evidence in the eye of the law; but a multitude of slight facts and circumstances, taken together as true, might become (make) evidence that would warrant a jury in finding a verdict of guilty in cases of the most serious moment. The court must be the judge as to when such a combination of facts and circumstances reveal the dignity of evidence, and it must judge of the pertinency and relevancy of the facts and circumstances going to make up such evidence. The court cannot, however, decide that they are true or false. This is for the jury. But it must decide that, altogether, they make *some evidence*, to be submitted to the jury; and they must be such, in a case like the present, as would, if the jury believed the same, reasonably warrant them in finding a verdict of guilty."

[2] The evidence of the state tended to prove that, on the night the crime is alleged to have been committed, there was a crowd in the hall until between 10 and 11 o'clock; that, while the crowd was there, the defend-

ant went to the hall and was told to leave, which he did; that, after the crowd left, the door was locked, a padlock, hasp, and staple being used; that property of some value was left in the hall; that between 1 and 2 o'clock in the night a policeman, who slept in the building, heard a noise like some one working at the lock of the door; that he heard something break, and he thought it was the lock; that he went immediately to the hall and found the door open and the lock gone; that the defendant was on the inside, and, when the policeman reached the door, he sat down by the stove.

If so, the jury could find from the evidence that the defendant broke the lock to the door and entered the hall, in which there was property, with the criminal intent alleged in the indictment.

"The intent may, and generally must, be proven by circumstantial evidence, for, as a rule, it is not susceptible of direct proof. It may be inferred from the time and manner at and in which the entry was made, or the conduct of the accused after the entry, or both." Cyc. vol. 6, p. 244.

In *State v. McBryde*, 97 N. C. 396, 1 S. E. 925, the defendant was charged with breaking into a dwelling with intent to commit larceny, and, in discussing the evidence of intent, the court says: "The intelligent mind will take cognizance of the fact that people do not usually enter the dwellings of others in the nighttime, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and, when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The intent is not the object of sense—it cannot be seen or felt—and, if felonious, is not usually announced. So where no felony is committed, it would be difficult to prove a crime consisting of the intent alone, unless the jury be allowed to infer the intent from circumstances."

This is the law as announced in many decisions of this and other courts; but in its application juries should be guided by the humane rule delivered by Judge Ruffin in *State v. Massey*, 86 N. C. 680, 41 Am. Rep. 478: "When an act of a person may reasonably be attributed to two or more motives, the one criminal and the other not, the humanity of our law will ascribe it to that which is not criminal. 'It is neither charity nor common sense nor law, to infer the worst intent which the facts will admit of. The reverse is the rule of justice and law. If the facts will reasonably admit the inference of an intent, which though immoral is not criminal, we are bound to infer that intent.'"

The evidence of criminal intent is, we think, stronger than in *State v. McBryde*, supra, and in *State v. Christmas*, 101 N. C. 754, 8 S. E. 361, in which judgments upon convictions were affirmed. The motion in arrest of judgment upon the ground that the

state failed to prove that the hall was the property of the town of Morganton was properly overruled.

[3] If there had been a failure of proof, the defendant should have taken advantage of it by a prayer for instruction, and not by a motion in arrest of judgment. *State v. Baxter*, 82 N. C. 606; *State v. Harris*, 120 N. C. 578, 26 S. E. 774; *State v. Huggins*, 126 N. C. 1056, 35 S. E. 606.

[4] It seems, however, there was evidence of the fact. A witness testified without objection, "The building belongs to the town of Morganton," and there was no evidence to the contrary. The fact that the defendant was in the house was a circumstance to be considered by the jury upon the question of criminal intent.

We find no error.

No error.

(155 N. C. 239)

YOUNCE v. BROAD RIVER LUMBER CO.
(Supreme Court of North Carolina. May 17, 1911.)

1. DEPOSITIONS (§ 75*)—TAKING—QUALIFICATIONS OF COMMISSIONER.

The fact that the commissioner taking depositions was not a relative of either party need not appear on the face of his certificate, though *Revisal 1905, § 1652*, provides that the commissioner shall not be so related.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 166-189; Dec. Dig. § 75.*]

2. DEPOSITIONS (§ 83*)—QUASHING—GROUNDS—RELATIONSHIP OF COMMISSIONER.

That a commissioner taking depositions was related to one of the parties, contrary to the statutory requirement, is ground for quashing the depositions, unless waived by the previous conduct of the party.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 219-226; Dec. Dig. § 83.*]

3. DEPOSITIONS (§ 83*)—QUASHING—BURDEN OF PROOF.

The burden is on one moving to quash a deposition because the commissioner was related to one of the parties, contrary to statute, to prove relationship, and where it appeared that a deposition was taken on the day and place fixed, by the person designated in the order, it is presumed, in absence of contrary evidence, that it was legally taken.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 219-226; Dec. Dig. § 83.*]

4. EVIDENCE (§ 244*)—HEARSAY—TESTIMONY OF AGENT.

In an action for damages for breach of a contract by which plaintiff was to cut and saw timber for defendant, and manufacture it, evidence was not admissible of a conversation between witness and defendant's vice president, wherein the latter stated that his company intended to freeze out plaintiff, and not let him complete sawing the timber, by claiming that it was improperly sawed, and wherein witness asked the vice president how he could say that when he had told witness that the lumber sawed by plaintiff was better than most of it sawed by defendant's other mills; the statement not being made in the line of the vice president's official duty and hence being hearsay.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

5. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—PREJUDICIAL EFFECT.

The admission of such conversation must have been prejudicial to defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

6. EVIDENCE (§ 543*)—EXPERT TESTIMONY—QUALIFICATIONS—COST OF MANUFACTURE.

In an action for damages for breach of a contract by which plaintiff agreed to cut and saw timber for defendant and manufacture it, wherein plaintiff claimed as damages the difference between the contract price of sawing and the cost thereof, a witness of 18 or 20 years experience in the sawmill business, who was engaged therein when the contract was breached, and had expert knowledge of the cost of manufacturing lumber in the county in which the work was done, though he had never seen the particular land, could testify to the average cost of sawing and manufacturing lumber; the weight of his evidence being for the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2356½-2358; Dec. Dig. § 543.*]

Appeal from Superior Court, Rutherford County; Webb, Judge.

Action by C. F. Younce against the Broad River Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Civil action to recover damages for breach of contract between the plaintiff and defendant, by which the plaintiff undertook to cut and saw certain timber for defendant and manufacture it into lumber. The deposition of the witness Middleby as to the conversation with defendant's vice president stated that witness had a conversation with the vice president wherein the latter said that they intended to freeze out plaintiff the same as they had done the other man who operated on the same land, and that he would do it by claiming that the lumber was improperly sawed, whereupon witness asked him how he could say that when he had told witness that he had been to a number of mills throughout the South, and that the lumber sawed by plaintiff was better than the majority of the other mills.

The issues submitted were:

"(1) Did the plaintiff saw the timber for defendant in accordance with the contract made between them? Answer: Yes.

"(2) Did the defendant wrongfully prevent plaintiff from performing his contract with it as alleged? Answer: Yes.

"(3) What damage, if any, is plaintiff entitled to recover? Answer: Eight hundred [\$800]."

S. Gallert and Justice & Broadhurst, for appellant. McBrayer, McBrayer & McRorie, for appellee.

BROWN, J. [1] The defendant moved to quash the deposition of J. Middleby, Jr., a witness for plaintiff, upon the ground that

the certificate of the commissioner was irregular, in that it failed to state that the commissioner was of kin to neither party. Revisal 1905, § 1652. It is not necessary that this should appear upon the face of the certificate, although it is a requirement of the statute in the selection of a commissioner.

[2, 3] It is ground for quashing the deposition, unless waived by previous conduct of a party, and the burden of proof to establish the relationship would be on the one making the motion. It appearing that the deposition was taken on the day fixed, at the place named, and by the person designated in the order, the presumption, in the absence of evidence to the contrary, is that all things were done rightly. *Gregg v. Mallet*, 111 N. C. 76, 15 S. E. 936; *Street v. Andrews*, 115 N. C. 421, 20 S. E. 450.

[4, 5] The second and third exceptions are to the ruling of the court in allowing the witness Middleby, whose deposition was taken, to testify to a conversation in Reading, Pa., with one Clements, vice president of the defendant company. We are of opinion that the testimony was both incompetent and prejudicial to the defendant. It was not a declaration by an officer of the company made in the line of his official duties while acting for the company in the particular transaction, nor was the alleged statement any part of the transaction between plaintiff and defendant. It is hearsay testimony, and falls within no exception to the rule that such evidence is incompetent. It is well settled that the declarations of officers of a corporation are competent only when made in line of declarant's official duty, and while discharging it in reference to a transaction for the company. 20 Century Digest, "Evidence," § 916; 16 Cyc. 1020; 10 Cyc. 947. It is said in *Smith v. Railroad*, 68 N. C. 114: "But, if his right to act in the particular matter has ceased, his declarations are mere hearsay, which do not affect the principal. Cases in support of this proposition may be found in abundance with but little industry." See, also, *Williams v. Williams*, 28 N. C. 281, 45 Am. Dec. 494; *Howard v. Stutts*, 51 N. C. 372; *McComb v. Railroad*, 70 N. C. 178; *Rumbough v. Imp. Co.*, 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528.

[6] The fourth and fifth exceptions relate to the issue of damages. The plaintiff's alleged damages were measured by him between the contract price of sawing the timber into lumber and what he contended was the cost of doing so. The defendant offered as a witness on the cost of doing the work a man who had 18 or 20 years of experience in the sawmill business, and was so engaged in 1906 and 1907, the year in which the breach is alleged to have occurred, and had manufactured lumber in some smooth and some rough land in the western part of Rutherford county. We think his honor erred in

excluding the evidence. It is true the witness had never been on this particular land, but he had expert knowledge of the cost of sawing and manufacturing lumber upon both smooth and mountainous lands in Rutherford county. It was proper for him to state the average cost of sawing and manufacturing lumber as a fact in his experience to be considered by the jury and given such weight as in their opinion it was entitled to. *Wilkinson v. Dunbar*, 149 N. C. 28, 62 S. E. 748, and cases cited; *McKelvey* on Ev. p. 230.

New trial.

(155 N. C. 250)

SHERILL v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. May 17, 1911.)

1. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAY IN DELIVERY OF MESSAGES—ACTIONS—EVIDENCE.

In an action for negligent delay in the delivery of a message announcing the death of a relative of the recipient, who was thereby deprived of the opportunity of attending the funeral, his testimony that, had the message been promptly received, he would have taken a train and asked for a delay of the funeral, and the testimony of the sender that, had such request been received, the funeral would have been delayed, was competent as against the objection that there was nothing to show that the train would not have been late so as to prevent the recipient from making connections; there being no presumption that the train would have been delayed.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

2. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAY IN DELIVERY OF MESSAGES—ACTIONS—EVIDENCE.

Where the recipient of a message announcing the death of a relative sued for negligent delay of the message, depriving him of the opportunity of attending the funeral, evidence that the delay in the message caused such a shock to the recipient's mother that he could not leave on the day after the receipt of the message was competent as a reason why he could not leave after the receipt of the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

3. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, in an action for negligent delay in delivering a message announcing the death of a relative, the evidence showed that the recipient by taking the first train after the receipt of the message could not have reached the place of the funeral in time, the error, if any, in allowing testimony that the delay in the message caused such a shock to his mother that he could not leave, was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

4. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAY IN DELIVERY OF MESSAGE—PRESUMPTIONS—EVIDENCE.

In an action against a telegraph company for delay in the delivery of a death message, thereby preventing the recipient from attending the funeral of a relative, evidence of the feeling existing between decedent and the recipient must

be shown by evidence where the relationship is distant, though affection is presumed in very near relationships.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

5. TELEGRAPHS AND TELEPHONES (§ 68*)—DELAY IN DELIVERY OF MESSAGES—NEGLIGENCE—DAMAGES.

Where, in an action against a telegraph company for negligent delay in delivering a message announcing the death of an aunt, the evidence showed that the recipient lived within sight of the terminal office of the company, and was known to its agents, and that the message was delayed nearly a day, and that the recipient, if the message had been promptly delivered, would have attended the funeral, but that, because of the delay, he could not attend, and that affection existed between the recipient and decedent, the recipient could recover for mental anguish.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

6. TELEGRAPHS AND TELEPHONES (§ 52*)—DELAY IN DELIVERY OF MESSAGE—LIABILITY.

A recipient of a message announcing the death of a relative must make every reasonable effort to reach the place of the funeral before he can claim damages for loss of the opportunity, and, where by delay in delivering the message he cannot by such efforts arrive in time for the funeral, he may recover damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 36; Dec. Dig. § 52.*]

7. TELEGRAPHS AND TELEPHONES (§ 74*)—NEGLIGENT DELAY IN DELIVERING MESSAGES—DAMAGES—INSTRUCTIONS.

An instruction in an action against a telegraph company for negligent delay in the delivery of a message announcing the death of a relative of the recipient, depriving him of the opportunity of attending decedent's funeral, that the jury should assess the damages at such a sum as will be just compensation for the injury, that they may not consider the grief natural to the loss of the relative, but must separate the grief for the relative's death from the grief at not attending the funeral, and only consider the anguish suffered therefrom, is sufficient on the question of damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 77; Dec. Dig. § 74.*]

Appeal from Superior Court, McDowell County; Lane, Judge.

Action by Lonnie Sherrill against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. H. Fearons and Alf. S. Barnard, for appellant. Pless & Winborne, for appellee.

CLARK, O. J. This is an action to recover damages for mental anguish because of the failure to deliver promptly the following message, which was filed at Johnson City, Tenn., at 3 p. m., December 21, 1909, addressed to the plaintiff at Old Fort, N. C.: "Ma died to-day. If any of you can come, will delay funeral." Though the plaintiff lived within sight of defendant's office, and was known to its agents and to the people generally at Old Fort, this message was not

delivered till 11 o'clock next morning, when the plaintiff happened to go into defendant's office. The deceased was the aunt of the plaintiff. They had lived together at various times, and he testified that, if the message had been delivered promptly, he would have gone to Marion on the 8:20 train next morning, and thence to Johnson City over the Carolina, Clinchfield & Ohio Railroad, and would have sent a message asking that the funeral be delayed, and it would have been delayed till he could have been present; that, if he had taken the first train after the message was delivered, he would have had to to have gone around by way of Morristown, and could not have reached Johnson City till late at night, and knowing that the funeral could not then be delayed till the next day, which would have been the third day, he wired the relatives that he could not come. The above statement of facts established negligence beyond controversy.

[1] Exceptions 1 and 2 were because the plaintiff was allowed to testify that, if the message had been received by him the day it was sent, he would have gone to Johnson City next morning on the 8:20 train, and that he would have sent a message asking that the funeral be delayed, and exception 9 was to the admission of the testimony of J. G. Pulliam, the sender of the message to plaintiff, that, if the plaintiff had sent such message, he would have been in time for the funeral, and that it would have been delayed on that day until his arrival. The most earnest contention of the defendant is that the 8:20 train might have been behind time, and that the plaintiff might have missed connection at Marion. But the evidence of both plaintiff and Pulliam is that if the plaintiff had left on the 8:20 train, and had wired as he said he would have done, the funeral would have been delayed that day till his arrival. This testimony is uncontradicted. There is no presumption of law or of fact that the train was behind time, or that plaintiff would have missed connection, or that the funeral would not have been delayed till his arrival if he had. It does not appear how many trains passed over the Carolina, Clinchfield & Ohio Railroad each day, nor the length of time between the arrival of the train from Old Fort at Marion and the departure of the train at that point for Johnson City. The evidence of plaintiff and Pulliam is simply that if he had left Old Fort on the 8:20 train that day, sending the message he said he would have sent, the funeral would have been delayed till his arrival.

[2] Exceptions 3 and 4 are because the plaintiff was allowed to testify that the delay in the message till the next day caused such a shock to his mother that he could not have left on the next day after receipt of the message. This was not submitted to the jury as an element of damages, and was

competent as one of the reasons why he could not have left after the receipt of the message at 11 o'clock next day.

[3] It was harmless, for the evidence was that, if he had left after the receipt of the message, he could not have reached Johnson City till late at night, and the funeral could not have been postponed then till the next day.

[4] The next four exceptions were to the admission of evidence as to the relationship and feeling existing between the plaintiff and the deceased. It has been long settled that feelings of affection are presumed in the very near relations of life, but between more distant relatives such feelings must be shown by evidence. *Cashion v. Telegraph Co.*, 123 N. C. 267, 31 S. E. 493; *Harrison v. Telegraph Co.*, 136 N. C. 383, 48 S. E. 772; *Luckey v. Telegraph Co.*, 151 N. C. 553, 66 S. E. 596.

[5] Exceptions 10, 11, 12, and 13 are to the refusal of the court to tell the jury that the plaintiff was not entitled to recover damages for mental anguish. This scarcely needs consideration. The delay in the telegram was unreasonable. A letter by mail would have gone from Johnson City to Old Fort in less time. The evidence is that the plaintiff would have gone in time to have been at the funeral if the telegram had been delivered before the 8:20 train next morning, that he could not have gone in time if he had left by the first train 1:10 p. m., after the receipt of the message, and there was evidence of affection between the plaintiff and deceased, in addition to the relationship.

[6] Exceptions 14 and 15 are to the instructions of the court that, after the plaintiff received the message, he should have made every reasonable effort to reach Johnson City in time for the funeral, and if by reason of the delay in delivering the message he could not after making such efforts have reached Johnson City in time for the funeral, and there was no fault on his part, he was entitled to recover damages. In this there was no error.

[7] The sixteenth and last exception is to the instruction of the court upon the question of damages, as follows: "If you come to the issue as to damages, you should assess the damages at such a figure as would be reasonable, fair, and just compensation for the injury, and, on arriving at it, you should apply reasonable common sense methods such as reasonable business men would apply. You should not consider the grief and anguish natural to the loss of the relative. You should separate the grief at the aunt's death from the grief and anguish at not being at the funeral. It is natural to suppose that a man who loses a near relative suffers grief, and you should not consider that, but only consider the anguish and suf-

fering he may have undergone by reason of the fact that he did not attend the funeral, if you find such failure was proximately caused by defendant's negligence." We do not see that the defendant can complain of this.

The defendant company is granted its franchise that it may serve the public by the prompt dispatch and delivery of messages whose urgency requires more speedy transmission and delivery than can be had by the ordinary course of the mail. When by the selection of inefficient agents or inefficient supervision of them such messages are unreasonably delayed, the telegraph company has failed in its duty, and the plaintiff who has sustained damages by reason of such negligence is entitled to recover therefor. It is in the power of the defendant to avoid all such actions as this by proper attention and the faithful discharge of its duties. The telegraph company has no cause to complain of any one but itself that such actions arise. It is in its power to prevent them, and it is its duty to do so.

No error.

(155 N. C. 436)

STATE v. ROWE.

(Supreme Court of North Carolina. May 17, 1911.)

1. CRIMINAL LAW (§ 655*)—APPEAL—REVIEW—REMARKS BY COURT—PREJUDICE.

After four of the counsel had closed their addresses to the jury, and just after one of defendant's counsel had spoken, the judge told the sheriff to give the jury water, and stated that, if they wished to retire to their room, they might do so for a few minutes—"We have no band to play between the speeches." What elicited the remark did not appear, and it was not shown that it applied any more to argument of counsel for defendant than for the state. *Held*, that defendant was not prejudiced thereby.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1520-1523, 1527, 1535; Dec. Dig. § 655.*]

2. HOMICIDE (§ 271*)—PROVOKING DIFFICULTY—WORDS—QUESTION FOR JURY.

Defendant and deceased had previously quarreled over the habit of deceased of passing out of the usual bed of a highway where it was rough, over defendant's clover field, and each had ordered the other not to speak to him. They were enemies, and on the morning in question defendant accosted deceased, telling him that he had broken his promise not to drive over the grass, and that, if he did not drive in the road, defendant would put the law on him. This led to a difficulty, in which defendant shot deceased. *Held*, that it could not be said as a matter of law that defendant's words were not such as might be calculated to provoke a difficulty under the state of feeling existing between the parties.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 565; Dec. Dig. § 271.*]

3. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REQUESTED CHARGE—INSTRUCTIONS GIVEN.

In a prosecution for homicide, a requested charge on self-defense held covered by instructions given.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.*]

4. WORDS AND PHRASES—"SERIOUS."

The word "serious" has no fixed or technical meaning in the law, but is rather general and indeterminate in its signification, and, when applied to an assault, may include one made with intent to kill or to inflict great bodily harm, or one committed without such intent.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6420.]

5. HOMICIDE (§ 23*)—DEADLY WEAPON—SECOND-DEGREE MURDER.

Where decedent was killed with a deadly weapon, defendant was at least guilty of murder in the second degree, nothing else appearing; and the burden rested on him to satisfy the jury that such facts and circumstances of mitigation or justification existed as would excuse the homicide or reduce its grade to manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35, 39, 40; Dec. Dig. § 23.*]

6. HOMICIDE (§ 340*)—DEGREE OF OFFENSE—SECOND-DEGREE MURDER—MANSLAUGHTER.

Where, in a prosecution for homicide, defendant admitted killing deceased by shooting him with a shotgun, but pleaded self-defense, the jury having disregarded such plea, it was their duty to convict him of murder in the second degree, and hence he could not complain that a conviction of manslaughter was unsustainable.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

7. HOMICIDE (§ 255*)—MANSLAUGHTER—EVIDENCE.

Where, in a prosecution for homicide, there was evidence justifying a finding that defendant entered into a fight with deceased willingly, if not with malice, deliberation, or premeditation, and that he pursued deceased and shot him when there was no real or apparent necessity for doing so, in order to defend his own person, and that after killing him he turned, and snapped his gun twice at deceased's son, a boy of 16 years of age, who was unarmed, and then fled, a conviction of manslaughter was justified by the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 539-541; Dec. Dig. § 255.*]

Appeal from Superior Court, Mitchell County; Pell, Judge.

Charles Rowe was convicted of manslaughter, and he appeals. Affirmed.

The defendants, Charles Rowe and Wesley Rowe, were indicted for the murder of Filmore Rose. Wesley Rowe was acquitted, and Charles Rowe was convicted of manslaughter. The killing was admitted by the defendant, Charles Rowe; his plea being self-defense. The evidence is voluminous, but, for the purpose of considering the exceptions, the following statement of facts, and a portion of the evidence, will suffice:

The deceased, whose wife was a first cousin of the prisoner, had in cultivation a field about a mile from his home, and, in order to reach the field, it was necessary for him to go over an old road which was used by the public at will, across the property of the defendant. At one place the road was rough and difficult to pass. The deceased on one or two occasions drove a little out of the usual bed of the road, allowing his wagon to run over the land and clover of the defendant. On the morning of the homicide, the

two defendants left home early, about 7 o'clock, one with an axe and the other with a gun, to place some poles along the road to prevent trespassing, as they alleged. From this point the evidence of the state and the defendant conflicts. The state's witness, Avery Rose, the 16 year old son of deceased, and the only one present at the homicide except deceased and the two defendants, testified: "Thursday morning father and I started to the field; got outside of Charlie Rowe's field, and quite a distance from us we saw Charlie Rowe and Wesley Rowe standing on a high knoll, about 125 yards away. Q. Were they on or near this road you were traveling? A. Yes, sir; up on a knoll, looking down the road towards us. We went on and met them. As soon as we got in sight, they came towards us. Q. What did they have in their hands? A. Wesley had a gun and Charlie Rowe had an axe. Q. What kind of gun was it? A. A double-barrel shotgun. Charlie had the axe. My father went up, and said, 'Good morning' to them, and they didn't speak to him. Charlie said: 'Now look here, Filmore, you have run over my clover and grass. If you don't drive down there in the road, I am going to put the law to you.' Father said: 'Charlie, clean out those stumps over there and fix the road so I can drive it, and I will do so.' Father went on up the road, Charlie following father, Wesley following Charlie. I was behind my father. Father went on up the road. Charlie turned around to Wesley, handed Wesley the axe. Wesley handed him the gun. I then turned, and saw there was trouble. I made for the gun, and Charlie knocked me down with the gun, and run on around and shot my father. He struck me above the right ear—side of the head. After he shot my father, he turned and snapped twice at me as I went to my father. Q. Then what happened? A. They ran; went back down the road." The witness further testified that neither he nor his father had a pistol or other weapon of any kind, and there was no evidence that one was found on the body. The wife of the deceased testified that deceased had not had a pistol for over 20 years. The appellant testified in his own behalf, and after telling about going to the place of the homicide on the morning when they met, and doing a little work on the road, continued as follows: "I was just on the bank of the road, just in the edge of the clover. Q. Did any one speak? A. I was throwing the stones out and making a racket just as they got up there, and didn't hear any one speak. Q. What was the first word spoken there that you heard? A. Just at that time they were up to us, and were just passing us, and I spoke and said: 'Filmore, you are not doing what you promised you would do, keeping off the clover.' Just at that time, he spoke

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and cursed me (using offensive and insulting language). Q. How far away from you was he when he said that? A. Two or three steps away. Q. What happened when he used the language you have mentioned? A. Just when he used the language I have mentioned I had seen his hand in his pocket all the time, from the time he came up, and just at that time he stooped and picked up a stone with his left hand, his right hand being in his right pocket, and Avery stooped and picked up two, a stone in each hand. Just at that time, Avery rushed at me, wildly, furiously, with the stones. As he rushed at me, he saw the axe, and he dropped the stones, and grabbed the axe. Q. Then what did he do? A. Just as he grabbed the axe, he was getting very close to me and made a blow at me with the axe, and I dodged him, the handle striking me on the left shoulder, jerking the axe out of his hand. I gave back three or four steps from him, and by then I had gotten to where my brother had stopped, and was standing with the gun on his shoulder. That was my brother Wesley. As the blow came and I dodged it, I was right at my brother and I reached and took the gun off his shoulder, and smashed him around the side of the neck or head. It staggered him considerably. He didn't fall. [Here witness indicates position of parties.] Q. When you struck him with the gun, what did you say, if anything? A. Filmore made about one step towards me with his right hand in his pocket, and as it came above his pocket, with the stone in his left hand, the right hand with the revolver in it, I fired. Q. How was he holding the pistol when you fired? [Witness indicates.] Q. Where was it when you fired? A. The butt was just above the pocket. Q. Did you see the pistol? A. Yes, sir. From the time he came up, I saw his hand was on his pocket, and I could see the bulk. It looked like the muzzle of the pistol. [Witness indicates to the jury how the pistol was held.] I could see the butt above the edge of the pocket. Q. When you saw the pistol in that position, what did you do? A. I shot. Q. Did you move from the point where you were standing when you struck Avery with the gun, as you have described? A. After I got hold of the gun and smashed him, I didn't move; stood right where I was. It was all in a minute. Q. Why did you shoot? A. Our life is dear to us, and I saw that, if I didn't shoot, I would be killed. Q. When you shot, what did Filmore Rose do? A. Just as I threw the gun up he scinged a little. He was square facing me, and, when I threw the gun up, he scinged around to the right, turning his left shoulder a little towards me. The instant I fired he began to sink down. He sank down, and at that moment I spoke to my brother, and said: 'Let's go.' Q. How did you go? A. Back towards home. Q. Did you run or walk? A. We trotted; didn't run fast; went faster than a walk. Of

course, when I fired the gun, I thought Avery would go to his father, and I expected when Avery got to his father he would grab the pistol. That was why we hurried away." The witness further testified that, when he reached his home, he changed his clothing and reloaded the gun, and went with it to Spruce Pine, and surrendered himself to an officer. He took the gun with him because he thought he would be assaulted. There was evidence tending to show that the prisoner and the deceased were very unfriendly at the time of the homicide, and had been for some time before. He had spoken before to the deceased about driving on his land, and the deceased became angry and quarreled with him, though he did not quarrel himself, but spoke mildly to him. The defendant, in this connection, testified: "I had been cursed by him and told him to never speak to me any more, and he had given me orders never to speak to him any more. Q. What made him mad with you [that morning]? A. My speaking to him, I suppose. Q. Didn't you know by your experience before that time that, if you spoke to him, it would make him mad? A. He seemed to be very passionate. Q. Did he get mad when you would tell him to keep off the road and clover? A. Yes; he got mad before. Q. You expected him to get mad that morning? A. I did not know whether he would get mad. I don't know what you are going to do. I spoke as kind to him as I am talking to you. I knew he had gotten mad at other times." He further stated that he bore no malice towards the deceased at the time of the shooting; that he had learned not to entertain malice; that the clover and grass were not worth much, not over ten cents; that deceased weighed about 140 pounds and the boy Avery Rose, about 125 pounds, and that he and his brother, Wesley, each weighed about 165 pounds. There was evidence that the prisoner and his brother, Wesley, did not start from home together. They met at the river, a half mile from the place of the homicide, prisoner with the axe and Wesley with the gun, which he carried for his brother to shoot squirrels with, as he did not hunt.

During the trial, after four of the counsel had closed their addresses to the jury, and just after one of the defendant's counsel had spoken, the judge said to the sheriff: "You can give the jury water, and, gentlemen of the jury, if you wish to retire to your room [the jury room being a private room at the right of the jury box], you can do so for a few minutes. We have no band to play between the speeches." Defendant excepted. The defendant requested the court to charge the jury that the language used by him when talking to the deceased about keeping off the clover was not calculated to provoke a difficulty or bring on a fight, if the words were spoken in a pleasant way and in a mild tone of voice. This the court refused to do and defendant excepted. The defend-

ant requested the court to give several instructions to the jury, and, among others, the following, which is typical of all of them, and presents the question of self-defense to the jury as fully as any of them: "The court charges you that from all the evidence both for the state and the defendant the defendants were in their field where they had a right to be, and being in a place where they had a right to be, if they were without fault in bringing on the difficulty and the deceased advanced upon them or either of them with a rock or pistol, with intent to slay the prisoners or either of them, then the defendants were not required to retreat or fly, but might stand their ground and repel the assault even to the extent of taking the life of the deceased, and, if they did this, your verdict should be 'not guilty.' You are to be the judges of the reasonableness of the apprehension of the prisoners, or either of them, at the time they were assaulted, if you shall find from the evidence that they were assaulted, and, to do this, you are to place yourselves in the position and circumstances that the prisoners were placed in at the time, and say whether or not their apprehension was reasonable." The record states that this instruction was given substantially. At all events, the court charged the jury as follows:

"(1) But, when a person is without fault, and in a place where he has a right to be, and a sudden, fierce, and continuous assault is made upon him with a deadly weapon, he may stand his ground and slay his adversary, if necessary, to protect himself from death or great bodily harm. And the accused under such circumstances is not required to wait until the opportunity for successful defense is passed, but has the right to act in time to prevent death or great bodily harm, and act on the facts and circumstances as they appear to the prisoner, which facts and circumstances are considered by the jury as sufficient to put in fear of death or great bodily harm a person of reasonable firmness and self-possession; and if under such circumstances the prisoner, Charlie Rowe, shot the deceased, it would be excusable homicide.

"(2) If you should find from the evidence that Charlie Rowe was in a place he had a right to be, and I charge you that he was in a place where he had a right to be, being on his own land, and you should find that he was reasonably without fault in bringing on the difficulty, and that Filmore Rose made a sudden, serious, and continuous assault upon them, then Charlie Rowe would be allowed to stand his ground and shoot the deceased to save his own life or himself from serious bodily harm.

"(3) Whether a person who is assaulted by another will be justified in using such violence in resistance as will produce death must depend upon the nature of the assault, and the circumstances under which it was

committed. It may be of such a character that the party assaulted may reasonably apprehend death or great bodily harm to his person, and, in order to protect himself from such an assault, he may kill his adversary. The law of self-defense is founded on necessity, and, in order to justify or excuse the taking of human life upon this ground, it must appear first that the slayer had reason to believe that he was in danger of losing his life or of receiving great bodily harm; secondly, it must also appear to the jury that he believed as a reasonably firm man that, in order to avoid such danger, it was necessary for him to take the life of the deceased. The danger of losing life or receiving great bodily harm must be real or honestly believed to be so at the time, and on reasonable ground, and the jury is the judge of such reasonableness of his fears. Though it may afterwards be ascertained that there was no actual danger, yet the slayer has a right to kill in self-defense if the danger is reasonably apparent. It should appear that the circumstances in which the slayer was placed were such as would have produced the fear of death or great bodily harm in the mind of a man of reasonable prudence, courage, and self-possession."

The court was also requested to charge the jury that there was no evidence of manslaughter. This was refused, and defendant excepted. Judgment was entered upon the verdict, and defendant appealed.

Hudgins & Watson, W. L. Lambert, C. E. Greene, M. L. Wilson, and Black & Ragland, for appellant. T. W. Bickett, Atty. Gen., G. L. Jones, J. W. Pless, and John C. McBee, for the State.

WALKER, J. (after stating the facts as above). [1] The remark of the judge to the jury is severely criticised by counsel as an intimation by him that the case was being argued by defendant's counsel at too great length, but we cannot draw this inference from it. Counsel for the state might just as well complain that it was directed against them. It seems to have been made indifferently. We are not informed by the record what elicited the remark, and we are unable to see that it was prejudicial to the defendant. It may have been so, but it is incumbent upon him to show it. We will not presume error. *State v. Tyson*, 133 N. C. 692, 45 S. E. 838; *State v. Davis*, 134 N. C. 633, 46 S. E. 722; *State v. Lance*, 149 N. C. 551, 63 S. E. 198; *State v. Plyler*, 153 N. C. 630, 69 S. E. 269.

[2] But it was strenuously contended and argued before us with much force and plausibility that the words of the defendant, addressed to the deceased, were not calculated, nor could they have been intended to provoke a difficulty, and therefore, if the jury accepted the defendant's version of the facts, he was without fault, while the deceased made

a sudden and deadly assault upon him, thus making complete the right of self-defense. Whether language is provocative or not cannot always be determined by a mere consideration of the words by themselves. It is sometimes necessary, in order to ascertain the meaning or intention of the speaker, or the probable effect of what is said upon the person to whom he has spoken, that we should view them in their proper setting, the circumstances and surroundings of the parties, their previous relations to each other, and the state of their feelings. What is said by a friend may pass unnoticed, while, if the same words are uttered by an enemy, they are like a spark, though small it be, falling into powder, and the explosion quickly follows. In such a case a single word, though apparently innocent and harmless, will arouse the human passions of anger and resentment. An illustration may be found in *McGrew v. State* (Tex. Cr. App.) 49 S. W. 226, in which it appeared that defendant and deceased, being unfriendly, had met casually in a saloon. Defendant ordered a glass of Dutch beer, whereupon deceased said, "I will take a glass of American beer," and a fight ensued. It was contended that the words of the deceased were not calculated to provoke a difficulty, but the court ruled otherwise, and said: "While the act of provocation must be confined to the time when the homicide was committed, yet we do not understand by this that we cannot look back to facts transpiring before this, the course of conduct of the parties, and their former conversations, in order to shed light upon and render significant some act or declaration done at the time of the homicide." The evidence in the case shows that the deceased had previously quarreled with the defendant about this same matter, and each had ordered the other not to speak to him. They were enemies, and the defendant should have known, and did know, of this state of feeling at the time he spoke to the deceased about driving over his "clover patch." According to his own testimony, he accused the deceased of bad faith, in that he had deliberately broken his promise not to injure his grass and clover, and he should have known, if he did not know, that such language was calculated to provoke a difficulty, as deceased had quarreled with him before under like circumstances, and they would have fought then if the defendant, as he says, had not exercised great self-control. The court properly instructed the jury to consider the evidence and decide whether or not the words were calculated and intended to bring on a fight, and the exception to this part of the charge must be overruled.

[3] The defendant was entitled to the instruction requested by him and which we have set out in the statement of the case, if he was entitled to any which he asked to be given, but, while the judge did not use

the language of the prayer, as he was not required to do so, we think the substance of the instruction was given in the general charge to the jury, and that was a sufficient response to the prayer. It may well be said that the charge of the court was favorable to the defendant, as much so as he had any right to expect, for the jury were told that the defendant was where he had a right to be, and that, if a sudden, fierce, and continuous assault was made upon him with a deadly weapon, the law permitted him "to stand his ground," and slay his adversary, and he was not required to wait until the opportunity for successful defense had passed, but might act at once upon the facts as they appeared to him, and if the jury found, when the evidence is thus considered—that is, by putting themselves in his place—that the circumstances were such as to put a man of ordinary firmness in fear of death or great bodily harm, the killing of the deceased was excusable, and they should acquit the defendant. The following instruction was still more favorable: "If you find from the evidence that the defendant was in a place he had a right to be, and I charge you he was in a place where he had a right to be, being on his own land, and you further find that he was reasonably without fault in provoking the difficulty, and that Filmore Rose made a sudden, serious, and continuous assault upon him, then the defendant had the right to stand his ground and shoot the deceased to save his own life or himself from serious bodily harm." It will be observed that in the last instruction the court did not describe the kind of assault which would justify the taking of human life with great particularity. He did not tell the jury that it must have been committed with intent to kill or even to inflict great bodily harm, but that, if it was "sudden, serious, and continuous," and without regard to its effect upon the defendant's mind or whether calculated to excite a reasonable apprehension of death or grievous bodily injury, it would be sufficient to justify him in "standing his ground" and killing his adversary.

[4] The word "serious" has no fixed or technical meaning in the law, but is rather general and indeterminate in its signification. It may when applied to an assault include one made with the intent to kill or to inflict great bodily harm, or it may not, and the jury should have been instructed more definitely upon the character of assault that will justify a killing in self-defense, but this omission was clearly in favor of the defendant, and he has no just cause of complaint. The defendant certainly has no ground upon which to base an exception that the case has not been tried in accordance with the law as declared in former decisions of this court. *State v. Dixon*, 75 N. C. 275; *State v. Blevins*, 138 N. C. 668, 50 S. E. 763; *State v. Hough*, 138 N. C. 663, 50 S. E. 709.

[5] The killing with a deadly weapon having

been admitted, the defendant was guilty, at least, of murder in the second degree, nothing else appearing, and the burden accordingly rested upon him to satisfy the jury that such facts and circumstances of mitigation or justification existed as would excuse the homicide or reduce its grade to manslaughter. *State v. Brittain*, 89 N. C. 481; *State v. Barrett*, 132 N. C. 1005, 43 S. E. 832; *State v. Gapps*, 134 N. C. 622, 46 S. E. 730; *State v. Fowler*, 151 N. C. 731, 66 S. E. 567. There was some evidence to show that the defendant slew Filmore Rose in self-defense, and it was fairly submitted to the jury under instructions which were at least free from any error unfavorable to the defendant. The jury decided the fact against him, and accepted the theory of the state and the evidence in support of it, that there was no felonious assault upon the defendant prior to the homicide. This being so, he was guilty either of murder in the first, or, at least, in the second degree, or of manslaughter. There was ample evidence upon which a conviction of either of the degrees of murder would have been warranted, but the jury, with merciful regard for the weakness and frailty of human nature, convicted of the inferior felony. What was said in *State v. Fowler*, 151 N. C. 731, 66 S. E. 567 (by Justice Brown), is peculiarly applicable to this case: "When, as in this case, the plea is self-defense and the killing with a deadly weapon is established or admitted, two presumptions arise: (1) That the killing was unlawful; (2) that it was done with malice. An unlawful killing is manslaughter, and, when there is the added element of malice, it is murder in the second degree. When the defendant takes up the laboring oar, he must rebut both presumptions—the presumption that the killing was unlawful and the presumption that it was done with malice. If he stops when he has rebutted the presumption of malice, the presumption that the killing was unlawful still stands, and, unless rebutted, the defendant is guilty of manslaughter. This is a fair deduction from the cases in this state. *State v. Hagan*, 131 N. C. 802, 42 S. E. 901; *State v. Brittain*, 89 N. C. 501, 502. At the request of defendant, the judge charged the jury very explicitly that, if they should find from the evidence offered by the defendant that the killing occurred under circumstances claimed by him and testified to by his witnesses, they should return a verdict of not guilty.

[6] The jury discarded defendant's plea, and if, as now argued by him, there was nothing in the evidence to warrant a verdict of manslaughter, it was the duty of the jury to convict of murder in the second degree. It necessarily follows that under such circumstances the defendant cannot complain of a verdict for manslaughter, a lesser degree of homicide. "An error on the side of mercy

is not reversible." [7] But, as also said in *State v. Fowler*, we think there is in this case evidence upon which a verdict of manslaughter may well be supported, and it is not necessary to apply the rule as broadly stated in *State v. Quick*, 150 N. C. 820, 64 S. E. 168. The jury evidently concluded that the defendant had entered into the fight willingly, if not with malice, or with deliberation and premeditation. There was evidence on the part of the state that the defendant pursued Filmore Rose and shot him, when there was no real or apparent necessity for doing so in order to defend his own person, and that, after killing him, he turned and snapped his gun twice at his son, a boy 16 years old. There was further evidence that Filmore Rose was not armed, and that defendant must have known it, as the jury rejected his statement of the facts. He and his brother ran immediately after this tragedy he says in fear of this boy, whom he thought would take the pistol from his father's pocket, when the jury find that there was none, and shoot him. There was evidence of other facts and circumstances strongly tending to show, not only the defendant's willingness, but his eagerness, for the fray. His misfortune is that the jury did not credit his story, but repudiated it and the whole of it. He was fortunate, though, in the fact that the jury, having disbelieved him, did not convict him of murder.

We have not set out the charges of the court in its entirety. If we had done so, it would appear more clearly than it does in the few passages taken therefrom that the jury were clearly and fully instructed as to the law and its application to the facts, and that the defendant was treated with perfect fairness and impartiality. We need not consider the other numerous exceptions, as they cannot be sustained in view of what we have already said, and we find no reversible error in the rulings to which they were taken.

No error.

(155 N. C. 257)

PIEDMONT LUMBER CO., Inc., et al. v.
CHRISTENBURY et ux.

(Supreme Court of North Carolina. May 24, 1911.)

1. MORTGAGES (§ 298*)—PAYMENT OF DEBT.

A logging contractor of a lumber company purchased from it a logging outfit and horses for \$800 and gave his note for the price secured by a mortgage on the property. He and his wife gave a mortgage on her land as collateral security for \$200. The contractor, while logging for the company, became indebted to it in excess of the sum earned, and one of the horses died. The company took back the remainder of the property, valued at \$587. *Held*, that the mortgage on the wife's land was unpaid and could be foreclosed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 836-863; Dec. Dig. § 298.*]

2. PRINCIPAL AND SURETY (§ 105*)—EXTENSION OF INDULGENCE OF PRINCIPAL DEBTOR—EFFECT.

Mere indulgence granted to the principal debtor by the creditor, without any binding agreement so to do, does not relieve the surety from liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 201-210; Dec. Dig. § 105.*]

Appeal from Superior Court, Burke County; Webb, Judge.

Action by the Piedmont Lumber Company, Incorporated, and another, against J. W. Christenbury and another. From a judgment for defendants, plaintiffs appeal. Reversed.

Plaintiff company, holding a mortgage with power of sale on the land of the feme defendant, to wit, one-eighth interest in the Christopher Shuffler place, as collateral security to the amount of \$200 for a debt held by company on her husband for \$800, which last debt had been secured by a mortgage on personal property, advertised and sold land pursuant to the terms of the mortgage, and same was bid in by plaintiff A. O. Birdsall. Deed was made pursuant to sale, which purported to convey the said land to the purchaser. Action was instituted to have said Birdsall declared the owner according to the terms of the deed. Defendants answered claiming that the \$200, the portion of the debt which the mortgage was given to secure, had been paid, and prayed judgment that this fact be declared and the land released of the lien. The cause having been duly referred, the referee heard the evidence on a full finding of fact, and held, in effect: That the mortgage debt had not been paid, but same and any part thereof was justly due. Second. That the plaintiff Birdsall had not bought the land outright for himself, but had bid the same in for the company, and that plaintiff company was entitled to judgment of foreclosure. The court, reversing conclusion of the referee, gave judgment for the feme defendant to the effect that as to her the debt secured by mortgage on her land had been paid. To this judgment plaintiffs, having duly excepted, appealed.

John T. Perkins, for appellants. J. F. Spainhour, for appellees.

HOKE, J. [1] On the hearing it was made to appear: That the male defendant, J. W. Christenbury, having undertaken to do some logging for plaintiff company, said company sold him a logging outfit, including four horses, at the price of \$800, and took a note therefor, secured by a mortgage on the property bearing date July 31, 1906, payable December 1, 1906, with interest from date, and plaintiff company was to make advancements to said J. W. Christenbury in provisions and money to enable him to perform his part of

the contract. That at the time of said sale, or shortly thereafter, J. W. Christenbury and wife, N. L. Christenbury, executed a mortgage to the company with power of sale on the lands of the feme defendant; said mortgage containing the stipulation as follows: "This deed is to be collateral security to a chattel mortgage of eight hundred dollars and the first payment of two hundred dollars on the same is to cancel this mortgage, then this deed to be null and void, otherwise to be in full force and effect." That defendant J. W. Christenbury entered on the performance of the contract and did a large amount of logging for the company; but the advancements made to him in provisions and money were, and continued to be, largely in excess of the amount earned even after allowing him 50 cents per thousand more for logging than the amount agreed upon, and defendant J. W. Christenbury, having become indebted to plaintiff company over and above any sum earned to the amount of \$600 or \$700, and one of the horses worth \$175 to \$200 having died in the meantime, plaintiff company some time in 1907 took back the remainder of the personal property, of value at the time \$587, leaving as balance due on the mortgage debt of more than \$200, and thereupon plaintiff company advertised and sold the land as heretofore stated.

On these facts, and it clearly appearing that plaintiff Birdsall bid in the land for the company, we think the referee correctly held: "As a matter of law that no payment as contemplated in the contract has ever been made which would operate as a release or discharge of the mortgage debt of \$200, and that J. W. Christenbury, as principal, and N. L. Christenbury, as surety, to his debt of \$200, are due the Piedmont Springs Lumber Company the sum of \$200, with interest thereon from the 17th day of July, 1906, and that the plaintiff lumber company is entitled to a foreclosure of the said mortgage to satisfy the said debt, interest, and costs. (2) I find as a matter of law that no title passed to the plaintiff A. C. Birdsall at the mortgage sale." The mortgage on the land in express terms purports to be collateral security to the chattel mortgage. This in ordinary acceptance should be an additional security to the property contained in the mortgage. It does not appear at all that the personal property was taken back in cancellation of the trade, the horse that died was the loss of the purchaser and owner, J. W. Christenbury, and to hold, as defendant contends, that the value of the personal property taken back should be received in exoneration of the mortgage on the realty, would be in effect to hold that this last amounted to nothing.

[2] Nor is there any merit in the position that the feme defendant is relieved by delay on the part of the company in enforcing its

claim under the chattel mortgage. The authorities are to the effect that mere indulgence of the principal debtor, without any binding agreement to do so, will not relieve the surety. *Jenkins v. Daniel*, 125 N. C. 161, 34 S. E. 239, 74 Am. St. Rep. 632; *Deal v. Cochran*, 66 N. C. 269; *Thornton v. Thornton*, 63 N. C. 211.

There was error in the judgment of the court below, and on the facts established plaintiff company is entitled to judgment of foreclosure, and it is so ordered.

Reversed.

(155 N. C. 240)

MILLS v. McDANIEL et al.

(Supreme Court of North Carolina. May 17, 1911.)

APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

The trial court's adoption of a finding of fact of the clerk of the superior court on petition to have a certificate of probate added to a deed executed by husband and wife, and approval of the clerk's dismissal of the petition, is not reviewable; there being evidence justifying the finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Appeal from Superior Court, Rutherford County; Lane, Judge.

Action by Henrietta Mills against Roy McDaniell and others. From a judgment dismissing the proceeding, plaintiff appeals. Affirmed.

McBrayer & McBrayer, W. C. McRorie, and R. S. Eaves, for appellant. Pless & Coleman, for appellees.

CLARK, C. J. This was a petition filed before the clerk of the superior court, alleging that in October, 1869, William Butler and his wife executed to I. J. Spurlin a deed for the tract of land described in the petition, and that in January, 1870, said Butler and his wife appeared before J. B. Carpenter, who was at that time the probate judge and clerk of the superior court of Rutherford, and then and there the said William Butler duly acknowledged the execution of such deed before said clerk, and the privy examination of the wife of said Butler was duly taken by said officer. The petition further alleged that said clerk either failed to write out and attach to said deed the certificate of probate as aforesaid, which had been taken by him, or the said certificate has since been lost or misplaced by some of the successive owners or custodians of said deed, and the petitioner asked that such certificate of probate be now written out and attached to such deed, and that the records of the court be amended to show that said acknowledgments and privy examination were duly had in January, 1870, as above duly alleged, and that such correction should be

adjudged to take effect, nunc pro tunc, as of January 8, 1870, at the time the acknowledgment and privy examination and the certificate of probate thereon were in reality had.

The grave questions of law intended to be presented, and which would have been presented if the facts had been found in accordance with the allegations of the complaint, do not arise, because the clerk found it as fact, and adjudged, "that the said deed was not duly and legally proven as alleged in the petition, and that no privy examination of the wife of said Butler was taken or had as alleged in the petition, or at any other time or before any other officer." On appeal to the judge, he adopted the finding of fact of the clerk, and approved his judgment dismissing the proceeding. There was evidence which justified such finding of fact. In such case the action of the court below is not reviewable. *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241; *Brafford v. Reed*, 125 N. C. 311, 34 S. E. 443.

The judgment of the court below is therefore affirmed.

(155 N. C. 235)

ELLIOTT v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 17, 1911.)

1. CARRIERS (§ 20*)—DELAY IN TRANSPORTATION—PENALTY—"PARTY AGGRIEVED."

Where goods are delivered to a carrier for transportation and a bill of lading issued, the title, in the absence of any direction or agreement to the contrary, vests in the consignee, who alone is the party aggrieved with Revisal 1905, § 2632, imposing a penalty for delay in transporting freight.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 1, pp. 273-278; vol. 8, pp. 7569, 7570.]

2. CARRIERS (§ 20*)—DELAY IN TRANSPORTATION—"PARTY AGGRIEVED."

Where goods are shipped under an open bill of lading, and the contract between the shipper and the consignee provides that the goods are not to be paid for until received, inspected, and weighed at the point of destination, and the stipulation is inserted to ascertain the quantity of the goods and the price therefor, the title remains in the shipper, who is the party aggrieved by the carrier's delay in transportation, and he alone may sue for the penalty imposed by Revisal 1905, § 2632, though the carrier is ignorant of the contract.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

3. SALES (§ 200*)—CONTRACTS—PASSING OF TITLE.

Where it is necessary to weigh, measure, test, or do some other act with reference to the goods to ascertain the price to be paid, the title does not pass to the buyer until such act is done, unless a contrary intention appears.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 524-528; Dec. Dig. § 200.*]

Appeal from Superior Court, McDowell County; Lane, Judge.

Action by J. Luther Elliott against the

Southern Railway Company. From a judgment of dismissal, plaintiff appeals. Reversed.

Pless & Winborne, for appellant. S. J. Ervin, for appellee.

WALKER, J. This action was brought to recover a penalty, under Revisal 1905, § 2632, for delay by defendant in transporting a car load of chestnut wood from Glenwood, N. C., to the United States Leather Company at Old Fort, N. C. The shipment was made under an open bill of lading; but the contract between the plaintiff and the consignee, United States Leather Company, provided that the wood was not to be paid for until it had been "received, inspected and weighed" at Old Fort, and of this stipulation the defendant had no notice. By consent of the parties, the judge found the facts and held that plaintiff was not the "party aggrieved" within the meaning of the statute. Judgment was rendered dismissing the action, and plaintiff appealed.

If the stipulation as to "receiving, inspecting and weighing" entitled the plaintiff, as the "party aggrieved," to sue for the penalty, it can make no difference that the defendant had no notice of it. *Rollins v. Railway*, 146 N. C. 153, 59 S. E. 671; *Cardwell v. Railway*, 146 N. C. 218, 59 S. E. 673.

[1] We held, in *Stone v. Railroad*, 144 N. C. 220, 56 S. E. 932, that, "when goods are delivered to a common carrier for transportation and the bill of lading issued, the title, in the absence of any direction or agreement to the contrary, vests in the consignee, who is alone entitled to sue as the 'party aggrieved' for the penalty." This decision was approved in *Cardwell's Case*, supra, and followed in *Gaskins v. Railroad*, 151 N. C. 18, 65 S. E. 518, and *Buggy Corporation v. Railroad*, 152 N. C. 119, 67 S. E. 251. But in each of those cases the bill of lading was an open one, and there was nothing in the contract of sale, except in *Cardwell's Case*, which prevented the title of the goods vesting in the consignee upon delivery by the consignor to the carrier, and there was nothing to distinguish them from the case of an ordinary and unconditional sale and shipment under an open bill of lading. All of the title and interest of the consignor was divested, and there was no reason why he should be held to have been damaged or aggrieved by the delay in the carriage of the goods to their destination. But not so in this and other cases of a like kind. It is said in *Summers v. Railroad*, 138 N. C. 295, 50 S. E. 714: "As to the position that no recovery at all can be had, the court is of opinion that, on the facts of this case, the plaintiff is the party aggrieved, and the only person who had the right to enforce the penalty for delay. These penalties are not given solely on the idea of making a pecuniary compensation to the person injured, but usually for the more important purpose of enforcing the perform-

ance of a duty required by public policy or positive statutory enactment. As said in *Grocery Co. v. R. R.*, 136 N. C. at page 404 [48 S. E. 804]: 'The object in providing penalties is clearly to compel the common carrier to perform its duty to the public.' They are sometimes enforceable only by the state; sometimes they are given to any one who shall sue for them; and again the recovery is confined, as in this instance, to the party aggrieved, the person having a peculiar and special interest in enforcing the performance of the duty. In giving the penalty to the party aggrieved, the statute simply designates the person who shall have a right to sue, and restricts it to him who, by contract, has acquired the right to demand that the service be rendered. The party aggrieved, in statutes of this character, is the one whose legal right is denied, and the penalty is enforceable independent of pecuniary injury. Ordinarily, in case of a shipment of goods by a railway to a person who has ordered them, on delivery to the railway, the company receives them as the agent of the vendee or consignee, and such person would be the aggrieved party by delay in forwarding. But in this case, by the terms of the agreement between the plaintiff and Ward & Son, the plaintiff was not to get credit for the returned goods till they were received by Ward & Son"—citing *Grocery Co. v. Railroad*, 136 N. C. 396, 48 S. E. 801; *Switzler v. Rodman*, 48 Mo. 197; *Qualls v. Sayles*, 18 Tex. Civ. App. 400, 45 S. W. 839.

In *Cardwell's Case*, a package of harness had been shipped to be delivered at Effland. The delivery at the place designated being an essential part of the contract of sale, it was held that the consignor, as the party aggrieved, could recover the penalty for delay in the transportation, and also any damages he had sustained by reason of the wrongful act of the carrier. To the same effect, and alike in its facts, is *Davis v. Railway*, 147 N. C. 68, 60 S. E. 722. In the *Cardwell Case*, the delivery was to be made at Effland. In the *Davis Case*, at Gastonia; the lumber not to be paid for until delivery at that place was made.

[2] In this case, the delivery of the chestnut wood was to be made at Old Fort, and to be measured, weighed, and inspected there before any part of the purchase price should be due and payable. We cannot distinguish the case from those we have cited. It is not stated in the findings of fact very clearly whether the provision for weighing, measuring, and inspecting was inserted for the purpose, not only of ascertaining whether the lumber was as represented by the plaintiff, but of fixing the price for the same; but it is fairly to be inferred therefrom that it was intended for both purposes, as the price which was agreed to be paid for the lumber is not stated.

[3] "As a general rule, where there is a contract for the sale of specific goods which are

in a deliverable state, but it is necessary to weigh, measure, test, or do some other act with reference thereto, for the purpose of ascertaining the price to be paid, the property in the goods, unless a contrary intention appears, does not pass until such act is done, and this rule is particularly applicable where the goods are to be paid for when delivered." 35 Cyc. of Law & Procedure, p. 283; Devane v. Fennell, 24 N. C. 36; Porter v. Bridgers, 132 N. C. 92, 43 S. E. 551. If the facts are as we have indicated, the authorities cited will apply, and, in that event, the plaintiff would certainly be the "aggrieved party."

We might pass upon the other question raised in the brief and argument before us, if the court had clearly found all the facts required for a determination of the amount of defendant's liability. The judgment of the court below dismissing the action is reversed. So far as we can now see, the plaintiff is entitled to recover the penalty, and the amount of his recovery will depend upon the facts as found by the jury, or by the court if the parties so agree. We merely declare there was error in the ruling of the court, and set aside the judgment of nonsuit, or judgment against the plaintiff, and order a new trial of the case, in accordance with the principle herein stated.

Having decided that the plaintiff is entitled to the penalty, upon the facts relating to the liability, as they now appear, it may be that the parties can settle without further litigation, and will prefer that course; there being a very small difference in amount between them.

ERROR.

(155 N. C. 466)

STATE v. BOYNTON.

(Supreme Court of North Carolina. May 24, 1911.)

1. INTOXICATING LIQUORS (§ 233*)—CRIMINAL PROSECUTION—ADMISSIBILITY OF EVIDENCE—INCRIMINATING CIRCUMSTANCES—INTERNAL REVENUE LICENSE.

Revisal 1905, § 2060, provides that the possession of or issuance to any person of a license to sell whisky by the United States government in any city where such sale is prohibited by law shall be prima facie evidence that the holder is guilty of doing the act permitted thereby in violation of the laws of the state, etc., and, in a prosecution for the illicit sale of whisky, where defendant had a government license to sell at a designated place in a city, the license is admissible as tending to establish a sale at a different place in the city, as it tends to show that the defendant had the whisky on hand and was in a condition to violate the law by making the sale as charged.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 298½; Dec. Dig. § 233.*]

2. INTOXICATING LIQUORS (§ 233*)—CRIMINAL PROSECUTION—ADMISSIBILITY OF EVIDENCE—POSSESSION OF LIQUOR AND APPLIANCES.

In a prosecution for the illicit sale of whisky, evidence that prior to the sale charged defendant had whisky in his possession at differ-

ent places in the city, and that at the places under his control whisky was being sold and drunk, and that persons who had been in his places of business had seen whisky and beer therein, is admissible to show that defendant had whisky on hand in prohibited territory and was prepared to make the illegal sale charged by the indictment.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 295; Dec. Dig. § 233.*]

3. CRIMINAL LAW (§ 369*)—OTHER OFFENSES AS EVIDENCE—OFFENSE CHARGED—OFFENSES AGAINST LIQUOR LAWS.

The rule that evidence of one illegal sale of intoxicating liquors should not be received as evidence that another such sale had been made exists only where the sales are entirely distinct transactions, the one having no fair tendency to establish the other, and not where the testimony tends to show that defendant habitually kept liquor on hand for the purpose of making illegal sales.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

4. INTOXICATING LIQUORS (§ 233*)—CRIMINAL PROSECUTION—EVIDENCE—INCRIMINATING CIRCUMSTANCES IN GENERAL.

Defendant's possession of liquors at the time of the illegal sale charged is a circumstance admissible against him, and in general the circumstances under which liquors are kept and that they are kept at other places may be shown.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 295; Dec. Dig. § 233.*]

5. INTOXICATING LIQUORS (§ 239*)—TRIAL—INSTRUCTIONS—LICENSE.

In a prosecution for the illicit sale of whisky, an instruction that under Revisal 1905, § 2060, the possession of a government license to sell liquor in a city where its sale is forbidden is prima facie evidence that the person licensed is guilty of doing an illegal act permitted by such license, and that he is selling liquor under a license at the place specified in the indictment, and that, while the license may be considered as tending to show that defendant is exercising the privilege of selling liquor at the place specified, yet, in order to convict, the evidence must satisfy beyond a reasonable doubt that he made the sale charged in the indictment, is correct, since the place specified referred to the city, and the effect and weight of the presumption is properly stated.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 331-347; Dec. Dig. § 239.*]

6. INTOXICATING LIQUORS (§ 239*)—TRIAL—INSTRUCTIONS.

An instruction, in a prosecution for the illicit sale of whisky, that evidence of defendant's previous possession of whisky, and that it had been previously sold and drunk in places managed by him, was for the purpose of corroborating the contention of the state that he is a liquor dealer and had liquor in his possession, and is to be considered for that purpose only, but not to prove that he sold it to the prosecuting witness in this case, is not erroneous, since the effect allowed to such evidence was properly stated.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 239.*]

7. CRIMINAL LAW (§ 785*)—EVIDENCE—WEIGHT AND SUFFICIENCY—TESTIMONY OF INTERESTED PERSONS—DETECTIVE.

It is a general rule that the jury should be directed to scrutinize the evidence of a paid detective and to make proper allowance for the probable bias of one having such an interest in the outcome of the prosecution, and also as to

any other facts calculated to influence the testimony of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1774; Dec. Dig. § 785.*]

8. CRIMINAL LAW (§ 785*)—TRIAL—INSTRUCTIONS—WEIGHT AND SUFFICIENCY—CHARACTER OF EVIDENCE—DETECTIVE.

Where the prosecuting witness, at the trial of defendant for the illicit sale of whisky, was a paid detective employed in the prosecution of such cases, an instruction that, when one acts in the capacity of a private detective or public officer, it becomes the duty of the jury to scrutinize his testimony and to say whether the testimony of a person so acting is biased and whether the interest he serves has influenced him to an extent that would affect his testimony, is a sufficient caution as to the weight to be given to the testimony of such witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1774; Dec. Dig. § 785;* Intoxicating Liquors, Cent. Dig. § 333.]

9. CRIMINAL LAW (§ 822*)—TRIAL—INSTRUCTIONS—CHARGE CONSTRUED AS A WHOLE.

The charge in a criminal prosecution should be construed as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1990; Dec. Dig. § 822.*]

10. INTOXICATING LIQUORS (§ 239*)—TRIAL—PROVINCE OF COURT AND JURY—INSTRUCTION AS TO DUTIES OF THE JURY.

The jury, in a trial for an alleged illicit sale of whisky, were instructed that it was their duty to try the defendant under the evidence, and that juries in such cases are not privileged to try the case upon any individual ideas as to the wisdom of the laws forbidding the sale of spirituous liquors, that, if they were prohibitionists, they must try defendant as they would if they were anti-prohibitionists, and, if they were anti-prohibitionists, they must try him under the law and the evidence as if they were prohibitionists, and that they should divest themselves of prejudice, take the evidence from the witnesses and the law from the court, and determine guilt or innocence as they should find, when read as a whole, is in effect a direction to give the defendant a fair and impartial trial upon the law and the testimony and upon that alone, and is not improper.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 239.*]

Appeal from Superior Court, Buncombe County; Council, Judge.

J. K. Boynton was convicted of the illicit sale of whisky in the city of Asheville, and he appeals. Affirmed.

On the part of the state, C. M. Laughter, the alleged purchaser of the whisky, testified as follows: "That on October 6, 1910, he bought a pint of rye liquor from the defendant, at No. 33 South Main street, and paid him 75 cents therefor," giving in detail the circumstances under which he purchased. On cross-examination he said that he was a carpenter, and had given up this business and accepted employment to work up liquor cases as a detective, for the city of Asheville; that he got a salary which was paid him by the city of \$70 a month, as a special policeman for such purpose, and was furnished with money from time to time to purchase the whisky, which money he never accounted for and was not required to account for; that this money was furnished him by Col. Lusk, and

witness used it as he was told to do. The state, over defendant's objection, then offered in evidence a list of names from the Collector of Internal Revenue Office, certified as being a list of those to whom government license had been sold to retail spirituous liquors, in Asheville, N. C.; the certificate as directly relevant to defendant's case being in terms as follows: "Record of Special Taxpayers in Buncombe County, 5th District of N. C. Name. Boynton, J. K. R. L. D. Asheville, Blomberg Bldg. Passenger Station. July 1910. Amt. of taxes \$25.00. Issued June 30th, 1910. Serial Number, 145784. Transferred August 20th, 1910, to 28 W. College St., Asheville. [Signed] Geo. H. Brown, Collector of Internal Revenue, 5th District of N. C. Certified Form, 7541, issued September 19, 1910, in lieu of stamp which was lost." Defendant specifying his objections as follows: "(a) Because defendant was not charged with being a liquor dealer. (b) That the place mentioned in said list is not the place where the prosecuting witness testified that he had purchased whisky from the defendant. (c) That the paper introduced shows the defendant was not authorized to sell, under said license, at any place other than No. 28 College street, Asheville, N. C."

The state, over defendant's objection, was allowed to show that, by Watt Britt, J. B. Bryson, and others, and at some time prior to this alleged sale and within 12 months, defendant had whisky in his possession in different quarters and in places in Asheville, N. C., and that at the business places under control and management of defendant, to wit, at the American Saloon on College street, and at Lexington avenue, and at 28 College street whisky was being sold and drunk, and the record further shows "That the state was permitted to introduce many other witnesses to show that they knew the defendant, that they had been in his place of business, and had seen whisky and beer in his places often." There was verdict of guilty, and from judgment on the verdict the defendant appealed and assigned for error the rulings of the court on questions of evidence, and to the charge of the court as indicated by various exceptions, properly noted.

G. S. Reynolds and J. G. Merrimon, for appellant. T. W. Bickett, Atty. Gen., and G. L. Jones, Asst. Atty. Gen., for the State.

HOKE, J. (after stating the facts as above). Our statute (section 2060, Revisal) provides, in effect: "That the possession of or issuance to any person of a license to manufacture, sell, or rectify whisky by the United States government, in any county, city or town where such manufacture, sale, etc., are prohibited by law, shall be prima facie evidence that the person, having such license or to whom the same was issued is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

guilty of doing the act permitted by such license in violation of the laws of the state, etc." The occasion for the enactment of such a law and its application to a state of facts not dissimilar to those presented here were considered and passed upon in *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002, and it was there held that the United States license was properly admitted in evidence. True, the questions chiefly discussed and dealt with in *Dowdy's Case* were: (1) As to whether the certificate there presented came within the term "license," used in the statute. (2) Whether the act was in excess of the power vested in the Legislature to confer artificial weight on a given kind of proof; and (3) whether it was in violation of the right of the accused to be confronted with the witnesses against him. An examination of the facts, however, will disclose that while the license specified a particular place, to wit, 104 Queen street, it was admitted as evidence and given its proper weight as a relevant circumstance, tending to establish an illegal sale, in the city of New Bern. The case, therefore, is a direct authority in support of his honor's ruling, and on further reflection we are satisfied that on this point also *Dowdy's Case* was well decided.

[1] By the terms of the statute, the license is evidence that the holder is doing the act that it permits, selling whisky by retail, in the county of Buncombe and city of Asheville, 28 College street, and this is a relevant circumstance, tending to establish a sale elsewhere in Asheville, as it shows, or tends to show, that the defendant had the whisky on hand and was in a condition to violate the law by making the sale as charged, the sale to C. M. Laughter. It is testimony in support of direct evidence of such a sale. Just as much so as if he was shown to have a barrel of whisky at 28 College street and was unlawfully engaged in selling it.

[2] And for the same reason the rulings must be upheld by which the oral evidence was admitted. It tended to show that defendant had and kept whisky on hand, in prohibited territory, and was prepared and equipped to make the illegal sale charged in the bill of indictment.

[3] There are, as defendant contends, many decisions of the court to the effect that one illegal sale should not be received as evidence that another such sale had been made; but this rule exists where they are entirely separated, distinct transactions, the one having no fair or reasonable tendency to establish the other, and should not obtain where the testimony, as it does in this case, tends to show that defendant habitually kept whisky on hand or under his control for the purpose of making illegal sales. The position is in accord with right reason and is well supported by authority.

[4] In 7 *Encyclopædia of Evidence*, p. 760, the author says: "Of course the possession of liquors by the defendant, at the time of the offense charged, is always a circumstance admissible against him, and in general the circumstances under which liquors are kept, and even that they are kept at other places or in other rooms, may be shown." And there are numerous decisions in support of this statement. *State v. Illsley*, 81 Iowa, 49, 46 N. W. 977; *State v. Welch*, 64 N. H. 525, 15 Atl. 146; *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406.

[5] Counsel for defendant, in his earnest and able argument before us, insisted that reversible error was committed, to his client's prejudice, when his honor, among other things, charged the jury, in reference to the effect of the United States revenue license, as follows: "The possession or issuance to any person of a license to manufacture, rectify, or sell spirituous liquor under section 2080 of the Code of North Carolina, laws of this state, makes the possession of such license prima facie evidence that the person having it, or to whom the same was issued, guilty of doing an act permitted by such license, forbidden by the laws of this state. In other words, the introduction of this paper, stating that he had a license issued to him for the purpose of selling whisky, makes it prima facie evidence that he is retailing and selling spirituous liquor under the provisions of that license, at the place specified and mentioned in the indictment." The objection being that as the license authorizes a sale of whisky at 28 College street, it should only be given the statutory effect as evidence at that place, and that the portion of the charge in question erroneously allows this same probative effect at the place of the alleged illegal sale, to wit, No. 33 South Main street; but we do not think the position correctly interprets his honor's charge. In telling the jury that the statute made the United States license prima facie evidence that the defendant was a retail liquor dealer at the "place specified and mentioned in the bill of indictment," the court was not referring to 33 South Main street, the place of the alleged illegal sale; nor was he ignoring the place specified in the license. "The place specified and mentioned in the bill of indictment" referred to the city of Asheville, and, so taken and understood, the charge is correct. The fact that he held a United States license to retail liquor at 28 College street, Asheville, N. C., was made by the statute prima facie evidence that he was there engaged in that business, and this was only recognized and allowed as a circumstance tending to support the direct evidence of the alleged illegal sale. To show that this was all the effect given the statutory presumption, the charge of the court immediately proceeds: "That, however, is not sufficient to make him guilty of the charge of selling liquor, as

charged in the bill of indictment, to the state's witness C. M. Laughter, and while you can consider this license as evidence tending to show that the defendant is exercising the privilege of selling liquor, in Asheville, as specified, yet, before the state can convict him, it must go further and satisfy you from the evidence, beyond a reasonable doubt, that he sold Laughter liquor, and you may consider the license, as before stated, as being evidence tending to show that he is a liquor dealer. The law makes it prima facie evidence that he is, in law, a dealer in spirituous liquor, under the provisions of the license referred to. But the state must go a step further and satisfy you from the evidence beyond a reasonable doubt that he sold to Laughter, before you can convict him of selling liquor under this indictment."

[6] And like effect was given the oral evidence objected to. Speaking to this testimony, the court in part said: "The state further contends that other evidence has been introduced that defendant sold spirituous liquor to others than Laughter, and the court has held it to be competent as a corroborating circumstance or circumstances, tending to show he is engaged in handling spirituous liquors, and the evidence which has been introduced tending to show that he was at the places of business, claimed to be the defendant's places of business, and that liquor was seen there under his control and in his possession, if there was such evidence, was for the purpose of corroborating the contention of the state that he is a liquor dealer and had liquor under his control and possession, and you can consider it for that purpose only, but not for the purpose of proving that he sold to Laughter." As heretofore stated, the court permitted the license and the oral evidence to be regarded as circumstances tending to support the direct evidence of the alleged illegal sale, and, for the reasons given as to the admission of the evidence, the effect allowed it in the charge must be upheld. Defendant further contended that the court did not properly caution the jury in reference to the testimony of the principal witness for the prosecution and especially in the failure to give certain prayers for instructions as follows: "In weighing the testimony of the witness Laughter, greater care should be exercised in relation to the testimony of a detective employed in hunting up evidence, who is interested in or employed to find evidence against the accused than in other cases, because of the natural and unavoidable tendency and bias of the mind of such person, against the person whom witness has been employed as a detective, and his evidence should be weighed with greater care than that given by a disinterested witness." And, second, the testimony of a detective must be scrutinized with unusual caution. These prayers have been upheld, and almost in this exact language, by courts of approved authority; but usually there were

facts ultra tending to impeach the testimony of the witness, and in one of them, certainly, the detective was shown to have a pecuniary interest in the result of the verdict, and it was no doubt in reference to these facts that the prayer was approved, and not with a view of establishing any hard and fast formula as to the evidence of detectives.

[7] The general rule is that the jury should be directed to scrutinize the evidence of a paid detective and make proper allowance for the bias likely to exist in one having such an interest in the outcome of the prosecution and in reference to any other relevant facts calculated to influence the testimony of the witness; but, where this is done, the exact terms in which the rule may be expressed are left, by our decisions, very largely in the discretion of the trial judge.

[8] In the present case, while his honor told the jury that it "was commendable on the part of a detective or sheriff or other officer of the law to use all reasonable and proper means in the apprehension of those who are violating the law of the land, and when they do so, in that spirit, that will enable the law to place its hands upon offenders and violators; it is to the credit, rather than the discredit, of the persons so acting"—he said, further, and in this immediate connection: "But, when one acts in the capacity of a private detective or public officer, it becomes the duty of the jury to scrutinize the testimony of such person, and to say whether or not the testimony of that person so acting is biased, whether the interest he serves has influenced him to an extent that would reflect upon or affect his testimony." And we are of opinion that this was all the caution that the facts of the present case required. *State v. Black*, 121 N. C. 578, 28 S. E. 518; *State v. Barber*, 113 N. C. 711, 18 S. E. 515. Defendant excepted, further, that the court told the jury: "If you are a prohibitionist, you must try this man as you would try an anti-prohibitionist; and, if you are an anti-prohibitionist, you must try him under the law and the evidence as if you were a prohibitionist." While this statement, taken by itself, might be to some extent misleading, the excerpt does not give a correct impression of his honor's charge, nor of this particular portion of it. In connection with this matter, the entire charge of the court was as follows: "In passing upon the guilt or the innocence of the defendant, it is not a question of privilege with the jury as to what they will do, but it is a matter of duty and obligation which rests upon them to try the defendant under the evidence, and convict or acquit him, as you shall find. Juries sitting in the trial of a case of this kind, involving an investigation into the illicit sale of spirituous liquor, are not privileged to try the case upon any individual ideas which they may have, as bearing upon the question of the sale of spirituous liquor. In other words, the ideas of any individual

juror, as to whether the law is wise or unwise, is not to be considered. If you are a prohibitionist, you must try the man as you would try him if you were an anti-prohibitionist; if you are an anti-prohibitionist, you must try him under the law and evidence as if you were a prohibitionist. In other words, you cannot ingraft upon your verdict any personal or individual views you may entertain upon the liquor law, but you must try him (defendant) as you would any other person for the violation of any statute law which we find upon the books of our state, divesting yourself of any prejudice, and take the evidence as it comes from the witnesses and the law as it is given to you by the court, and determine the guilt or the innocence of the defendant. Now in that spirit you go about this investigation, and return a verdict, as you are in duty bound to do, of guilty or not guilty, as you shall find." (9, 10) Considering the statement as a whole—and it is right so to consider it (State v. Exum, 138 N. C. 599, 50 S. E. 283; Thompson on Trials, § 2407)—it directs the jury, in apt and forceful language, to divest themselves of all prejudice and give the defendant a fair and impartial trial under the law and on the testimony and on that alone, and the jury must have so understood it. After giving the case most careful consideration, we find no reversible error, and the judgment against the defendant is affirmed.

No error.

(155 N. C. 233)

SMATHERS et al. v. WESTERN CAROLINA BANK et al.

(Supreme Court of North Carolina. May 24, 1911.)

1. BANKS AND BANKING (§ 47*)—LIABILITY OF STOCKHOLDERS—STATUTORY LIABILITY.

The liability of stockholders of banking corporations is statutory, and imposed for the benefit of creditors, and attaches by virtue of the statute to the owners of the stock.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 64-68; Dec. Dig. § 47.*]

2. HUSBAND AND WIFE (§ 98*)—LIABILITY OF MARRIED WOMEN—STOCKHOLDERS IN BANKING CORPORATIONS.

A married woman who owns stock in a banking corporation is not on account of coverture exempt from the liability imposed on stockholders by Pub. Laws 1897, c. 298, and Revisal 1906, § 2094, prohibiting a married woman from making any contract affecting her real or personal estate, except for necessary personal expenses or for the support of the family, is inapplicable.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 374; Dec. Dig. § 98.*]

3. BANKS AND BANKING (§ 47*)—STOCKHOLDERS' LIABILITY—STATUTES.

Under Pub. Laws 1893, c. 471, § 1, providing that no holder of corporate stock as trustee shall be subject to any liability as stockholder, a holder of bank stock as trustee is not subject to the stockholders' liability imposed by Pub.

Laws 1897, c. 298, but the beneficiary is subject thereto.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 64-68; Dec. Dig. § 47.*]

Appeals from Superior Court, Buncombe County; Council, Judge.

Action by George H. Smathers and others against the Western Carolina Bank and others. From the judgment, both parties appeal. Reversed.

Chas. E. Jones, for W. W. Jones. J. H. Merrimon, T. F. Davidson, and Bourne, Parker & Morrison, for Mrs. Lauretta Maddux.

CLARK, C. J. This action was begun against the Western Carolina Bank, which was chartered by the state, for a receiver, and to wind up the affairs of the bank, which had become insolvent. The present plaintiff, receiver of the bank, appealed from so much of the judgment as adjudged that Lauretta Maddux and L. P. McLoud were not liable to the creditors for double the amount of their stock, as provided by the statute (chapter 298, Pub. Laws 1897), by reason of the fact that they were married women. The administrator of Lewis Maddux appealed from the ruling of the court that his estate was responsible for the stock liability upon the shares which stood in his name as trustee.

Plaintiff's Appeal.

Pub. Laws 1897, c. 298, entitled "An act to regulate the liabilities of stockholders in banks chartered by the state," etc., provides: "Section 1. The stockholders of every bank or banking association now operating by virtue of any charter or law of North Carolina, or that may hereafter operate by virtue of any charter or law of North Carolina shall be held individually responsible, equally and ratably and not for one another, for all contracts, debts and agreements of such association to the extent of the amounts of the stock therein at the par value thereof in addition to the amount vested in such share." This statute was construed in *Smathers v. Bank*, 135 N. C. 410, 47 S. E. 893.

[1] The liability of stockholders is statutory, and attaches by virtue of the statute to the owners of the stock. There is no exemption as to married women. A married woman incurs liability by virtue of the statute as owner of the stock, and not by contract. The liability is imposed by statute for the benefit of depositors and creditors.

[2] Married women consequently are liable out of their individual estate just as they are for debts contracted for necessities, or for the support of the family or to obtain money to pay antenuptial debts, as to which execution would be issued against and col-

lected out of her individual property as if she were a feme sole. Revisal 1905, § 2094. The provision of our statute of 1897 (chapter 298), above quoted, is copied verbatim from Rev. St. U. S. § 5151 (U. S. Comp. St. 1901, p. 3465), originally National Banking Act 1864, § 12 (Act Cong. June 3, 1864, c. 106, 13 Stat. 103), under which it was held that "a married woman who owns stock in a national bank is not exempt on account of coverture from the liability imposed upon all stockholders in such banks." *Anderson v. Lline* (C. C.) 14 Fed. 405; *Witters v. Sowles* (C. C.) 32 Fed. 767. In the latter case the stock was owned by a married woman in Vermont, in which at that time the contract of a married woman was wholly void. The above cases and others hold that this liability is not contractual on the part of the stockholder, but is statutory and imposed for the benefit of creditors, and hence a married woman, when she becomes the owner of the stock, assumes the same liability as all other stockholders. *Scott v. Latimer*, 89 Fed. 843, 33 C. C. A. 1; *Aldrich v. Skinner* (C. C.) 98 Fed. 378. Even if the liability of the stockholder had been contractual, our Constitution contains no provision imposing any disability upon a married woman to contract. And the disability imposed, with certain exceptions by statute (Revisal 1905, § 2094), would not apply to this case where the statute imposes liability upon all owners of stock without excepting married women. The liability of the bank in creating the debt is contractual, but the liability of the stockholder is statutory. *Bernheimer v. Converse*, 206 U. S. 533, 27 Sup. Ct. 755, 51 L. Ed. 1163.

Defendant's Appeal.

[3] Certificate for \$14,000 stock was issued to "Lewis Maddux, trustee for Lauretta Maddux, his wife." This stock was subscribed for by Lewis Maddux, but the certificate therefor was issued to Lewis Maddux, "trustee for Lauretta Maddux," and was so held up to the time of the insolvency of the bank. There is no evidence of fraud, and nothing to rebut the beneficial ownership thereof being in Lauretta Maddux, as appears upon the face of the certificate. It nowhere appears that she did not receive the dividends, and that it was not in all respects her property. The mere fact that her husband voted the stock, and was president of the bank, is no evidence of fraud. Nothing would have been more natural and in the ordinary course of events than that as her proxy or as her agent he so voted it. Pub. Laws 1893, c. 471, § 1, provides: "No person holding stock in any corporation in this state as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security shall be personally subject to any liability as a stockholder in such corporation (but the person pledging such stock

shall be construed as holding the same and shall be liable as a stockholder accordingly) and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be liable in like manner and to the same extent as the testator or intestate or the ward or the person interested in such fund would have been had he been living and competent to act and hold the stock in his own name." This act is conclusive as to the nonliability of the trustee, Lewis Maddux, for the stock liability upon the shares of which his wife was the beneficial owner. There being no evidence to rebut the ownership of the stock being in Mrs. Maddux, according to the tenor of the certificate, the holding of the court that Lewis Maddux was the owner, viewed as a finding of fact, is reviewable, and, considered as a conclusion of law, is erroneous. *Bank v. Cocke*, 127 N. C. 467, 37 S. E. 507, to which we were cited by counsel, does not conflict with what we have just said. In *Bank v. Cocke* the stockholders in a meeting assumed liability for \$75,000, for which they agreed to become liable. The court held that this was a contractual liability for which the guardian became individually liable, and could not bind his wards, for he had no authority to create such debt for them or to charge their stock. But the liability which attaches to the ownership of the stock, which was held by him as a guardian, is statutory, and therefore would bind the estate of the wards in his hands. The court in that opinion points out this very distinction in the nature of the two liabilities.

In both appeals the judgment below is reversed.

(155 N. C. 260)

WILLIAMS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 24, 1911.)

1. CARRIERS (§ 113*)—BAGGAGE—CONDITIONS OF LIABILITY—ACCEPTANCE.

To make a railroad company liable as a common carrier or warehouseman for baggage lost, it must have been delivered to and accepted by the carrier, either actually or constructively.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 608-620; Dec. Dig. § 113.*]

2. CARRIERS (§ 393*)—BAGGAGE—DELIVERY—NOTICE.

As a rule, notice must be given to an authorized agent of a carrier when baggage is taken to a railroad station or other place where baggage is usually received, in order to make the carrier liable, but the carrier may bind itself by a custom of treating baggage as received when left at a given place, without other notice.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1502-1504; Dec. Dig. § 393.*]

3. CARRIERS (§ 408*)—BAGGAGE—ACTIONS FOR LOSS—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action against a railroad company for loss of a trunk claimed to have been delivered to it as baggage, a witness testified that he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

took the trunk to the baggage room on Sunday afternoon, and asked a man there who was the only one in the office and who had on citizen's clothes, except for a railroad employe's vest, if he could put the trunk in the baggage room, and the man told him to put it in the alleyway where they put the trunks, which witness did. He also testified that he had seen the man once before at the baggage room, and that he came out of the place where the baggage agent checked the baggage. The baggage agent and his assistant testified that they had charge of the baggage room, and had not received plaintiff's trunk or authorized any one else to accept it, but the agent also testified that he was temporarily out of the office at times. Plaintiff requested a charge that, if it was the custom of the railroad company that baggage should be left at the station in care of the company's agent or of "any one whom the company held out to the public to be in charge of the baggage room," and plaintiff's trunk was left in the baggage alley with the knowledge and consent of an agent in charge of the baggage room, there was an acceptance of it as baggage. The court modified the requested charge by instructing that, if the trunk was left at the station at the customary time and place with the knowledge and consent of a baggageman or other "authorized agent," the company should be held to have accepted it, etc., and afterwards, in response to a request from the jury for a further charge on the question of delivery, instructed that plaintiff must show that some person authorized by the company to act for it was acting for it when she claimed she delivered the trunk to it, and that nothing short of a delivery to some person authorized to act for the company would suffice. *Held*, that the evidence required that the charge as requested be given, and the modification of the requested charge was error.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 408.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—MODIFICATION OF INSTRUCTIONS.

The modification of the requested instruction was error prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

5. PRINCIPAL AND AGENT (§ 137*)—AGENCY BY ESTOPPEL.

As a rule, one who knows of or negligently permits another to act for him in a particular transaction, so as to clothe him with apparent authority, is estopped from denying his authority as against a third person, who, in good faith and with reasonable prudence, relies upon such apparent authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 492-494; Dec. Dig. § 137.*]

6. TRIAL (§ 352*)—SPECIAL ISSUES—DISCRETION OF COURT.

The framing of special issues is largely in the trial court's discretion, so long as they are responsive to the pleadings, and determine the questions involved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840-842, 844, 845; Dec. Dig. § 352.*]

7. CARRIERS (§ 408*)—ISSUES—"IMMEDIATE."

To make a carrier liable for baggage delivered to it, it must be delivered and accepted for transportation within a reasonable time before departure of the train, so that, if an issue was submitted in an action for loss of baggage as to whether the trunk was received for "immediate" transportation, the court should have instructed that the term "immediate" did not have its usual meaning of "instantly, forthwith, nothing intervening either as to place, time, or action," but rather meant within a reasonable

time having due regard to the circumstances (citing 4 Words & Phrases, 3393).

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 408.*]

8. CARRIERS (§ 393*)—BAGGAGE—LIABILITY AS CARRIER—TIME OF DELIVERY.

If a trunk was accepted by a carrier for transportation on the following morning pursuant to custom, the carrier would be liable as such if the trunk was lost before it was forwarded, though, if it was only received for storage for an intending passenger until he had it checked, the carrier would be only a bailee for hire with the duty of exercising ordinary care for its safety.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1502-1504; Dec. Dig. § 393.*]

9. CARRIERS (§ 408*)—BAGGAGE—ACTIONS FOR LOSS—BURDEN OF PROOF.

The burden is on the carrier to show legal excuse for failure to deliver on demand baggage received by it, whether held as carrier or warehouseman.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 408.*]

Appeal from Superior Court, Mecklenburg County; Long, Judge.

Action by Susie E. Williams against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

There was evidence on part of plaintiff tending to show: That on or about August 30, 1908, on Sunday afternoon, at Charlotte, N. C., plaintiff, having purchased a ticket over defendant's road, via Statesville, N. C., sent her trunk to the station of defendant company in Charlotte, to be received as baggage for transportation over defendant's road, plaintiff intending to take the train leaving Charlotte on Monday morning following, August 31st. The trunk was first given in custody to Robert Ramsaur, a drayman working for the Black Transfer Company, at the house where plaintiff was then staying, with directions to take same to the station for the purpose indicated, and no check or receipt for same was given by Ramsaur; that not being the custom. That the trunk was taken to the station, as directed, the defendant company duly notified, and same was left at the accustomed place and by direction of an agent of defendant company in apparent charge of the baggage room and baggage business at the station. Plaintiff went to station Monday morning for purpose of taking the train and to baggage room to check her trunk, and she and the baggage agent walked immediately to a new steamer trunk, and check was placed on same and duplicate given plaintiff. As this was handed plaintiff, the agent asked her if she was positive that it was hers, and witness said: "No; I am not positive. I borrowed the trunk from Mrs. Hook." He said: "Is there a name on it?" "I looked over the trunk, and found no name on it. Then he said, 'Well, just open the trunk, and see if it is yours.' I took my key and opened the trunk,

and it contained a gentleman's clothes. He said, 'This won't do. It can't be yours.' And, of course, I knew it was not mine, and I said, 'What will I do? I am going to Blowing Rock, and will need my clothes.' And he said: 'I will send your trunk to you just as soon as it comes.' I said, 'Suppose this is not my trunk that you send to Blowing Rock to me; what will I do? I will need my clothes.' I said: 'If my trunk is lost, what will I do?' And he said they very rarely lost a trunk. He said, 'If a gentleman has your trunk, he will send it back here, and I remember distinctly shipping a new steamer trunk Sunday afternoon.' He said there was an overflow of baggage from the flood, and he said, 'Where are you going?' And I told him I was going to Green Park Hotel, Blowing Rock, and he gave me a check, and I put it in my purse. When I took the train, I had the check given me by Mr. Harrill. I went to Blowing Rock. I have not received the trunk or the contents or the value thereof from the Southern Railway Company. I made a list of the contents about 10 days after my trunk was lost." There was evidence offered, also, tending to show that the trunk was left at the place where unchecked baggage for transportation was usually placed, a covered archway, between the baggage room proper and Gresham's Dining Room, in the main station building, and that it was customary to receive baggage for transportation on Sunday afternoon for trains leaving Monday morning from station. It was proven or admitted that neither the trunk nor its contents had ever been restored to plaintiff, and that check given by company for same had been destroyed or lost. Percy Shaw, the agent of defendant company, having charge of baggage room and business concerning baggage at the Charlotte station and attending to same usually in the daytime, and J. H. Harrill, his assistant, having like charge usually at night, were examined for defendant company, and on matters more directly relevant to the questions presented testified that the trunk claimed by plaintiff was never delivered to them at the time nor for the purpose stated, either by Ramsaur or any other person.

Percy Shaw, as witness, speaking especially to this question, testified: "I live in Charlotte. I am baggage agent at the Southern Depot. Yes; I was baggage agent in August, 1908. I went on duty at 7 a. m. and left at 7 p. m. I was succeeded at night by Mr. Harrill. No one else there had authority to receive trunks. No; I did not at any time receive a trunk belonging to Miss Susie Williams. No; on August 30th, I did not leave any employé there at the baggage room with a blue vest on, with brass buttons, to take my place. Conductors running on the trains are the only employés on the Southern Road who wear such a uniform." Cross-examination of Percy Shaw: "On August 30th I came on duty at 7 a. m. I suppose. I can't

remember whether I came exactly at 7 o'clock or not. No; I did not leave any conductor in my place that day. No; I did not leave any one in my place that day."

J. H. Harrill testified to like effect, and gave evidence tending to contradict plaintiff's account of the circumstances under which he gave the check.

On the question of whether the trunk was actually delivered to defendant company by Robert Ramsaur, he testified as follows: "I live at 810 East First street, Charlotte. I work on transfer wagon. Yes; I know Miss Susie Williams. Yes, on or about August 30, 1908, I took her trunk from Mrs. Hook's house—305 East Morehead street—to Southern Railway Station. I took the trunk to the Southern Station, and asked some railroad man there. No; I don't know who I was talking to. It was a man in the baggage room. No; I don't know who the man was I had the talk with. He was a tall slim looking man. No; I don't think he had charge of the baggage room there. Yes; I know Mr. Percy Shaw. Q. What took place between you and a man in the baggage room? A. I asked him could I set the trunk inside the baggage room. He said 'No,' to put it in the alleyway, where they put trunks. I put it in the alleyway. There is a gate there now, but there wasn't none there then. I have worked for Black about two years in all. Q. Do you know what the custom is about placing trunks there for next morning's trains? Did you put that trunk there? A. Yes." Cross-examination of Robert Ramsaur: "Yes; I have been hauling trunks for about two years. Yes; I was working for the Black Transfer Company at that time. Yes; Black sent me to Miss Williams to get the trunk. No; I don't carry claim checks for trunks. The transfer man at the depot has them. Yes; I went there some time in the evening, before sunset. Yes; I got this trunk and loaded it on the wagon. Yes; I know Mr. Percy Shaw. No; he was not the man I was talking to in the station—in the baggage room there. Yes; Mr. Shaw was the baggage master there. No; I did not see him there at that time. No; I did not say anything to him. Yes; he was the baggage master. Yes; he was the man who received the trunks at the station, if you could find him when you took trunks there. Yes; this tall slim man was a white man. He was standing just beyond the scales in the baggage room. I put the trunk in the passage-way, between the baggage room and Gresham's Dining Room. Gresham has a dining room there. Q. And wagons drive up next to the kitchen? A. Yes; I first pulled the trunk inside the baggage room, and the man in the baggage room told me 'No,' to put it back there where trunks belong. Yes; I put it back out there. No; I said nothing to any one about it. No; I did not tell whose trunk it was. If the baggageman had been there, I would have told him." And,

being recalled, this witness testified further: "The man I saw there in the baggage room had on citizen's clothes, all but his vest. He had on a railroad vest—a railroad porter's or something's vest. When he told me to take the trunk out of the baggage room, he walked out of the place where Mr. Shaw and them checked the baggage. I asked him if I could put it there, and he said 'No,' to put it outside where the trunks belonged. He came from the office where Mr. Shaw stayed. He was doing business, and I asked him if I could put the trunk there, and he said 'No.' I don't know whether any one except the baggage agents come from there. Yes; the baggage room door was open when I went in there. Yes; he was doing the things what the baggageman does. When I seen him, he was coming out the gate, and he had got beyond the scales when I saw him. I seen him doing nothing. Q. So all you know is that you saw a man in there, who had on a blue vest with brass buttons, with 'Southern' marked on the buttons, and you asked him if you could put the trunk in there, and he said 'No,' to put it out there. Had you ever seen the man before? A. I think I had seen him once before. I have never seen him since. No; it was not Mr. Percy Shaw, nor Mr. Harrill. Q. State whether or not when you took trunks there to the station Mr. Shaw or Mr. Harrill were always there, or whether they got other people to stay in their places sometimes? A. There were other men in there besides Mr. Harrill and Mr. Shaw. I have seen baggage agents on the Southern Railway in there checking baggage."

A paper writing, containing a written statement of this witness in direct contradiction of the principal portion of his testimony as to delivery of the trunk, was introduced by defendant.

The jury rendered the following verdict: "(1) Did the defendant company receive the trunk of the plaintiff on Sunday evening, August 30, 1908, as alleged in the complaint as baggage for transportation? Ans. No. (2) Was said trunk received by defendant company for immediate transportation? Ans. No. (3) Was the trunk delivered by the defendant company to the plaintiff? Ans. No. (4) What amount, if any, is plaintiff entitled to recover from defendant on account of the alleged loss of said trunk? Ans. Nothing."

Judgment for defendant, and plaintiff excepted and appealed.

E. R. Preston and Neill R. Graham, for appellant. W. B. Rodman, for appellee.

HOKE, J. (after stating the facts as above). [1, 2] To fix responsibility for lost baggage on a railroad company, either as common carrier or warehouseman, there must have been a delivery of same, including an acceptance by the company, either actual or constructive, and, in order to a valid delivery, the general rule is that when baggage is

taken by others to a railroad station, and even to the place where baggage is usually received, some kind of notice must be given to some agent of the company authorized to accept the same. *Hutchinson on Carriers*, § 105; *Fetter on Carriers*, § 610; *So. Ry. v. Bickley*, 119 Tenn. 528, 107 S. W. 680, 14 L. R. A. (N. S.) 859, 123 Am. St. Rep. 754; *Gregory v. Webb*, 40 Tex. Civ. App. 360, 89 S. W. 1109; *Wright v. Caldwell*, 3 Mich. 51; *Merriam v. Hartford & R. R.*, 20 Conn. 354, 52 Am. Dec. 344; *Transfer Co. v. Gurley*, 107 Ala. 600, 18 South. 209, 34 L. R. A. 137. This rule is at times modified where a custom of the company is established to consider and treat baggage as received when left at a given place and without further notice. *Fetter on Carriers*, supra; *Green v. Railroad*, 41 Iowa, 410; *Green v. Railroad*, 38 Iowa, 100; *Lake Shore Ry. v. Foster*, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

[3] There is no objection open to plaintiff by reason of his honor's charge on the last position, for it was dealt with as plaintiff requested, but, in reference to the first plaintiff, admitting that his honor stated the rule in general terms, sufficiently correct, insists that there was reversible error committed to his prejudice in so modifying a prayer for instructions on the first issue as to exclude from consideration a view in his favor properly arising on the evidence, and this in especial reference to the testimony of the witness Robert Ramsaur and corroborative facts tending to show a delivery of the baggage at the proper place and notice duly given. As heretofore shown, Robert Ramsaur, in effect, testified that, having taken charge of the trunk, he took it to the passenger station on Sunday afternoon and to the baggage room, and asked a man in there if he could put it in the room, and the man replied, "No; put it in the alleyway where they put the trunks." And witness then placed the trunk as directed. The man was a white man in citizen's clothes, except that he had on a railroad company vest; that he was the only man there in the office. Recalled on this point, the witness testified further: "When he told me to take the trunk out of the baggage room, he walked out of the place where Mr. Shaw and them checked baggage. He came from the office where Mr. Shaw stayed. He was doing business, and I asked him if I could put the trunk in there, and he said, 'No.' He was doing things what the baggageman does." The witness further said that he had seen this same man once before, and that there were at times other men in there besides Mr. Shaw and Mr. Harrill, and the witness had seen baggage agents on the Southern Railway in there checking baggage. On the part of the defendant Mr. Shaw and Mr. Harrill testified that they had charge and control of the baggage room, and that neither of them had received the trunk claimed by plaintiff nor had they authorized the man referred to by the witness, Ramsaur,

nor any other man, to receive it or to accept notice concerning it; the witness Shaw, however, stating that he was at times temporarily out of the office. In view of this testimony and supporting facts on either side, the plaintiff requested the court to charge the jury: "That if it was the custom of the railroad company to receive baggage Sunday afternoon or evening before for transportation on the next morning train, and that trunks or baggage should be left at defendant's passenger station at such times, in care of the baggageman in charge of defendant's baggage room or of any agent or servant of the company in charge of defendant's baggage room or in care of any one whom the company held out to the public to be in charge of the baggage room, and should the jury find that the trunk, having been put in charge of the drayman for the purpose, was left by him at defendant's baggage room, or in what was known as the baggage alley, with the knowledge and consent of the agent or servant in charge of defendant's baggage room, as aforesaid, then, in any of those events, the court instructs the jury the compliance with such a custom existing at the time by the transferman, with the knowledge and consent of the defendant's baggageman or other agent of the defendant as aforesaid, would be an acceptance of plaintiff's trunk, and such acceptance would be a delivery of plaintiff's trunk to defendant." The court gave the prayer generally as requested, but modified same by saying that if the plaintiff's trunk was left at defendant's station at the customary time and place, with the knowledge and consent of defendant's baggageman or other authorized agent of the company, etc. The case further states that the jury, having received the charge in the forenoon of Wednesday, October 5, 1910, considered of the case, and on Thursday morning stated they had been unable to agree on what was a legal delivery of the trunk, and at their request and without objection the typewritten instructions of the court were given them. The jury, having further considered of the case until Friday morning, again came into court, when his honor gave them further charge on the question of delivery as follows: "As I understand you, you say you are troubled as to what constitutes an agent at the depot of the defendant to receive baggage. The defendant is a corporation. The defendant, therefore, conducts its business through and by its employés or agents. As the plaintiff in this case has alleged that she caused her trunk to be delivered to the defendant company, it is necessary for her to offer evidence that satisfies the jury by the greater weight of the evidence that some person authorized by the defendant corporation to act for it was acting for it at the time that she alleges she delivered her trunk or caused it to be delivered through her agent. Nothing short of a fair delivery of the baggage to the carrier or its agent will render the carrier liable

for a nondelivery. That is to say, the plaintiff in this case upon all of the evidence must satisfy the jury by the greater weight of it that the trunk was delivered to some person authorized to act for the defendant company as baggage to be transported over the defendant's line as such, and the agent of the defendant company must have received the baggage." Plaintiff duly excepted to the modification of this prayer and to the additional charge as given.

[4] In thus modifying plaintiff's prayer for instructions and more emphatically in the additional charge as given, the court intended to, and did, withdraw from the jury the view arising on the testimony that, if the baggage was placed at the customary time and place with the assent and knowledge of "one held out by the company as being in charge of its baggage room," there was a proper delivery to the company; and in this we think there was reversible error, to plaintiff's prejudice, which entitles her to a new trial of the issue. True, the witness Ramsaur testified that he knew both Percy Shaw and J. H. Harrill, and knew, also, that they were the baggage agents at defendant's station, but a perusal of the entire testimony of this witness presents a permissible interpretation for the consideration of the jury that, while he knew Shaw and Harrill were the company's agents in general charge and control of the baggage business, yet the man he found in sole occupation of the baggage room when he asked to place the trunk in the room was the company's agent then in charge for the time being, and, if not so in fact, he was allowed by defendant company to hold himself out as such, and for that reason a notice to him may have been sufficient evidence of delivery. This agency by allowing one to appear as such or agency by estoppel, as it is usually termed, has an important place in this branch of the law.

[5] It is very well stated in Clark and Skyles on the Law of Agency, § 55, p. 140, as follows: "It is a well-established doctrine that if a person by his words or conduct expressly or impliedly represents to another that a certain state of facts exists, and thereby induces the other to act in reliance on such representation, he will be estopped to deny the truth of the representation, to the other's prejudice. And by the application of this doctrine an agency may be created or arise by estoppel, irrespective of the actual intention, and even though it may be conceded that there was no agency in fact. The general rule is this: If a person knowingly permits another to act for him in a particular transaction, or otherwise clothes him, either intentionally or by negligence, with apparent authority to act for him therein, he will be estopped to deny the agency as against third persons who, in good faith and in the exercise of reasonable prudence, deal with the apparent agent in the belief that his apparent authority is real." Tiffany on Agency is to like effect,

and innumerable decisions here and elsewhere recognize and apply the principle. *Gooding v. Moore*, 150 N. C. 195, 63 S. E. 895; *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811; *Morrow v. Railroad*, 134 N. C. 92-96, 46 S. E. 12; *Harrell v. Railroad*, 106 N. C. 258, 11 S. E. 286; *Oulmit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646; *Minter v. Railroad*, 41 Mo. 503, 97 Am. Dec. 288; *Battle v. Railroad*, 70 S. C. 329, 49 S. E. 849; *Rogers v. Railroad*, 2 Lans. (N. Y.) 269, affirmed 56 N. Y. 620; *Insurance Co. v. Railroad*, 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752. Some of these decisions (and many others could be cited) were on facts very similar to those presented here, making them apt authorities in support of plaintiff's position as embodied in his prayer. In *Morrow's Case*, on a question whether defendant company knew that one had entered its trains for the purpose of assisting a passenger, the fact that an employé of the company was standing near in a position to observe and note the circumstances was held evidence from which knowledge on the part of the company could be inferred. Associate Justice Walker, speaking for the court, said: "Whether the person who stood near the steps of the coach was the conductor or some other employé charged in law or fact with the duty of providing for plaintiff's safety while exercising the lawful right of assisting the company's passengers is a proper subject of inquiry for the jury," etc. In *Battle's Case*, supra, it was held: "That delivery of baggage to the only person in charge of the station who is at the time engaged as a telegraph agent depositing it at a place indicated by him, description of trunk and directions as to checking, and that owner would soon appear and attend to it, is delivery to the carrier." In *Oulmit's Case*, supra, it was held that "a passenger has a right to regard as agent of a railroad company a person who handles and takes charge of baggage upon arrival of train at a station, and notice to such person by a passenger is notice to the company." And in case of *Rogers v. Railroad* it was held as follows: "The owner of a trunk sent it to the defendant's depot by an expressman, who placed it within the depot, beside the baggage crate, which was locked, and, upon inquiring of persons there engaged in handling freight, was referred to the ticket agent as the person who took charge of baggage. He went to the ticket agent's office and told him that there was a trunk outside. The agent said that it was right, and immediately sent two men to take care of it. When the owner inquired for the trunk on purchasing his ticket later in the day, it could not be found, though the ticket agent said he had seen one a short time before answering to its description. Employés of the defendant also said that it had been delivered upon presentation of a check. In an action to recover the value of the trunk and

its contents, held, that there was sufficient evidence of delivery, and a nonsuit was wrong." Stating the proposition in a negative way in 6 Cyc. p. 671, it is said: "But the carrier will not be liable for the acts of its servants not authorized nor held out as authorized to receive baggage." On authority, therefore, the plaintiff was entitled to have this latter view presented to the jury, and to have his prayer for instructions given substantially as requested.

[6] Plaintiff excepted, further, that the court submitted the second issue as to the receipt of the trunk for immediate transportation. We have frequently held that the framing of issues is a matter which is left very largely in the discretion of the trial judge; the limitation being that the issues must be sufficiently responsive to the pleadings and determinative of the rights of the parties involved therein. And the statement is not infrequently made in the books that in order to charge transportation companies as common carriers, making them liable as carriers, the goods or baggage must be left with them for "immediate" transportation.

[7] If it becomes necessary, therefore, in order to make full determination of the rights of these litigants, that decision should be made whether this trunk was received and held as common carrier or warehouseman, it is well enough to submit the issue as framed. If this is done, however, the jury should be instructed that the term "immediate," in this connection, does not have its more usual meaning of "instantly, forthwith, nothing intervening either as to place, time or action," given in 4 Words & Phrases, p. 3393, as Worcester's definition, but it means rather "reasonable time," having due regard to the nature and circumstances of the case, cited in Words & Phrases as Bouvier's definition; the controlling idea being that, in order to fix upon a company responsibility for baggage as a common carrier, the same must be delivered by the passenger and accepted for transportation within a reasonable time before taking his intended train.

There is a decision—*Goodbar v. Railroad Company*, 53 Mo. App. 434—which tends to hold that this must be the next train, but we doubt if this is a correct statement of the general rule, and certainly not where a custom is established on the part of the company to accept baggage for transportation on a subsequent or later train. The true rule, we think, is very fully stated by Messrs. Elliott in their valuable work on Railroads (2d Ed.) § 1351, as follows: "The liability of the company as a common carrier begins as a rule at the time the baggage is delivered to it for transportation, unless the time of such delivery be an unreasonable length of time before the owner's intended departure. In order that the liability as a common carrier should exist, it is not always necessary that the passenger should have purchased a ticket,

nor that he should even make the journey which he intends to make. As persons often become entitled to the rights of passengers before the purchase of a ticket, so the liability of a carrier for baggage sometimes begins before the purchase of a ticket, or even before the company becomes liable to the owner of the baggage as a passenger. Where a person in good faith intends to take passage on a railway train or the like and delivers his baggage to the company a reasonable time in advance of the anticipated journey, it seems that the company will be liable for such baggage as a common carrier from the time of such delivery and acceptance. And in such cases the company may be liable, although the person does not purchase a ticket or make the proposed journey as for instance, where he is prevented from so doing by the fault of the carrier and the loss or destruction of the baggage before the journey begins." And well-considered decisions are in support of the statement. *Hickox v. Railroad*, 31 Conn. 281, 83 Am. Dec. 143; *Manufacturing Co. v. Ullman*, 89 Ill. 244; *Lake Shore & Mich. R. R. v. Foster*, 104 Ind. 298, 4 N. E. 20, 54 Am. Rep. 319; *Insurance Co. v. Railroad*, 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752; *Woods v. Devin*, 13 Ill. 747, 56 Am. Dec. 483. And as relevant to the question more directly involved in this position, the case of *Hickox v. Railroad*, supra, holds as follows: "A railroad company is presumed to receive baggage for transportation and not for storage, and its liability commences as soon as the baggage is delivered to, and is received by, the agent, notwithstanding the fact that it was not checked at the time it was received and would not be for several hours nor until 15 minutes before the train started, and that the passenger was so informed. Delivery or nondelivery of check for baggage is of no importance as affecting the liability of the carrier; it being merely in the nature of a receipt and intended as evidence of the ownership and identity of the baggage, and this is the rule generally obtaining in the absence of some specific and reasonable regulation, restrictive of its liability." As the cause goes back for a new hearing, we consider it well to advert to another exception insisted on for plaintiff that his honor charged the jury, as requested by defendant, as follows: "If the jury find from the evidence that the plaintiff, Susie E. Williams, purchased a ticket over the defendant's line from Charlotte to Statesville on Saturday morning, and on the following Sunday evening sent a trunk to the depot, giving no instructions for shipment, and no instructions for it to be checked, and did not intend for the same to be checked until the following morning, then the company, even if it received the trunk for storage, was merely a gratuitous bailee, and liable only for its gross negligence. There being no evidence that the trunk was lost by the gross negli-

gence of the defendant company, the jury will answer the fourth issue nothing."

[8] As heretofore stated, if the trunk was delivered and accepted by the company in the afternoon for transportation on the following morning, and it was customary to receive baggage for transportation in that way, in the absence of some reasonable regulations, restrictive of the company's liability, they would take as common carriers, and could be held as insurers, in case the trunk is lost, but if no such custom existed and the trunk was only received for storage for one intending to become a passenger, and until he claims the trunk and has the same checked, in such case the company is ordinarily regarded as bailee for hire, and is responsible for ordinary care. It is the same rule of responsibility obtaining where baggage reaches its destination, and is not called for in a reasonable time. After such time the carrier holds the baggage as warehouseman, and is responsible for lack of ordinary care. *Elliott on Railroads*, §§ 1463-1533. In making this charge the court was no doubt influenced to some extent by expressions in the opinion in *Kindley v. Railroad*, 151 N. C. 207, 65 S. E. 897, 24 L. R. A. (N. S.) 634, to the effect that in certain aspects of that case the defendant company was a gratuitous bailee, and as such responsible only for gross negligence. But the statement of the law and expressions referred to must be considered and construed in reference to the facts presented and in view of the rights there involved. In *Kindley's Case* a passenger took the train at Fayetteville, N. C., intending to go through to Charlotte; the route lying over the Atlantic Coast Line to Maxton, and over the Sea Board from Maxton to Charlotte. At Maxton the passenger determined to return to Fayetteville, and notified the Coast Line conductor of such an intent, with a request that the baggage be also returned. The trunk was carried on to Charlotte, and when it was returned to the owner, some time thereafter, it was found to have been entered, and some of the contents stolen. The appeal involved only the liability of the second carrier, and the decision in *Kindley's Case* was placed on the ground that the intended passenger had never become such in reference to the second or connecting carrier, and that nothing had ever been paid or tendered such carrier, either for carrying the passenger or storing the trunk, and in that view only was the second carrier considered and dealt with as gratuitous bailee. In *Kindley's Case*, too, weight was given to the language of the statute bearing on the subject (*Revisal 1908*, § 2624), which makes carriers responsible "for baggage of passengers from whom they have received fare." The principle, however, does not apply to the facts presented here in any aspect of them, for, if it should be established under proper ruling that until the trunk was claimed

and checked for baggage it was held for storage only and not for immediate transportation, as heretofore explained, on authority, the company is chargeable as bailee for hire and responsible for ordinary care.

[8] If received and held, either as common carrier or warehouseman, on failure to deliver, the burden is on defendant to render legal excuse for the failure. In *Fetter on Carriers*, at page 1557, it is said: "With respect to baggage in possession of a railroad company as warehouseman, evidence that it failed to deliver the property to the owner, when demanded, prima facie establishes negligence and want of due care, and the onus of accounting for the default lies with the carrier." There is error, which entitles plaintiff to a new trial, and it is so ordered.

New trial.

(155 N. C. 242)

SMITH v. MILLER.

(Supreme Court of North Carolina. May 17, 1911.)

APPEAL AND ERROR (§ 80*)—DECISIONS REVIEWABLE—FINAL JUDGMENT.

Where an order of reference has been made in a proceeding to sell contingent interests in land, as provided by Revisal 1905, § 1590, and there has been an appeal therein and the case remanded, with directions to make a sale of certain lands and a restoration to certain heirs, and to proceed with the cause, reserving all other questions then presented and preserved by exceptions noted of record until the sale of the land and a final hearing on the report of commissioners, an application by one of the appellants in the former appeal, claiming a lien against the heirs having priority over their rights to a restoration of proceeds, that the court consider and pass upon his exceptions will not be considered while the proceeding is in the lower court, before final judgment therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 494-509; Dec. Dig. § 80.*]

Action by Elizabeth A. Smith against O. H. Miller, a Commissioner, to sell contingent interests in land, and others, and from a decree ordering the sale of a contingent remainder, certain parties appealed, and the decree was modified and affirmed (151 N. C. 620, 66 S. E. 671), and thereafter Miller's petition for a rehearing of that judgment was dismissed (152 N. C. 314, 67 S. E. 746), and he now makes application to have the court consider and pass upon certain exceptions noted by him in the proceedings in the court below. Motion denied.

See, also, 71 S. E. 355.

A. S. Barnard, for defendant.

HOKE, J. This is an application by C. H. Miller, a former commissioner, to have the court consider and pass upon certain exception noted by him in the progress of the case in the court below, on the ground that on appeal the cause had been retained and was now in this court for the purpose indicated.

The appeal referred to is reported in 151 N. C. 620, 66 S. E. 671, and again in 152 N. C. 314, 67 S. E. 746, on a petition to rehear, filed by the present applicant, and, from a perusal of the record and the opinions in the case, it appears that this was a proceeding, under section 1590 of the Revisal, to sell land for reinvestment, the sale involving the disposition of contingent interests, and in which all the parties in esse were before the court. That during the progress of the cause in the court below decrees and orders were made, directing present applicant, C. H. Miller, who was at that time commissioner, to sell a portion of the land in question and to construct and equip a hotel on another portion, a lot in the city of Asheville. That the costs of the hotel, authorized and estimated, was to be not less than \$193,350.53, with an additional expenditure recommended, increasing the cost of the proposed building to \$225,000. Commissioner, having sold a part of land, proceeded with the construction of the hotel, expended thereon something like \$30,295.28, and contracted a large indebtedness to various parties for labor and material, etc., and the enterprise, having come to a standstill, and various creditors having filed accounts, claiming liens, etc., on the structure, the cause was referred and report made to June term, 1908, Buncombe superior court, where it was heard, on exceptions, before his honor, R. B. Peebles, judge presiding.

On the hearing, among other things, it was made to appear that it would require at least \$100,000 in addition to what had been already spent and contracted to complete the hotel, and, for various reasons stated, it was not to the interest of the owners that any further sale of land be made; and the judge held that this being a proceeding involving the disposition of contingent interests the power of the court was only that contained in the statute, and the law contained no provision authorizing any such scheme of expenditure as had been made in this case, and that such lack of power, appearing of record, all creditors were affected with notice, and judgment was entered that the hotel in question, or so much of it as was then built, together with the lot, be sold, and out of the proceeds the original value of the lot, together with the amount of the heirs' money, improperly invested in the improvement, be restored to them; and the court, having ruled on exceptions filed by various claimants and others, including some filed by the present applicant, adjudged that the surplus, if there was any, should be distributed among the claimants according to the rulings made.

On appeal to this court, 151 N. C. 620, 66 S. E. 671, supra, the construction of the statute, as made by his honor, was approved and the judgment affirmed, in so far as it directed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a sale of the property and a restoration of the money belonging to the heirs. It appearing probable, however, as it subsequently turned out that the proceeds of sale would no more than suffice for this payment to the heirs, and that there would therefore be no surplus to distribute, this court, reserving all other questions which were presented and preserved by exceptions noted of record, directed the decision to be certified down that the sale should be had and the cause proceeded with. When this order had been duly complied with, the present applicant conceiving that the decision might be construed as a final disposition of the case so far as his rights were concerned, filed a petition to rehear, and the court in denying the petition (152 N. C. 314, 67 S. E. 746), again distinctly declared that the cause was in the court below, that a sale should be had and final judgment entered, and that all rights or questions properly noted by exceptions for review would be preserved and dealt with on appeal from such final judgment.

Speaking to this question, Associate Justice Walker said: "The only question to be decided by us at the last term (151 N. C. 620, 66 S. E. 671) was as to the power of the court to order an investment of the proceeds of sale before any sale of the property had been made, and before it could be ascertained, with any degree of certainty, whether the said proceeds would be sufficient for the improvement of the other property, as contemplated by the former order of the court. We therefore merely directed a sale of the property by the commissioner, W. R. Whitson, and a report of the sale to the court, and it was not our purpose to deprive the petitioner in this case of any rightful claim or lien he has upon the fund to be realized, as between him and the heirs or the owners of the property which is to be sold. Our decision was, it is true, that the heirs should be reimbursed; but if, as contended by the petitioner, he is entitled to a lien upon the fund, as against the heirs, or to be preferred in the distribution of the proceeds of the sale, on account of commissions justly due him, or by reason of any other claim he has preferred and which constitutes a prior lien upon such proceeds, he is not deprived by that decision of asserting such prior lien, and his exceptions, as we said in the former opinion, will be considered without reference to the fact that we have merely ordered a sale of the premises and a report to the court, and refused to pass upon the exceptions until the clear amount of the proceeds of the sale could be ascertained." And further: "Our conclusion is that the former decision is sufficiently explicit to show that the petitioner and the other parties, who claim that they have a lien upon the fund, will not be prejudiced hereafter by reason of our refusal to pass upon their exceptions at the time we made the decision. If the

property in the hands of the heirs is, as between them and any of the claimants, subject to a charge or lien for its preservation, or for the payment of taxes or any other incumbrance of a like nature, this question will be open for consideration and decision in the court below, when the report of the commissioner, W. R. Whitson, is made to the court." And again: "We do not reverse or modify our former decision, but simply declare, by this opinion, that the legal rights of the claimants who have excepted shall be preserved until the land is sold and the final hearing is had upon the report of the commissioners."

It will thus be seen that the position now contended for by defendant was directly presented and passed upon in the petition to rehear, and it was expressly decided that the cause was in the court below, and that the exceptions of present application were preserved for consideration on appeal from the final judgment. This is the orderly course which should obtain in these reference proceedings, and is in accord with numerous decisions in our court on the subject. *Riley v. Sears*, 151 N. C. 187, 65 S. E. 912; *Pritchard v. Spring Co.*, 151 N. C. 249, 65 S. E. 968; *Brown v. Nlmoocks*, 126 N. C. 808, 36 S. E. 278; *Halley v. Gray*, 93 N. C. 185; *Jones v. Call*, 89 N. C. 188.

In the *Pritchard Case*, supra, it was held: "An appeal is premature from the judgment of the lower court modifying the report of a referee, declaring the indebtedness and priorities among defendant's creditors, and ordering a reference as to one of them, and it will be dismissed without prejudice; for when a reference has been entered upon, it must proceed to its proper conclusion, and an appeal will only lie from a final judgment, or one in its nature final." And delivering the opinion the court said: "If a departure from this procedure is allowed in one case, it could be insisted upon in another, and each claimant, conceiving himself aggrieved, could bring the cause here for consideration, and litigation of this character would be indefinitely prolonged, costs unduly enhanced, and the seemingly and proper disposition of causes prevented."

In *Brown v. Nlmoocks*, 126 N. C. 808, 36 S. E. 278, it was held: "The intent and policy of the statute allowing appeals (the Code, § 548), are to present for review the exceptions taken and questions of law arising upon the whole case, and fragmentary appeals will not be entertained, when no substantial right is put in jeopardy by such refusal." "(2) A party can preserve his rights by having his exceptions noted in the record and bringing them forward on the final hearing."

And in the *Jones Case*, supra, it was held: "An appeal from an order sustaining some of the exceptions to a referee's report and overruling others, and recommitting the report, with instructions to correct the same

in conformity to the ruling of the court, is premature, and will be dismissed. Upon the coming in of the report and the rendition of a final judgment, all the exceptions can be noted and passed upon in one appeal." And Merrimon, J., delivering the opinion, said: "It is settled that an appeal does not lie at once from every order or judgment that may be made in the progress of an action. Generally, in the order of procedure, it lies from the final judgment, and then it brings up altogether the exceptions that may have been taken and noted in the record from time to time, and the whole are heard together. An action might easily be protracted indefinitely, if an appeal could be taken at once from every order or judgment, however unimportant or inconclusive, entered in the course of its progress, suspending unnecessarily its progress pending the determination of successive appeals in this court. The due administration of justice does not require such a course of practice, even if a fair construction of the statute providing for appeals to this court would allow it, as it certainly does not."

It will thus be seen that every question raised by exceptions, on the part of the applicant, were and are preserved to him, that they are open for consideration on appeal from the final judgment, and that the court acted by analogy to approved precedents, and on express authority with us (*Gray v. James*, 147 N. C. 139, 60 S. E. 906), in remanding the case on the original appeal and in holding, on the petition to rehear, that the entire cause was in the court below, to be proceeded with to final judgment. It is no answer to this position that the price realized at the sale is without result on claims of plaintiff, and that the final judgment in no way affects them. This may be true, as a matter of form; but in entering the final judgment the right of appeal at once arises, and the applicant is entitled to have the positions indicated by his exceptions reviewed on such appeal.

For the reasons stated the application on the part of C. H. Miller must be denied, and it is so ordered.

Motion denied.

(155 N. C. 247)

SMITH v. MILLER et al.

(Supreme Court of North Carolina. May 17, 1911.)

1. CERTIORARI (§ 6*)—GROUNDS—ERROR OF COUNSEL.

Error of counsel, whereby a party fails to appeal from a final judgment, is not ground for certiorari, except under very exceptional circumstances.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 7-11; Dec. Dig. § 6.*]

2. CERTIORARI (§ 16*)—FINALITY OF DETERMINATION—INTERLOCUTORY JUDGMENT.

Where the judgment against a party is retained for further orders, and there is no judg-

ment disposing of the costs or directing payment of them, the judgment is interlocutory and not appealable, and certiorari will not be granted as a substitute for an appeal.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 31, 32; Dec. Dig. § 16.*]

3. APPEAL AND ERROR (§ 514*)—RECORD—SPECIAL ORDERS AS TO CONTENTS—PRINTING.

On appeal from final judgment, in an action from which a former appeal has been taken and in which the record fully presented the appellant's exceptions, it will only be necessary in making up the record to set out so much of the proceedings since the former appeal as present such orders as affect the appellants, and to print such additional record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2330; Dec. Dig. § 514.*]

4. APPEAL AND ERROR (§ 460*)—STAY OF PROCEEDINGS—APPEAL FROM FINAL JUDGMENT—UNDERTAKING.

Upon compliance with Revisal 1905, § 598, relating to the giving of an undertaking to stay proceedings, there will be a stay of execution as to parties appealing from a final judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2217-2246; Dec. Dig. § 460.*]

Action by E. A. Smith against C. H. Miller and others. Decree for plaintiff, and C. H. Miller petitions for certiorari to bring up his appeal. Petition denied.

A. S. Barnard, for petitioner.

CLARK, C. J. This is a petition for certiorari by C. H. Miller. The facts have been fully stated in an opinion just filed by Mr. Justice Hoke (71 S. E. 353), denying Miller's motion to consider his exceptions, without the necessity of an appeal. He now asks for a certiorari to bring up his appeal, alleging that he failed to appeal from the final judgment rendered at the December term below on account of the error of his counsel.

[1] The court has often held that this would not be ground for a certiorari, except possibly under very exceptional circumstances. *Barber v. Justice*, 138 N. C. 21, 50 S. E. 445; *Cozart v. Assurance Co.*, 142 N. C. 524, 55 S. E. 411; *Harrill v. Railroad*, 144 N. C. 544, 57 S. E. 382.

[2] Besides we find upon examination of the judgment at December term, 1910, below that it is not a final judgment, but the cause is "retained for further orders," and there is no judgment disposing of the costs or directing payment of them. If the ground for a certiorari was sufficient in other respects, it could not be granted as a substitute for an appeal when the judgment was interlocutory, and no appeal lay.

[3] At the next term of the court below, the petitioner can move for final judgment in the action, and on his appeal therefrom the exception heretofore taken by him will be brought up and reviewed. As it will be expensive and entirely unnecessary to reprint the voluminous record which was here on the former appeal, on the appeal from the final judgment, the record which was brought here

on the former appeal (151 N. C. 629, 66 S. E. 671), and which fully presented the petitioner's exceptions, can be used without reprinting. It will only be necessary in making out the record on the appeal from the final judgment to set out so much of the proceedings since the former appeal as is necessary to present such orders as affect C. H. Miller, and other appellants, if there shall be others. And it will only be necessary to print such additional record.

[4] Should there be an appeal from the final judgment, there will be a stay of execution as to such of the parties as appeal, upon compliance with the requirements of Revisal 1905, § 598.

(39 S. C. 34)

SOUTHERN POWER CO. v. WALKER.

(Supreme Court of South Carolina. May 28, 1911.)

1. EMINENT DOMAIN (§ 274*)—CONDEMNATION PROCEEDINGS—CONTEST—PROCEDURE.

When the right to institute condemnation proceedings is contested, the proper remedy is to bring an action in the court of common pleas, that the court may, in the exercise of its chancery powers, determine such right.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 753, 765-768; Dec. Dig. § 274.*]

2. EMINENT DOMAIN (§ 35*)—POWER OF CORPORATIONS—STATUTES—REPEAL.

Civ. Code, § 1895, providing that corporations shall have no power to condemn lands except for certain purposes, was repealed by necessary implication by Act Feb. 25, 1904 (24 St. at Large, p. 489), conferring on electric lighting and power companies, whether incorporated under the laws of the state or thereunder domesticated, the right to resort to condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 35.*]

3. STATUTES (§ 113*)—TITLE AND SUBJECT OF ACT—CONSTITUTIONAL PROVISIONS.

Act Feb. 25, 1904 (24 St. at Large, p. 489), entitled, "An act to grant unto electric lighting and power companies all the rights, etc., subject to the same duties and liabilities, as are conferred on telegraph and telephone companies under section 2211, etc., of the Civil Code, and to amend said section 2211, by adding another provision at the end thereof," does not violate Const. art. 3, § 17, providing that every act shall relate to but one subject, which shall be expressed in the title, the subject of the act being the granting of certain rights, etc., to electric lighting, etc., companies and that part of the title describing those rights not being another subject, but merely explanatory of the nature of the powers conferred, and that portion of the title amending section 2211, by adding a proviso at the end thereof, not being another subject, but being merely intended to provide a method to achieve the object expressed in the title, and therefore being germane to that object.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 113.*]

4. STATUTES (§ 170*)—RE-ENACTMENT.

To the extent that the Legislature may refer, even to the provisions of a repealed statute and adopt them, the repealed statute is thereby re-enacted, and to that extent is as much the

law as if its provisions were set out in the new statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 245, 248, 249; Dec. Dig. § 170.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; J. W. De Vore, Judge.

"To be officially reported."

Condemnation proceedings by the Southern Power Company against L. P. Walker. From the decree, defendant appeals. Appeal dismissed.

The exceptions referred to in the opinion are as follows:

"(1) Because his honor erred in holding that the fact that the state of New Jersey did not give to the respondent corporation the right and power to condemn lands would not prevent this state from so doing if it should see proper to do so; it being submitted that a foreign corporation coming into this state cannot exercise larger powers than those conferred upon it by the parent state.

"(2) Because his honor erred in holding that the act of the Legislature of the state of South Carolina found in the Acts of 1904, p. 489, is not in violation of article 3, § 17, of the Constitution, which provides that 'every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title'—it being submitted that the title to said act gives no intimation of what is in the act itself—and the real subject and the real contents thereof are the right given to electric light and power companies to condemn private property, when no such drastic or unusual power is even hinted at in the title. The act is therefore unconstitutional, because not complying with the provisions of the section just herein mentioned.

"(3) Because his honor erred in holding that the title of the act just mentioned, to wit, the act of 1904, shows that 'electric light and power companies' is the subject, when he might as well have held that 'telephone and telegraph companies' is the subject, and, if this is true, then the act in question relates to two subjects, and is therefore unconstitutional.

"(4) Because his honor erred in not holding that it is not a compliance with the constitutional provisions above referred to to refer to the original act merely by the number of sections of the published laws, and that the true and actual subject of any act must be expressed in its title, and not by way of reference to some other law, in order to make it constitutional and valid.

"(5) Because his honor erred in not holding that the act referred to refers to two subjects, and is therefore unconstitutional, it being submitted: (1) That it attempts to confer upon electric light and power companies certain rights and powers theretofore

enjoyed by telephone and telegraph companies. (2) It attempts to amend the then existing law, with regard to the powers of telephone and telegraph companies.

"(6) Because his honor erred in holding that the Southern Power Company comes under that class of corporations known as quasi public corporations when he should have held that under the terms of its charter and the laws of the state of South Carolina the said corporation is a private corporation, and therefore has no right to condemn private property for its own use, as section 17, art. 1, of the Constitution of South Carolina, forbids this.

"(7) Because his honor should have held that since the state of South Carolina has no power of regulation or control over the affairs of the said corporation, Southern Power Company, with respect to the manner in which it shall do business—the rate it shall charge the people whom it shall serve—it is therefore a private corporation, and cannot have given to it the power to condemn private property for its uses.

"(8) Because his honor erred in not holding from the undisputed evidence shown by the several contracts introduced in evidence that the petitioner, Southern Power Company, has been making, and does make, with its various patrons contracts differing in rates of charges and in other particulars and that it thereby establishes itself as a private corporation with the right to furnish its power and other products to such persons and on such terms as it may choose.

"(9) Because his honor, the circuit judge, erred in not holding that certain of the powers and privileges named in its charter at least, if not all of them—with the exception of the power to light the streets of municipalities—were, and are, private and in no sense public, and, inasmuch as the public uses and the private uses for which the said power company has sought to condemn appellant's lands cannot be separated so that condemnation may be had for the one and not for the other, the said Southern Power Company cannot, under the law, have any right to condemn at all, and the circuit judge should have so held.

"(10) Because his honor, the circuit judge, erred in not holding that inasmuch as very nearly all, if not quite all, of the powers given to the respondent Southern Power Company are for private uses and purposes, and in no sense public, the said corporation did not have the power to condemn for any of these uses, and its power to condemn should have been, and should be limited to the condemnation for those of the uses and purposes named in its charter, which are clearly public.

"(11) Because his honor erred in dismissing each and every of the grounds of appeal of this defendant, and in not holding that each and every of the said grounds should be sustained.

"(12) Because his honor, the circuit judge, erred in sustaining all grounds of the appeal of the original petitioner, Southern Power Company, when it was distinctly understood and agreed between the parties to this proceeding that all questions affecting the condemnation money to be paid and the methods of reaching the amount thereof should be postponed until after the determination of the legal questions now raised, with the exception that, if the right to condemn should be established in this proceeding, the amount of compensation to be paid to the defendant should then be fixed by a new jury in the court of common pleas."

J. W. Nash and Simpson & Bomar, for appellant. Osborne, Lucas & Cocke, Nicholls & Nicholls, and John Gary Evans, for respondent.

GARY, A. J. The petitioner herein seeks a right of way through the land of the defendant under condemnation proceedings. In accordance with the practice in such cases, a jury was impaneled, and assessed the damages, to be paid by the petitioner, to the defendant. Both the petitioner and the defendant appealed to the circuit court. The petitioner's grounds were sustained, but those of the defendant were overruled. The defendant then appealed to this court upon exceptions, which will be reported.

[1] "When the right to institute condemnation proceedings is contested, the proper remedy is to bring an action in the court of common pleas, in order that the court may, in the exercise of its chancery powers, determine such right." *Water Co. v. Nunamaker*, 73 S. C. 550, 53 S. E. 996. In the case under consideration the defendant did not bring an action to contest the petitioner's right to condemnation proceedings, but raised the questions involved on an appeal from the verdict of the jury. As no objection has been interposed to the manner in which the questions are presented, we will not decline to consider them, especially as they are of public interest.

[2] The first question that will be considered is whether the petitioner, being a foreign corporation, without the power to condemn in the state of its origin, was empowered under the laws of this state to exercise the right of condemnation. The petitioner's certificate of incorporation under the laws of the state of New Jersey contains this provision: "Nothing herein shall empower the said corporation to construct, maintain or operate railroads, telephone or telegraph lines, canals, turnpikes, or any other business which shall need to possess the right of taking and condemning lands, within the state of New Jersey; but nothing herein contained, shall prevent the taking and condemnation of lands, without the state of New Jersey." Section 1790, c. 44, Code Laws, is as follows: "All and every such foreign corporation, carrying on business or owning prop-

erty in this state, shall be subject to the laws of the same, in like manner as corporations chartered, under the laws of this state. * * * Section 1895, c. 48, Code Laws, is as follows: "Corporations organized for any purpose, under the provisions of this article, shall have power to construct and operate a railroad, electric railway, tramway, turnpike or canal, for their own use and purposes, and shall have the right to effect a crossing, with any existing railroad or public roads, as is now provided by law for railroad corporations; but they shall have no power to condemn lands, except for crossing any existing railroad or public road, as herein provided." Acts 1904, p. 489, is as follows:

"An act to grant unto electric lighting and power companies all the rights, powers, and privileges, subject to the same duties and liabilities, as are conferred upon telegraph and telephone companies, under sections 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, and 2219, of the Civil Code of South Carolina, and to amend said section 2211, by adding another proviso, at the end thereof.

"Section 1. Be it enacted by the General Assembly of the state of South Carolina, that, subject to the same duties and liabilities, all the rights, powers and privileges conferred upon telegraph and telephone companies, under sections 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, and 2219, of the Civil Code of South Carolina, be, and the same are hereby granted, unto electric lighting and power companies, incorporated under the laws of this state, or any other state, upon complying with the laws of this state, regulating foreign corporations, and by becoming a domestic corporation.

"Sec. 2. That section 2211 of the Code of Laws of South Carolina, 1902, be, and the same is hereby, amended by adding the following additional proviso at the end thereof, to wit: Provided, further, that no telegraph, telephone, electric light or power wire, shall be erected or maintained, within fifty yards of any public road or highway in this state, unless the same, shall be so constructed, erected and maintained and provided, with sufficient lightning guards or arresters (and in case of electric light or power wires, with such automatic cut-offs, and other devices), as may be necessary for the protection of the persons and property."

Then follows the penal clause. It will thus be seen that section 1790 of the Code of Laws shows that the petitioner was subject to the laws of South Carolina in like manner as corporations chartered under the laws of this state. And the act of 1904 not only confers upon electric lighting and power companies incorporated under the laws of this state the privileges therein mentioned, but also, upon those companies incorporated under the laws of any state, which have complied with the laws of this state, regulating

foreign corporations, by which they become domestic corporations. The petition alleges, and it is not denied, that the petitioner became a domestic corporation under the laws of this state regulating foreign corporations. As it is clearly the intention of the act of 1904 to confer upon electric lighting and power companies, whether incorporated under the laws of this state, or domesticated under its laws, the right, to resort to condemnation proceedings, and, as the provisions of this act are inconsistent with section 1895 of the Code of Laws, it must be regarded as repealed by necessary implication. The exceptions raising this question are overruled.

[3] The next question for consideration is whether the presiding judge erred in ruling that the title of said act was not obnoxious to article 3, § 17, of the Constitution, which is as follows: "Every act or resolution, having the force of law, shall relate to but one subject, and that shall be expressed in the title." The purpose of this provision is stated in Cooley's Con. Lim. pp. 171, 172, to be: "First, to prevent hodge-podge, or log-rolling legislation; second, to prevent surprise or fraud upon the Legislature, by means of provisions in bills, of which the title gave no intimation, and which might therefore be overlooked, and carelessly and unintentionally adopted; and third, to fairly apprise the people, through such publication of legislative proceedings, as is usually made, of the subjects of legislation, that are being considered, in order that they may have opportunity, of being heard thereon, by petition or otherwise, if they shall so desire. The generality of a title is, therefore, no objection to it, so long as it is not made a cover to legislation, incongruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection." On page 175 the author also says: "There has been a general disposition, to construe the constitutional provision liberally, rather than to embarrass legislation by a construction, whose strictness is unnecessary, to the accomplishment of the beneficial purpose for which it has been adopted." "When an act of the Legislature expresses in its title the object of the act, the title embraces and expresses any lawful means to achieve the object, thus fulfilling the constitutional injunction that every law shall embrace but one subject, and that shall be expressed in its title." This language was used by the court in *San Antonio v. Lane*, 32 Tex. 402, and adopted in *Charleston v. Oliver*, 16 S. C. 47, and *San Antonio v. Mehafeey*, 96 U. S. 315, 24 L. Ed. 816. In *Connor v. Railway*, 23 S. C. 427, the court had under consideration the constitutionality of an act, entitled, "An act to incorporate the Green Pond, Walterboro & Branchville Railroad Company," by which power was conferred upon the county commissioners to issue bonds in subscription to the capital stock of this railway. The act was declared to be constitutional. In com-

menting on that case the court in *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242, used this language: "The principle upon which it was held that the act was constitutional was that the authority granted to the county to subscribe to the railway was a means to achieve the object expressed in the title of the act, and therefore was germane to that object. So it appears to us that declaring the township a corporate body, with power to tax in aid of the Greenville & Port Royal Railroad, was contributory to, and furnished means to achieve, the object of the act, as expressed in the title." See, also, *Riley v. Union Station Co.*, 71 S. C. 457, 51 S. E. 485, 110 Am. St. Rep. 579; *State v. O'Day*, 74 S. C. 448, 54 S. E. 607; *Park v. Cotton Mills*, 75 S. C. 560, 56 S. E. 234; *Aycock Little Co. v. Railway*, 76 S. C. 331, 57 S. E. 27; *Bulst v. Charleston*, 77 S. C. 260, 57 S. E. 862; *State v. Hunter*, 79 S. C. 91, 60 S. E. 226; *Jelico v. Commissioners*, 83 S. C. 481, 65 S. E. 725.

The subject of the act is the granting of certain rights, powers, and privileges to electric lighting and power companies. That part of the title describing those rights, privileges, and powers to be such as are conferred upon telegraph and telephone companies under the sections of the Code of Laws therein mentioned was not another "subject," but was intended merely to explain the nature of the powers conferred upon those companies, and really was unnecessary. Nor was that portion of the title amending section 2211, by adding a proviso at the end thereof, another "subject," but was merely intended to provide a method to achieve the object expressed in the title of the act, and therefore was germane to that object.

[4] To the extent that the Legislature may refer, even to the provisions of a repealed statute and adopt them, the repealed statute is thereby re-enacted, and, to that extent, is as much the law as if its provisions were set out in the new statute. *Lyles v. McCown*, 82 S. C. 127, 63 S. E. 355. Therefore it cannot be successfully contended that the act was rendered invalid by reason of the fact that the title referred to the provisions in another statute, which could be adopted, without setting them out, in the body of the act. The exceptions raising this question are overruled.

The next question that will be considered is whether there was error on the part of the circuit judge in ruling that the land was subject to condemnation for a right of way, other than for a public purpose. This question has lately undergone judicial discussion so frequently that we deem it only necessary to cite the following cases to show that the exceptions raising this question cannot be sustained: *Boyd v. Granite Co.*, 66 S. C. 433, 45 S. E. 10; *Wilson v. Alderman*, 69 S. C. 176, 48 S. E. 81; *Riley v. Union*

Station Co., 71 S. C. 457, 51 S. E. 485, 110 Am. St. Rep. 579; *Alderman v. Wilson*, 77 S. C. 165, 57 S. E. 756; *McMeekin v. Power Co.*, 80 S. C. 512, 61 S. E. 1020, 128 Am. St. Rep. 885; *Williams v. Gold Mine Co.*, 85 S. C. 1, 66 S. E. 117, 1057. The appellant's attorneys were granted permission to review these cases in so far as this question was involved, but, after careful consideration, the court adheres to the doctrine therein announced. These views practically dispose of all the questions, now presented to the court for determination.

Appeal dismissed.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(89 S. C. 97)

HARRELL et al. v. COLUMBIA ELECTRIC ST. RY., LIGHT & POWER CO.

(Supreme Court of South Carolina. May 24, 1911.)

1. TRIAL (§ 63*)—ORDER OF PROOF—JUDICIAL DISCRETION.

It was not an abuse of discretion to permit plaintiffs to introduce cumulative testimony at the close of defendant's case, though it did not reply to defendant's evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 153; Dec. Dig. § 63.*]

2. TRIAL (§ 312*)—RECALLING JURY FOR INSTRUCTION—PROPRIETY.

Recall of the jury for proper instruction is not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 744; Dec. Dig. § 312.*]

3. CARRIERS (§ 318*)—STREET RAILWAYS—INJURY TO BOARDING PASSENGER—WANTON NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that injury to a boarding street car passenger caused by suddenly starting the car resulted from wanton negligence.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 318.*]

4. CARRIERS (§ 341*)—INJURY TO PASSENGERS—NEGLIGENCE—WANTONNESS—CONTRIBUTORY NEGLIGENCE.

Contributory negligence was no defense to suit for wanton negligent injury to a street railway passenger.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 341.*]

Appeal from Common Pleas Circuit Court of Richland County; J. W. De Vore, Judge. "To be officially reported."

Action by R. E. Harrell and another against the Columbia Electric Street Railway, Light & Power Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Elliott & Herbert, for appellant. Weston & Aycock and E. J. Best, for respondents.

JONES, C. J. The plaintiff Mattie Harrell, joining her husband, R. E. Harrell, in this suit, recovered of the defendant company a judgment of \$5,000 for personal in-

juries alleged to have been sustained by her on October 30, 1907, in the city of Columbia, S. C., at the intersection of Main and Taylor streets, by being thrown from the running board of defendant's car, through the negligence and wanton conduct of defendant (1) in failing to have the guard rail down on the west side of its car going north up Main street, at that time unusually crowded because the State Fair was being held in the city; (2) in suddenly and recklessly and without warning starting said car before plaintiff had sufficient time to get into the car and be seated.

[1] The first and second exceptions of defendant appellant assign error in permitting the plaintiff Mrs. Harrell and a witness, Harry Olstein, to testify after the close of defendant's testimony as to matters not in reply to any testimony brought out by defendant. The testimony was merely cumulative, and its admission was within the discretion of the trial court, which does not appear to have been improperly exercised. *Wilson v. Moss*, 79 S. C. 120, 60 S. E. 313.

[2] After the jury had been charged and had retired to their room, Judge De Vere discovered that he had inadvertently failed to instruct them as to punitive damages, and called the jury back and charged them on that subject. This is made the basis of the fourth exception. There was no error. On the contrary, it is a proper exercise of the judicial function to cure an omission to give proper instruction, as well as to withdraw an improper instruction, as was done in *State v. Lightsey*, 43 S. C. 114, 20 S. E. 975.

[3] The third exception alleges error in refusing defendant's request to charge that there was no evidence in the case to support a verdict for punitive damages, and the fifth exception, in part, alleges error in the refusal of motion for new trial made on the same ground. We are unable to say that there was no testimony whatever tending to show wantonness, since there was testimony that the car was moved suddenly with a violent jerk without warning, while plaintiff was upon the running board of the car and before she had time to take her seat. Whether the conductor or motorman knew, or should have known, of plaintiff's exposed position at the time, whether due warning was given, or whether the sudden jerk was due to some peculiar or unpreventable action of the electric power, were matters of explanation for the jury.

[4] The fifth exception also contends there was error in refusing new trial because the evidence showed contributory negligence of plaintiff. After a careful reading of the testimony, we cannot say that the cause of action for mere negligence was conclusively overthrown by the testimony tending to show negligence on the part of plaintiff, and, as to the cause of action based on willfulness,

the matter of contributory negligence is inapplicable.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(30 S. C. 57)

FORT v. CALDWELL et al.

(Supreme Court of South Carolina. May 23, 1911.)

1. LOGS AND LOGGING (§ 3*)—BONA FIDE PURCHASERS.

Defendants contracting with the purchasers of timber rights on land for the cutting of the timber and expending time and money and assuming financial obligations in carrying the contract into effect, before they had notice that the deed to such timber was void, were purchasers for a valuable consideration without notice.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. LOGS AND LOGGING (§ 3*)—SALE OF TIMBER—BREACH OF CONTRACT—DAMAGES.

Where purchasers of timber rights from one holding under a deed subsequently declared void were allowed to continue operations for a part of the time of the contract, and thereafter voluntarily removed such parts of their mill as rendered its further operation impossible, they were not entitled to damages.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Common Pleas Circuit Court of Lexington County; Ernest Gary, Judge.

"To be officially reported."

Action by Leslie H. Fort against Howard Caldwell and others. From the judgment, plaintiff appeals. Judgment modified.

The decree and exceptions referred to in the opinion are as follows:

"On and for many years prior to the 12th day of September, 1907, the plaintiff was the owner in fee of a large body of timbered land situated in Lexington county. That at said time the defendant Howard Caldwell was a real estate dealer living in the city of Columbia. That said Caldwell opened up negotiations with the plaintiff and her husband to acquire a license to cut and market the timber on said premises, and, as a result, the plaintiff in consideration of \$500, on that date paid to her by said Caldwell, executed and entered into a written agreement with the defendant Caldwell, wherein she agreed to sell to the said Howard Caldwell all the saw timber on the said premises for a space of six years, the said agreement by its terms expressly authorizing the said Howard Caldwell to cut and saw and take and carry away and sell all the saw timber now standing on said land, and other privileges not material to this issue are fully set out in said agreement.

"It is also stipulated in said agreement that the defendant Howard Caldwell, in consideration of the covenant above set forth,

would pay to the plaintiff \$2,500 upon the execution and delivery to him by the plaintiff of a proper conveyance carrying out the terms of said agreement, including a deed to a mill plant and its equipments, already erected on said premises, also \$6,000 to be paid 9 months from the date of the bargain and sale of said timber, with interest from date until paid at the rate of 6 per cent. per annum; also \$3,000 12 months from the date of said deed and sale, with the same rate of interest (6 per cent. until paid). Subsequently to the execution of this agreement, and on the 19th day of September, 1907, the plaintiff executed to the defendant Howard Caldwell an instrument in the nature of a deed, but in effect a license, conveying the saw timber on said premises with full power to cut, saw, and take and carry away and sell all the saw timber standing upon the said land. This deed by its terms conveys to the said Howard Caldwell the land as well as the timber for a period of six years. The consideration expressed in said deed is \$12,000. The real consideration, however, was the execution and delivery by Caldwell of two promissory notes, the one for \$3,000, dated 19th of September, 1907, payable 12 months after date to the order of the plaintiff; the other executed at the same time for \$6,000 and payable 9 months after date, together with the \$500 paid at the time of the execution of the agreement for the license, and the sum of \$2,500 paid at the time of the execution and delivery of the deed. That immediately after the execution and delivery of said deed, to wit, on the 19th day of September, 1907, said defendant Howard Caldwell went into possession of said real estate and commenced his operations cutting, sawing, and marketing the timber on said premises. That thereafter, on the 13th day of January, 1908, said defendant Caldwell entered into a contract with the defendant N. C. McDuffie & Co., whereby he sold and conveyed to said N. C. McDuffie & Co. as much of the timber on said tract of land as was sufficient to run a shingle mill for 'so long a time as the timber on said land lasts or until it had been exhausted.' This contract included a sale of both original timber and tops.

"The consideration for this contract was recited to be the sum of \$1 in hand paid, and a further payment by N. C. McDuffie Company to said Howard Caldwell of so much per thousand for shingles cut by said N. C. McDuffie Company, —, a price varying according to the grades of shingles manufactured. Under this contract N. C. McDuffie & Co. moved its shingle mill to said tract of land, dug a well, put up sheds and tenant houses, and expended a considerable sum of money in putting itself in a position to carry out its part of the contract, and commenced to develop its business by the manufacture and sale of various grades of shingles. That thereafter, on or about the 24th day of Feb-

ruary, 1908, said N. C. McDuffie & Co. contracted to buy from said Howard Caldwell all of his, said Howard Caldwell's, timber rights on said tract of land, and actually paid the sum of \$100 in cash as a part of the purchase price, agreeing to pay the balance, to wit, the sum of — dollars upon the execution and delivery of a good and sufficient deed conveying the same rights to it as the said Howard Caldwell had acquired in said timber under his deed from Lessie H. Fort, the plaintiff herein.

"It appears from the complaint and the answer of N. C. McDuffie & Co.: That about this time—before the actual transfer of Howard Caldwell to N. C. McDuffie & Co.—that the plaintiff, learning of the proposed transfer, and being acquainted with the fact that the consideration to be paid by N. C. McDuffie & Co. to Howard Caldwell was less than the aggregate sum of the two notes given by Caldwell to her for the agreed portion of the purchase price under her said deed of the 19th of September, 1907, made a demand upon said Caldwell to have the purchase money from the McDuffie Company paid to her, but that such demand was refused. That thereupon, through her attorneys, she warned the defendant N. C. McDuffie & Co. not to comply further with the terms of its agreed purchase, as she intended to take steps to protect her rights therein, and it appears that said N. C. McDuffie & Co. did not further comply with its contract to purchase. Subsequently, by complaint dated the 3d day of March, 1908, the plaintiff brought this action against the defendants above named, alleging her prior ownership in the tract of land and 'the sawmill, engine, log wagons, wagons, and all other sawmill equipments then located upon the said tract of land.' That she had contracted to sell the timber rights and the chattels above mentioned to said Howard Caldwell upon the terms hereinbefore stated in this decree, and that she had so conveyed the same upon the terms agreed upon in view of certain representations made to her by said Caldwell as to his worth and ability to meet the credit portion of the purchase price as represented by the said two notes, aggregating \$9,000. That the deed was procured through fraud and thereof; further, that, in spite of such representing to plaintiff his worth in money and in representing to her the time that it would take for him to cut, saw, sell, and dispose of said timber, and in further representing that he could not and would not sell and dispose of the timber until after she had been paid the credit portion of the purchase price thereof; further, that, in spite of such representation, said Howard Caldwell had contracted to sell for a lump sum of money in cash—being less than the amount due by him to the plaintiff—all of said timber, with the intent to defeat the payment of the sum of money he was due plaintiff, and that, by reason thereof, plaintiff would suffer an ir-

reparable injury and lose the whole of the \$9,000 owing her. The defendant N. C. McDuffie & Co. was made a party to the action as the one to whom said Howard Caldwell had contracted to sell said timber.

"The action was for fraud in the obtaining of the said deed to said tract of timber, and the complaint prayed that the conveyance be declared void and the deed ordered delivered up for cancellation; further, that said defendant Caldwell be enjoined and restrained from cutting, selling, and disposing of the timber or in any manner interfering with the same until he had paid the sum of \$9,000 owed by him to the plaintiff, and that the defendant N. C. McDuffie & Co. be enjoined and restrained from buying said timber and from paying the defendant Caldwell any sum of money therefor. The complaint also prayed for the appointment of a receiver to take charge of the property and for such other relief as might be just and might meet the demands of equity. Thereafter, on the 12th of March, 1908, the Honorable John S. Wilson, judge presiding in the Fifth circuit, passed an order requiring the defendants to show cause before him why the injunction prayed for in the complaint should not be granted, and in the meantime enjoining and forbidding said defendants from committing any of the acts prayed for by the plaintiff. The summons, complaint, and rule to show cause was served on both defendants on the 13th day of March, 1908.

"Both defendants made return to the rule to show cause, and on the 24th day of March, 1908, his honor, Judge John S. Wilson, made permanent the temporary injunction theretofore granted, pending the hearing of the cause on its merits, requiring the plaintiff to enter into an undertaking in the sum of \$5,000, conditioned that the plaintiff would pay to the defendants such damages as they might sustain by reason of such injunction if the court should finally decide that the plaintiff was not entitled thereto. The record disclosed the fact that the injunction bond required of the plaintiff was given.

"Thereafter both defendants answered. The answer of the defendant Caldwell is, in effect, a denial of all of the allegations of the complaint charging fraud and imposition on his part, but admitting the allegations with reference to his purchase of the timber and incumbrance by way of mortgage placed thereon, and a contract to sell the same to the defendant N. C. McDuffie & Co. The answer of the defendant McDuffie & Co. sets up the defense of purchaser for valuable consideration without notice under its contract 'to run a shingle mill for so long a time as the timber on said land should last or until it had been exhausted, with no limitation as to the time except such as was set forth in the deed from the plaintiff to the defendant Howard Caldwell.' It also admits that it had contracted to purchase

from said Howard Caldwell the entire timber rights on said tract of land—such contract to purchase being subsequent in date to the contract for the operation of the shingle mill. It asks to be relieved from the contract to purchase on account of having been restrained and enjoined from complying with said contract to purchase. It asks for damages under the restraining order on account of the expense it had been put to in fitting up and carrying on its operations under said shingle mill contract, and for damages resulting from its being prevented from performing its work, labor, and operations under said contract.

"The only modification of the order of injunction hereinbefore referred to was a consent order signed by the Honorable John S. Wilson on April 15, 1908, permitting the defendant N. C. McDuffie & Co. to continue its operations under its shingle mill contract until June, 1908, term of the court of common pleas for Lexington county—the prices to be paid for shingles cut to be those mentioned in said contract, all parties agreeing that such prices were full and fair—payment being made to the clerk of the court for Lexington county, who should hold all funds coming into his hands from such source subject to the further orders of this court. This right continued until some time in June, 1908, when the attorneys for the plaintiff declined to have the order continued, and the defendant N. C. McDuffie & Co. discontinued its operations by reason of the former injunction order, shut down their mill, and kept the same shut down until the ——— day of ———, when they moved the same away from said tract of land.

"Under said consent order all other rights and equities of the defendant N. C. McDuffie & Co. were preserved except that it was released from its contract to purchase the timber from Howard Caldwell. Under an order of reference, dated the 23d of June, 1908, signed by his honor, Judge J. W. DeVore, presiding judge, referring the cause to Samuel B. George, Esq., to take the testimony, the case now comes before me for a hearing and determination; the testimony having been reported by said referee. So far as the controversy constitutes a conflict of the rights of the plaintiff on the one hand, and the defendant Howard Caldwell on the other hand, after hearing exhaustive argument by counsel for all parties, Messrs. Graham and Sharpe on behalf of Mrs. Fort, Messrs. D. W. Robinson and Washington Clark on behalf of the defendant Caldwell, and Messrs. Logan & Edmunds on behalf of the defendant N. C. McDuffie & Co., and after a careful review of the testimony, I am satisfied that in the making of the contract to sell the timber and the mill plant which went therewith, and in the subsequent conveying the same, that the plaintiff and her husband who was acting with her, and was at the time an aged man, feeble in health

(he has since the commencement of this action died), were overreached by the said Howard Caldwell, and that the deed executed and delivered by her to said Caldwell should be delivered up for cancellation.

"The evidence to my mind is clear and convincing that the representations alleged in the complaint, as having been made by said Caldwell to the plaintiff, were made, and that upon the strength of these representations the deed to the timber rights was executed. The testimony of all parties present when the original agreement was made, with the exception of the testimony of the defendant Caldwell, all shows that the plaintiff relied upon the representations of said defendant as to his worth and ability to pay the obligation incurred for the credit portion of the purchase money, and the representations as to the length of time it would take to cut, saw, and market the timber, and that she would be paid before that time elapsed. Mrs. Fort testified: 'I asked if it was not necessary or customary in a case like that for me to have some security, something like that. * * * He said, "No," that would not be necessary. He said the timber would be there, and that he could not possibly make way with the timber by the time payment was due in six months. He intended to saw it himself.' The witnesses Earle Fort and W. D. Durham testified to the same effect. Mrs. Fort and the two witnesses named also testified as to the defendant Caldwell giving an estimate of his worth in money and property.

"The denial of said defendant upon these matters is qualified and more in the nature of an avoidance. He admits that he did not represent his worth, but simply denies the extent he went to in making these representations. As to the matter of time within which he expected to cut and market the timber, he admits in his answer that the credit portion would become due 'long before the expiration of the six years mentioned in the contract and deed.' It could not have been in the mind of either party at the time of the execution of the contract and deed, certainly so far as the testimony shows, that the purchase made by Caldwell was for any purpose other than to use the rights individually, and that nothing could be done to defeat the plaintiff's rights to recover the \$9,000 owing for the credit portion. Yet the defendant Caldwell placed a mortgage incumbrance on the land and contracted to sell the same for a price much less than he owed the plaintiff for the credit portion of the purchase price, and refused to do any act whereby the plaintiff's rights might be protected. His explanation of his conduct falls to satisfy me of the bona fides of the transaction on his part. A great portion of the best timber, so far as the testimony shows, has been cut—the value of the tract as a timber tract greatly decreased—a considerable lot of timber has been marketed, and the balance standing was contracted to be

sold. Had the latter transaction been consummated, there can be scarcely a doubt but that the plaintiff would have suffered an irreparable injury in the loss of a debt due her on account of the rights which she had parted with contrary to every representation made to her, and I am forced to the conclusion from all of the acts of the defendant Caldwell, after he acquired the timber rights from the plaintiff, that the original transaction in procuring the contract and deed was so lacking in the elements of good faith on his part as to shock the conscience of a court of equity, and require the cancellation of the deed as hereinafter ordered and decreed.

"So far as the rights of the defendant N. C. McDuffie & Co. are concerned, they are now under the pleadings, and the order of Judge Wilson of date 15th of April, 1908, hereinbefore referred to, limited to a consideration of the single matter of their rights as bona fide purchasers for valuable consideration without notice under their 'shingle mill contract'; the matter of their rights to purchase the entire tract having been eliminated under said consent order of the 15th of April, 1908. I have no hesitation in reaching a conclusion as to their rights under said contract.

"At a glance, it is seen that McDuffie became a purchaser of the license for a valuable consideration. And I so hold, and conclude that, as between the claim of the plaintiff against the defendant Howard Caldwell for a rescission and cancellation of the deed and an injunction restraining him from further use of the timber, the rights of N. C. McDuffie & Co. intervene as bona fide purchasers for valuable consideration without notice under said contract referred to, and that they are entitled to such protection as innocent purchasers.

"It is therefore ordered, adjudged, and decreed:

"(1) That the defendant Howard Caldwell be, and he is hereby, forever restrained and enjoined from cutting, selling, wasting, disposing of, or in any manner using the timber on the land described in the complaint.

"(2) That the defendant Howard Caldwell deliver up to the clerk of court for Lexington county the said deed of Leslie H. Fort to Howard Caldwell of date the 19th day of September, 1907, and that the same be marked null and void and canceled of record by said clerk of court.

"(3) That inasmuch as the plaintiff Leslie H. Fort received from Howard Caldwell the sum of \$3,000 in cash on account of the purchase price of said timber that it be referred to Samuel B. George, Esq., as special referee to take the account between the plaintiff and said Howard Caldwell to determine the difference, if any, between the amount so paid by said Caldwell to plaintiff and the value of the use and occupation of said land and timber, including the amount of timber cut and sold and the depreciation

in the value in said timber tract by reason thereof by said Caldwell from the 19th day of September, 1907, to the 13th day of March, 1908, being the date of the temporary restraining order and rule to show cause herein, so the judgment may be rendered accordingly.

"(4) That it be adjudged that the plaintiff was not entitled to the injunction granted under the order of Judge Wilson, dated 24th of March, 1908, as against the defendant N. C. McDuffie & Co., was restrained and enjoined from pursuing its work under its said contract to cut, saw, and market shingles by the said order of March 24, 1908; that it be referred to the said Samuel B. George, Esq., as special referee to take the testimony as to the damages suffered by said defendant by reason of such injunction order, such testimony being limited to the damages suffered from the said 24th of March, 1908, to the ——— day of January, 1909, at which latter time it voluntarily moved the shingle mill from said tract of land, and that such damages be assessed against the bond given by the plaintiff to indemnify the defendant as provided in said order of March 24, 1908, and that judgment be rendered in favor of said defendant N. C. McDuffie & Co. accordingly.

"(6) That the plaintiff have judgment for her costs against the defendant Howard Caldwell.

"(7) The defendant N. C. McDuffie & Co. have judgment for its costs against the plaintiff."

"Exceptions.

"The plaintiff appeals to the Supreme Court of South Carolina from the decree of Hon. Ernest Gary in the above stated case, and will move the said Supreme Court to reverse the same on the following grounds:

"(1) Because his honor erred in holding that the defendant N. C. McDuffie Company were bona fide purchasers for valuable consideration without notice of the timber in question under their 'shingle mill contract,' when said contract shows that no consideration was paid by the McDuffie Company at the time of the execution of said contract, and when the testimony of W. B. Montgomery, the vice president of the McDuffie Company, testified that no money had been paid the defendant, Howard Caldwell, for the said timber up to the time of the commencement of this action, and it is respectfully submitted that there was not a particle of testimony going to show that the defendant McDuffie Company was a purchaser of said timber for value without notice.

"(2) For that his honor erred in not holding that the defendant N. C. McDuffie Company had failed to prove that it had paid valuable consideration for the timber, that it had the legal title, or best right to it, and that it had purchased bona fide without notice, and was not a bona fide purchaser of said timber, for value without notice.

"(3) For that his honor erred in not holding that the deed from plaintiff to defendant Howard Caldwell for the timber in question showed that said timber had not been paid for, but merely 'secured to be paid' was such constructive notice to the defendant McDuffie Company as to put it on inquiry, said deed being on record prior to the execution of said 'shingle mill contract,' and therefore the McDuffie Company was not an innocent purchaser without notice.

"(4) For that his honor erred in not holding that plaintiff being in the actual possession of the land and timber in question, and actually living on said premises, which was well known to the McDuffie Company, operated as notice to the McDuffie Company, who should have made inquiry under the facts of plaintiff and circumstances of this case, and that it could not claim to be an innocent purchaser for value without notice.

"(5) For that his honor erred in holding that the plaintiff was not entitled to the injunction granted by Judge Wilson on the 24th day of March, 1908, against the defendant McDuffie Company under the facts and circumstances of the case, when the said McDuffie Company utterly failed to show that it was a bona fide purchaser for value under its shingle mill contract, and when said McDuffie Company advised plaintiff to institute an action for injunction.

"(6) For that his honor erred in holding that the McDuffie Company was entitled to recover of plaintiff damages from the 24th day of March, 1908, to the ——— day of January, 1909, which it had suffered by reason of the injunction, when all the testimony in the case showed, and his honor so found, that said McDuffie Company was allowed to operate its mill under said 'shingle mill contract' by an order of the court herein, until the June term of court in Lexington county, in 1908, and when from McDuffie's own testimony he removed the engine and boiler from said premises in August, 1908, which engine and boiler were parts of said shingle mill and without which he could not have operated it, and it is respectfully submitted that his honor erred as a matter of law in holding that the McDuffie Company was entitled to any damages at all, and especially for any damages prior to June term of court in 1908, and after August, 1908, at which last date the said McDuffie Company voluntarily removed its mill or the greater portion of it from said premises.

"(7) Excepts because his honor erred in holding that the McDuffie Company were entitled to judgment against the plaintiff for its costs, when under the facts and circumstances of the case it is respectfully submitted that it was not entitled to such costs.

"(8) For that his honor erred in not holding that the McDuffie Company was estopped from asking for any damages against the plaintiff in this case, by asserting that it was the friend of plaintiff,

and would not injure her; by persuading plaintiff to allow it to operate its shingle mill on said premises from the granting of said order of injunction until the June term of court, 1908.

"(9) For that his honor erred in not holding that the McDuffie Company had violated the said shingle mill contract in failing to saw up the tops and laps of said trees, when the testimony shows that it had not sawed up the tops and laps of the trees, and the dead timber as requested by said contract, but that it had only sawed up the best part of the trees, leaving the tops and laps of the trees and the dead timber on the ground, and, having breached said contract, it could not claim damages.

"(10) Because having required the referee to take the testimony and determine the difference, if any, between the amount paid by Caldwell to the plaintiff and the value of the use and occupation of said land and timber, including the amount of timber cut and sold and the depreciation in the value in said timber tract by reason thereof, by said Caldwell from the 19th of September, 1907, to the 13th day of March, 1908, his honor erred in not requiring the said Caldwell to account for the use and occupation of said lands and timber, including the amount of the timber cut and amount sold, and the depreciation in the value of said timber and land from the 19th day of September, 1908, to the filing of the injunction bond in this case, on the 30th day of March, 1908, when the testimony shows that the said Caldwell and his agents and servants continued to occupy and sell the timber on said land or premises, until the filing of the injunction bond in this case.

"(11) For that having found that the said mill and outfit which the defendant Caldwell bought from plaintiff was a part of the consideration of the \$12,000 which Caldwell was to pay plaintiff for said timber, which said sawmill was used by the said Caldwell, and greatly injured and damaged by him, a great portion of which mill and outfit had been removed, torn up, and destroyed, sold, and disposed of by the said Caldwell as shown by the testimony in the case, thereby rendering the same valueless, his honor erred in not requesting him to account for the use, damage, and injury to said land, sawmill, and outfit as well as the parts thereof torn up and destroyed by the said Caldwell.

"(12) For that having held that the defendant Caldwell procured the deed from plaintiff for the timber and sawmill through fraud and imposition, it is respectfully submitted that his honor erred in not requiring the defendant Caldwell to account for the use, damage, and injury to said sawmill and outfit, timber, and land from the time he took possession thereof until he ceased to occupy the use and possess the same, to wit, until the 30th day of March, 1908, when the injunction bond was filed in the clerk's office."

W. H. Sharpe and G. T. Graham, for appellant. Logan & Edmunds and Washington Clark, for respondents.

GARY, A. J. This is an action to set aside a deed for fraud. The facts are fully stated in the decree of his honor, the circuit judge, which, together with the appellant's exceptions, will be reported.

[1] The first question raised by the exceptions is whether there was error on the part of his honor the circuit judge in concluding that the defendants N. C. McDuffie & Co. were purchasers for valuable consideration without notice. They entered into the contract with Howard Caldwell before they had notice that the deed executed in his favor by the plaintiff was void. Under that contract, N. C. McDuffie & Co. not only assumed financial obligations, but expended time and money in carrying the provisions of the contract into effect, before they had notice that said deed was not valid. The exceptions raising this question are therefore overruled.

[2] The next question is whether there was error on the part of the circuit judge in ruling that N. C. McDuffie & Co. were entitled to damages from the 24th of March, 1908, to the ——— day of January, 1909. There are two reasons why the exceptions raising this question must be sustained. During a part of that time, to wit, from the 15th of April to the June term of the court, in 1908, N. C. McDuffie & Co. were allowed to continue operations under their shingle mill contract. The other reason is that N. C. McDuffie & Co. removed their plant in August, 1908. N. C. McDuffie, one of the defendants, testified as follows: "Q. And you have left the mill there until last January, until the last week in January of this year, for the reason that you had no place to put it? A. No; that is not exactly right." Q. Then, what is right? A. We moved the boiler and engine away from there, about last August. Q. Well you are not damaged \$400 per month, as to the boiler and engine that were moved away? A. We purchased a sawmill and necessary equipments to rig up a complete sawmill, and in that way made use of the boiler, engine, and live stock. The shingle machinery was left at the Pellion location until the last week in January of 1909"—thus showing that they voluntarily removed such parts of the shingle mill plant as rendered its further operation impossible. Therefore, upon the accounting, they will not be entitled to recover damages after that time. Statements made in open court by the attorneys for the plaintiff and the defendant Howard Caldwell render unnecessary the consideration of the eleventh and twelfth exceptions.

It is the judgment of this court that the judgment of the circuit court be modified.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(88 S. C. 196)

STATE ex rel. LYON, Atty. Gen., v. CITY COUNCIL OF AUGUSTA.

(Supreme Court of South Carolina. March 20, 1911.)

FISH (§ 12*)—DAMS—CONSTRUCTION OF FISHWAYS.

The city of Augusta, in maintaining a dam across the Savannah river, must on the South Carolina side thereof construct a fishway according to plans approved by the Department of Fisheries of the United States and the Attorney General of this state.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 47; Dec. Dig. § 12.*]

Action by the State, on relation of J. Fraser Lyon, Attorney General, against the City Council of Augusta. Decree rendered.

J. F. Lyon, Atty. Gen., for petitioner. D. S. Henderson, C. Henry Cohen, and W. H. Barrett, for respondent.

PER CURIAM. Whereas, subsequent to the filing of the petition and answer in the above case, the General Assembly did, at its January session, 1911, adopt an act, which was duly approved by the Governor, as follows:

"An act relating to the action pending in the Supreme Court concerning the dam across the Savannah river beginning in Edgefield county, and in relation to the maintenance of so much of said dam as lies in the waters of Savannah river from the middle thread of the stream to the South Carolina shore.

"Whereas, the General Assembly of the state of South Carolina did in the year 1909 (see Journal of Senate of 1909, page 807) adopt the following resolution:

"Be it resolved by the House of Representatives, the Senate concurring, that the Attorney General be and, he is hereby required to bring an action against the owners of the dam situated in Edgefield county, state of South Carolina, above the city of Augusta, to erect and maintain proper fishways, or an action to abate said dam as in violation of the terms of the original grant by said state of South Carolina as he is advised;" and

"Whereas, the Attorney General of this state did, in compliance with said resolution, institute an action before the Supreme Court of this state against the city council of Augusta for the purpose of effectuating the object of said resolution; and

"Whereas, the city council of Augusta, the defendant to said action, has made answer thereto, the full text of which will appear by reference to said answer on file in the office of the clerk of the Supreme Court of South Carolina; and

"Whereas, the city council of Augusta has secured from the Department of Fisheries of the United States an approved plan

of the best kind and location of fishway, and said plan and location has been examined by a majority of the members of the committee from the General Assembly charged with this matter, and by the Attorney General, and such plan and location is now in the hands of the Attorney General to be filed with the Secretary of State:

"Now, be it enacted by the General Assembly of the state of South Carolina:

"Section 1. That the Attorney General be, and he is hereby authorized and directed to apply for the entry of a decree in the above mentioned action of the State of South Carolina ex relatione J. Fraser Lyon, Attorney General, against the City Council of Augusta, now pending in the Supreme Court of this state, to the following effect, to wit: That the city council of Augusta shall be required to promptly construct a fishway of the kind and in the location indicated on the said plan, approved by the Department of Fisheries of the United States and by the Attorney General, and to be filed by him in the office of the Secretary of State; and that so long as such fishway be maintained as thus constructed, this will be recognized as a compliance with the duties of the city of Augusta as to the maintenance of such fishway. That such fishway as aforesaid shall be constructed by the 1st day of May, nineteen hundred and eleven; the said decree to contain such other provisions as may be proper to carry out the purposes of this act: Provided, that if work of constructing said fishway be prevented by bad weather or other unavoidable, reasonable cause, the Attorney General is empowered to extend the time for constructing the same: Provided, further, that the application for the decree above provided for shall not be made until a resolution or ordinance shall be duly adopted by the city council of Augusta and filed in the Supreme Court of this state, authorizing and directing their attorneys to appear in said court and consent to such decree.

"Sec. 2. That should such fishway at any time be damaged or destroyed, it shall be repaired or restored as may be necessary according to the plans hereinbefore referred to (unless other plans shall then be prescribed by the General Assembly), within such reasonable time as may be prescribed by the Board of Fisheries of South Carolina.

"Sec. 3. When such fishway shall have been completed, the Attorney General shall request the Department of Fisheries of the United States to cause the same to be inspected by a representative of said department, and the report of such representative of the Department of Fisheries as to whether or not it has been constructed in accordance with the aforesaid plans shall be filed with the Secretary of State, to be kept along with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

said plans. If, however, said Department of Fisheries declines to inspect the said fishway, then the Board of Fisheries of the state of South Carolina, appointed in pursuance of Act No. 60 of the Acts of the General Assembly of this state for the year 1906, be, and they are hereby, required to inspect such fishway so erected, and make their report to the Attorney General, and to the Secretary of State, which said report shall be filed with said plans.

"Sec. 4. That the right and power of the city council of Augusta, Georgia, to maintain the aforesaid dam at its present height across the Savannah river from the middle thread of the stream of the said river to the South Carolina shore is hereby granted to the city council of Augusta, and its successors in office, subject, however, to the condition that they shall maintain a fishway in accordance with the aforesaid plans, and shall keep open both above and below said fishway an unobstructed channel sufficient for the free and uninterrupted passage of fish: Provided, however, that nothing herein contained shall preclude the General Assembly of the state of South Carolina from requiring the location, construction and maintenance on said dam of suitable locks for the passage of boats sufficient for the commerce of the river, whenever in its judgment the same is necessary.

"Sec. 5. That in the event the city council of Augusta shall fail or refuse to consent to the decree provided for in section 1 of this act, or, having consented thereto, shall thereafter fail or refuse to obey the said decree or to comply with the provisions of this act, the Attorney General shall have the right to apply to the Supreme Court in the said case now pending for the relief demanded in the petition, or such other relief as the court shall deem to be proper: Provided, the Attorney General, in the event the city council of Augusta shall fail or refuse to comply with the provisions of the decree hereinbefore provided for, or with any of the provisions of this act whatsoever, then the Attorney General shall in his discretion, institute such action or proceeding as he may deem advisable for the purpose of compelling compliance with the intention of this act, or for the purpose of abating, as a public nuisance, so much of said dam as lies within the boundaries of South Carolina.

"Sec. 6. This act shall take effect immediately upon its approval by the Governor." And

Whereas, the city council of Augusta, on the 6th day of March, 1911, did adopt the following resolution:

"Be it resolved by the city council of Augusta:

"That Mr. C. H. Cohen, city attorney, and Messrs. D. S. Henderson and William H.

Barrett, all attorneys of record for the city council of Augusta in the case of the State of South Carolina ex relatione J. Fraser Lyon, Attorney General, v. the City Council of Augusta, now pending in the Supreme Court of South Carolina, be, and they are hereby, authorized and directed to consent to the entering of a decree in the above case, in accordance with the provisions of the act of the General Assembly of the state of South Carolina, entitled 'An act relating to the action pending in the Supreme Court concerning the dam across Savannah river beginning in Edgefield county, and in relation to the maintenance of so much of said dam as lies in the waters of Savannah river from the middle thread of the stream to the South Carolina shore,' adopted at the 1911 session of such General Assembly, and duly approved by the Governor of South Carolina.

"Done in council, this 6th day of March, 1911." And

Whereas, it has been made to appear that the city council of Augusta has already entered into a contract for the construction of the said fishway:

Now, therefore, it is ordered, adjudged, and decreed that the city council of Augusta be, and it is hereby, ordered to construct a fishway in said dam of the kind and in the location indicated on said plan approved by the Department of Fisheries of the United States, and by the Attorney General, and now of file in the office of the Secretary of State, and that so long as such fishway is maintained as thus constructed, this will be recognized as a compliance with the duties of the city of Augusta as to the maintenance of said fishway, and said fishway shall be constructed by the 1st day of May, 1911: Provided, however, that if the work of constructing said fishway be prevented by bad weather or other unavoidable reasonable cause, the Attorney General is empowered to extend the time for constructing the same.

Both parties to this proceeding have leave at the foot of this decree to apply to the court for such other or further relief as may be proper in the premises.

(89 S. C. 73)

HOLLIDAY v. PEGRAM et al.

(Supreme Court of South Carolina. May 23, 1911.)

1. LANDLORD AND TENANT (§ 22*)—LEASE—EXISTENCE.

Letters constituted mere negotiations for a lease, and not a completed contract, where they provided for "making" and "arranging" the agreement at a future meeting.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 55-59; Dec. Dig. § 22.*]

2. EVIDENCE (§ 419*)—TESTIMONY AFFECTING WRITING—ADMISSIBILITY.

Parol evidence is admissible to show that, as part consideration for a lease, in writing,

but silent as to repairs, the lessor agreed to repair.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1920; Dec. Dig. § 419.*]

3. LANDLORD AND TENANT (§ 223*)—COVENANT TO REPAIR—BREACH BY LANDLORD—RIGHTS OF TENANT.

A tenant, damaged by breach of the landlord's agreement to repair, is entitled to a deduction of the amount of such damage from the rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 885-893; Dec. Dig. § 223.*]

4. LANDLORD AND TENANT (§ 231*)—ACTION FOR RENT—EVIDENCE.

In an action for rent, letters and a proposed contract constituting negotiations for an agreement were admissible.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926-934; Dec. Dig. § 231.*]

5. PARTNERSHIP (§ 218*)—DIRECTED VERDICT—PARTNERSHIP OR INDIVIDUAL OBLIGATION.

It was improper to direct a verdict against a firm for rent, where the evidence was admitted tending to show merely individual liability by one of the partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 426-428; Dec. Dig. § 218.*]

Woods, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Florence County; Thos. S. Sease, Judge.

"To be officially reported."

Action by J. W. Holliday against G. H. Pegram and another, partners as G. H. Pegram & Co. Judgment for plaintiff, and defendants appeal. Reversed, and new trial ordered.

This is an action, to recover the sum of \$850 for the rent of a tobacco warehouse.

The complaint alleges that, at the times therein mentioned, the defendants G. H. Pegram and C. W. Payne were copartners under the firm name of Pegram & Co.; that about the 23d of March, 1910, the plaintiff entered into an agreement with the defendants, by the terms of which, they were to occupy certain property, known as the Dixie Warehouse, for the season of 1910, and to pay, as rent, the sum of \$850 on the 1st of September, 1910; that, pursuant to said agreement, the defendants entered into possession of the premises, and were in possession of the same, at the time this action was commenced. The defendants, in their answer to the complaint, admitted the allegations of partnership between the defendants, but denied all the other allegations.

The following letters were introduced in evidence, without objection:

"Exhibit A: Kinston, N. C., February 3, 1910. Mr. Jos. W. Holliday, Savage, S. C.—Dear Sir: I have discussed your proposition with Mr. Payne, and he prefers, as I do, to rent the W. H. for the coming season, with option to buy, October 1, 1910. We will give you \$850 rent, if we don't buy, but if we buy the W. H., will pay \$1,000 October 1, 1910, and eight per cent. interest on

\$6,000 from date of contract and \$1,000, with interest at 8 %, each October 1st thereafter, until the \$6,000 is paid. Please write me as soon as convenient, on account of the other proposition I have under consideration. Yours truly, G. H. Pegram."

"Exhibit B: Savage, S. C., March 10, 1910. Mr. G. H. Pegram, Kinston, N. C.—Dear Sir: Referring further to renting you my warehouse in Florence, S. C., for the coming tobacco season, will say, that if you still care for it, I will rent it to you for eight hundred and fifty dollars, payable on the first day of September, 1910, provided you accept same promptly. You being the first to see about it, and others are after me for it. If you want it, we can arrange the rent agreement, when you come down to look after the work. I am, Yours truly, [Signed] Jos. W. Holliday."

"Exhibit C: Kinston, N. C., March 20, 1910. Mr. Jos. W. Holliday, Savage, S. C.—Dear Sir: We will take your warehouse at Florence, S. C., \$850.00 rent, for the coming season 1910. You can send me copy contract, will arrange rent agreement, when come down. Yours truly, [Signed] G. H. Pegram."

"Exhibit D: Savage, S. C., 3-23-1910. Mr. G. H. Pegram, Kinston, N. C.—Dear Sir: I beg to acknowledge yours of March the 20th, 1910, in answer to mine to you, of the 10th of March, and as per same, consider it a bargain or trade of rent, for my warehouse in Florence, S. C., for the coming season. We can arrange the agreement when you come down to begin work, out in the country. Yours truly, [Signed] Jos. W. Holliday."

"Exhibit E: Florence, S. C., June 7, 1910. Mr. J. W. Holliday, Savage S. C.—Dear Sir: If you can make it convenient, to come over to Florence this week, I am ready to make contract for your warehouse. If you can't come this week, please state time when you can come, so I won't be out of the city. Yours truly, [Signed] G. H. Pegram."

"Exhibit F: Savage, S. C., 6-9-10. Mr. G. H. Pegram, Florence, S. C.—Dear Sir: I am just in receipt of yours of the 7th. It will be so that I can't get up to Florence this week. If you are going to do any work, out through the country, in working this section, call by and we can fix up our contract. If you are not coming down this way, I will try and go to Florence, one day before long. Trusting, though, that you will come down, through this section, I am, Yours truly, [Signed] Jos. W. Holliday."

The following letters and proposed contract were offered by the defendants, but his honor, the presiding judge, refused to allow them to be introduced in evidence.

"Florence, S. C., July 20, 1910. Mr. J. W. Holliday, Savage, S. C.—Dear Sir: Mr. G. H. Pegram is not quite satisfied with the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

contract, for lease of the Dixie warehouse, which you sent him. He would like to have the following changes made in the contract: 1st. The lease should be for the term of one year from the 20th day of March, 1910, to the 20th day of March, 1911. * * * 2nd. An agreement on your part, to keep the roof in good repair, so far as is practicable, will be satisfactory to Mr. Pegram; or an agreement giving him the authority, to put the roof in good repair, and to make such repairs, as he may think necessary, at your expense, will be equally satisfactory. * * * 3rd. In making an agreement for an option to renew the lease, the contract should state, that in case of renewal, the new contract should be upon the same terms and conditions, which govern this contract. * * * Please advise us at your earliest convenience, in regard to this matter, and if our suggestions are acceptable to you, we will draw a contract accordingly, and will have it signed by Mr. Pegram, and forwarded to you for your signature. Yours very truly, [Signed] R. E. Whiting."

"Savage, S. C. 7-21-10. Messrs. G. H. Pegram & Co., Florence, S. C.—Gentlemen: I am in receipt of yours of the 18th, and am very much surprised and very sorry, to hear the roof is as you write. I did not make any bargain or offer with Mr. Lundy to do the work. He mentioned it to me, in the warehouse, and I asked him to look at, and examine it, and see what he would do it for, and write me, as I stated in Mr. Ragsdale's office, where, in talking over it, I left it to you, to have done, and I was to pay you for it. As yet, I have no help, and it is very bad for me, to get away from here, and as per our understanding, it seems you could have the leaks stopped, just as well as I could. And if the shingles are as you state, there is a roof paint that will stop leaks; even if it is put on a wire gauze it won't leak; so, see if it is kept by any of the stores there, and use that on the leak to stop them, in place of taking off the shingles. I will pay for it and the putting on. Trusting the paint will stop the leaks, and you can get it and will have it attended to at once, and from time to time as needs be. I would suggest that you mark the leaks, and then get some one that understands putting on paint (a regular painter) to do it. Look into this, and let me hear from you about it. Hoping it will do all right, I am, Yours truly, [Signed] Joseph W. Holliday."

"Savage, S. C., 8-29-10. Messrs. G. H. Pegram & Co., Florence, S. C.—Gentlemen: Your rent to me of eight hundred and fifty dollars, for the warehouse will be due on the first day of September, 1910; please send me your check for same on that date, less what you have paid out, on repairing building, and for the amounts; send me receipted, itemized bills from the parties, who did the work for you, and from whom you got the material. Trusting you will be prompt in

this, I am, Yours truly, [Signed] Jos. W. Holliday."

"Savage, S. C., July 14, 1910. Mr. J. W. Ragsdale, Florence, S. C.—Dear Sir: As per mutual understanding between Mr. Pegram, Mr. Whiting and myself, I enclose an agreement for rent of warehouse property, for 1910, which covers all points, as per our discussion in your office. I have signed same, in the presence of a witness, and you can have Mr. Pegram to sign them, keeping one and returning one to me. I am, Yours truly, [Signed] Jos. W. Holliday."

"State of South Carolina, County of Florence.

"This agreement, made about the 20th day of March, 1910 between Jos. W. Holliday, lessor, and G. H. Pegram and C. W. Payne, constituting the firm of G. H. Pegram & Co., lessees. The said Jos. W. Holliday, does hereby rent to the said G. H. Pegram & Co., his lot from the first day of January, 1910, to the 31st day of December, 1910, for eight hundred and fifty dollars, payable on the first day of September, 1910. * * * The said G. H. Pegram & Co. have rented from the said J. W. Holliday, his lot known as the Dixie Tobacco Warehouse lot, for which the said G. H. Pegram & Co. are to pay to the said Jos. W. Holliday, eight hundred and fifty dollars, on the first day of September, 1910. * * * And it is understood by and between the said parties, that, as there are some leaks in the roof of the warehouse, which the said G. H. Pegram & Co. agree to have patched, from time to time, by putting on a good shingle or shingles, in the place of the defective one or ones, or shingles that may be off of said roof, to stop said leaks, which they are to keep an itemized account of the cost of said work, rendering same to the said Holliday, which he is to pay them for. And the said Jos. W. Holliday further agrees, that if he does not dispose of the said property, by the first day of February, 1911, he will give the said G. H. Pegram & Co. the preference of renting said property again, for 1911, provided they want it, and will notify me, so I will get said notice by the 10th day of February, 1911, and we enter, at once, into an agreement which is mutually satisfactory to both parties. Witness our hands and seals this the 14th day of July, 1910.

"[Signed] J. W. Holliday. [L. S.]

"Signed, sealed, and delivered in the presence of R. S. Altman, witness as to J. W. Holliday's signature."

At the close of the testimony his honor, the circuit judge, directed a verdict in favor of the plaintiff for \$850, with interest from the 1st of September, 1910, and the defendants appealed.

J. W. Ragsdale, for appellants. Willcox & Willcox, for respondent.

GARY, A. J. The plaintiff contends that the letters "B," "C," and "D," show a com-

plete contract between him and the defendants, and that the verdict was properly directed. On the other hand, the defendants contend that the letters merely show negotiations for an agreement which was not to be binding upon the parties, until it was formally executed; also that G. H. Pegram, alone, rented the house in his individual capacity.

[1] The first question that will be considered is whether the letters which were introduced without objection make out a complete contract. The letters "B," "C," and "D" must be considered in connection with the letters "A," "E," and "F," as they were introduced without objection.

"A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation. The question in such cases always is, Did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up and by which alone they designed to be bound?" *Lyman v. Robinson*, 14 Allen (Mass.) 242.

"Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words, and of the correct application of the language to the things described." *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527.

"Where there is a doubt as to the proper meaning of a contract, the court may receive evidence of the practical construction which the parties themselves have placed on it, as indicated by their acts under it, for it is a canon in the interpretation of contracts that the practice of the parties under them may furnish a solid basis on which their construction may rest, inasmuch as the subsequent acts of the parties, in executing a contract, may reflect their intention in making it." 21 A. & E. Enc. of Law, 1115.

"It is unquestionably the duty of the court, in construing a written instrument, to interpret its language, and it may also state the effect thereof, where it is susceptible of but one inference; but where the inference to be drawn from the facts stated in the instrument is in dispute, and such facts susceptible of more than one inference, then the question must be determined by the jury, especially when the inference to be drawn is dependent upon other facts in the case." *Glover v. Gasque*, 67 S. C. 34, 45 S. E. 119.

"Doubtless the general rule is that it is the province of the court to construe writ-

ten instruments; but it is equally well settled that, where the effect of the instrument depends, not merely on its construction and meaning, but upon collateral facts and extrinsic circumstances, the inference of fact to be drawn from the paper must be left to the jury." *West v. Smith*, 101 U. S. 263, 25 L. Ed. 809.

"Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions. And the subsequent acts of the parties, showing the construction they have put upon the agreement themselves, are to be looked to by the court, and in some cases may be controlling." 9 Cyc. 588, 589.

"The construction of a contract is a question for the court, if the terms of the contract and the extrinsic facts which may affect construction are free from dispute. This rule applies where the contract consists of several writings, as where it consists of letters exchanged between the parties. * * * If the terms of the contract are in dispute, or it is possible to draw more than one inference from the established facts which are relied on to show the intention of the parties, the jury must determine such facts, or decide which of such inferences is the correct one. The court should, in such cases, submit the question of fact to the jury, under proper alternative instructions, as to the construction to be given in the event of each possible finding of fact by the jury." 2 Page on Contracts, § 1129.

"It is a well-settled principle that when the construction to be given a contract is rendered doubtful by the language thereof, the interpretation of the contract, by the parties themselves, is entitled to great weight." *Williamson v. Association*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822.

In letter "B" the plaintiff says: "If you want it, we can arrange the rent agreement when you come down to look after the work." In letter "C" the defendant G. H. Pegram says: "You can send me copy contract; will arrange rent agreement when come down." In letter "D" the plaintiff says: "We can arrange the agreement when you come down to begin work in the country." In letter "E" the defendant says, "I am ready to make contract for your warehouse," and in letter "F" the plaintiff says, "Call by, and we can fix up our contract." It will also be observed that the other letters do not mention all the provisions of the contemplated agreement set out in letter "A." The foregoing authorities show the court erred in ruling that the said letters made a complete contract.

[2] But, even if the said letters showed that the contract was complete without further action on the part of the plaintiff and the defendants, it would not follow that the presiding judge was right in directing a verdict. When the defendants offered testimony tend-

ing to show that there was an agreement as to repairs, the plaintiff's attorneys objected to the introduction of such testimony, whereupon the defendants' attorney thus stated the object of the testimony: "I want to show that, according to the terms of the agreement entered into between Mr. Holliday and Mr. Pegram, and the subsequent agreement between Mr. Holliday and Mr. Pegram, of Pegram & Co., that Mr. Holliday agreed to have this work done." The following then took place: "The Court: You do not plead it in your answer. Mr. Ragsdale: How could I set up a counterclaim under the law of this case? Mr. Willcox: He could sue us in an independent action. (Objection sustained.)"

[3] If there is a lease in writing, which makes no reference to repairs, the lessee is not precluded from introducing parol testimony to show that, as a part of the consideration of the agreement to pay rent, the lessor promised to make repairs. And, if it appears that the lessee suffered damage by reason of the lessor's failure to make the repairs, he would not be allowed to recover the whole amount mentioned as rent, but only that amount, after deducting such damages as the lessee may have sustained by reason of the lessor's failure to make the repairs. *Williams v. Salmond*, 79 S. C. 459, 61 S. E. 79.

[4] The foregoing authorities also show that the presiding judge erred in his ruling that the letters and proposed contract, which he refused to allow the defendants to introduce, were not admissible in evidence.

[5] The next question that will be considered, is whether there was error in directing a verdict, on the ground that there was testimony tending to show that G. H. Pegram alone rented the warehouse, in his individual capacity. His honor allowed defendants to introduce testimony to that effect. He did not change his ruling, or strike out such testimony. Therefore, in determining whether there was error in directing a verdict, the testimony which he ruled to be competent must be taken into consideration. As the defendants denied the allegation that the defendants, as partners, entered into the contract, and there was testimony tending to show that G. H. Pegram alone entered into the contract, in his individual right, the presiding judge erred in withdrawing such fact from the consideration of the jury by directing a verdict.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

JONES, C. J., and HYDRICK, J., concur.

WOODS, J. I concur in the conclusion that there should be a new trial in this case, on the ground that the defendants should

have credit for the repairs made on the warehouse. But I am unable to assent to the views expressed by Mr. Justice GARY on the other points. The letter of the plaintiff of March 23, 1910, to G. H. Pegram, in answer to a letter agreeing to pay \$850 rent, stated that the plaintiff considered the warehouse rented for the coming tobacco season. Not only was there no dissent or objection on the part of the defendants to the statement of this letter, but both the defendants, in the face of it, entered into possession of the warehouse and used it for the tobacco season. The correspondence shows that, besides the allowance for repairs, the only other claim made by the defendants was that they should have a right to a renewal of the rent contract. The right of renewal, if established, could not affect the right of the plaintiff to recover the rent when it fell due.

(90 S. C. 196)

DU BOSE v. KELL et al.

(Supreme Court of South Carolina. May 23, 1911.)

1. TRUSTS (§ 72*)—RESULTING TRUSTS—EVIDENCE.

A husband purchased land, mortgaged to his wife, for a payment in cash, and an assumption of liability for the payment of an undesignated mortgage debt. There was no evidence that any money of the wife was used in the purchase of the land. *Held* not to establish a resulting trust, for the assumption by the husband of the payment of the mortgage could only create liability against him for the payment to the wife of the mortgage.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 72.*]

2. MORTGAGES (§ 96*)—RENEWAL.

The mere recording in a deed record book of a deed reciting that the grantee is to satisfy a balance to an unstated amount due to an undesignated person on an unidentified mortgage is not a compliance with Civ. Code 1902, § 2449, requiring that some written acknowledgment of the debt secured thereby must be recorded on the record of the mortgage in order that the same shall constitute a lien on any real estate after the lapse of 20 years from the creation of the same.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 96.*]

3. JUDGMENT (§ 876*)—LAPSE OF TIME—PRESUMPTION OF PAYMENT.

Where more than 20 years have elapsed since the rendition of a judgment for the payment of a legacy, a presumption that the judgment has been paid arises.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1648-1652; Dec. Dig. § 876.*]

4. ESTOPPEL (§ 28*)—ESTOPPEL BY DEED—PERSONS BOUND.

One claiming title as heir of a deceased ancestor, who in her lifetime conveyed the land by warranty deed to a third person, is estopped from setting up title, whether the ancestor had title at the time of the conveyance or subsequently acquired title.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 68; Dec. Dig. § 28.*]

5. DEEDS (§ 68*)—"MENTAL CAPACITY."

To render a deed void on the ground of the grantor's mental incapacity, it must appear

here in controversy which the defendants Eunice R. Cloud and Susan A. Boylston may have at any time possessed has passed by conveyance to the other defendants in this action.

"Coming now to the report of the referee upon the equitable issues in the case and considering first the questions sought to be made by the plaintiff's fifth exception, it appears clearly that this exception raises purely a question of legal title which depends upon the proper construction of the wills of Jane Hemphill and Mary Hemphill, and perhaps also upon the question of fact as to who were the heirs at law of Mary Hemphill at the time of her death or at the time of Susan C. Kell's death, and that such question of title can only be tried upon the hearing of the legal issues in this case. As no waiver has been made of the right to trial by jury of this issue, the same must be left for determination upon the trial of the legal issues in this case.

"As to the first four exceptions by the plaintiff, these do raise equitable questions which are now to be determined.

[1] "The referee does find that B. E. Kell, Sr., 'took up' the mortgage which was given by J. H. McMurray to Susan C. Kell for the purchase price of the Fishing Creek Place. What meaning was intended by the referee in using the expression above quoted is not altogether clear, but if there was any such finding as that B. E. Kell, Sr., had paid the mortgage to Susan C. Kell, there is nothing in the testimony of J. H. McMurray to warrant such finding nor has attention been called to any other evidence to sustain the same. Indeed, an examination of the context of the referee's report leads to the inference that he did not intend to make any such finding as that B. E. Kell, Sr., had paid the mortgage debt of J. H. McMurray to Susan C. Kell. While not so finding in express terms, perhaps, the referee does in effect find that B. E. Kell, Sr., did agree with J. H. McMurray to pay the purchase-money mortgage due by the latter to Susan C. Kell.

"There is nothing in the evidence to show error in the finding by the referee of which complaint is made by the fourth exception. The evidence showed merely a purchase of this land by B. E. Kell, Sr., from J. H. McMurray, a payment by him of part of the purchase money in cash and an assumption of liability for the payment of a certain undesignated mortgage debt against the said land conveyed to him. There is no evidence whatever that any money belonging to Susan C. Kell was used in the purchase of this land or applied in the payment of the purchase money thereof; but the evidence was simply of an assumption by the said B. E. Kell of responsibility for the payment of an unidentified mortgage debt upon the same. If it be assumed that the mortgage debt referred to was that owing to Susan C. Kell, this would only amount to an acknowledg-

ment of liability for the payment of any balance that might be due thereon, but would not constitute a using of the money of Susan C. Kell in the purchase of the land. Under such circumstances, there is nothing upon which a resulting trust can be based, as even the assuming of the payment of a mortgage debt due to the wife of the grantee could not operate to raise a resulting trust in the land, but could occasion merely a liability by B. E. Kell, Sr., for the payment to her of the mortgage debt. See *Rogers v. Rogers*, 52 S. C. 388, 29 S. E. 812, and authorities there cited.

[2] "There was no error in the holding by the referee, of which complaint is made by the second exception, and no error in the failing to hold that the acceptance by B. E. Kell of the deed from J. H. McMurray, containing the recital that said Kell should 'satisfy a balance of a mortgage covering the premises' conveyed, and the recording of such deed was a sufficient compliance with the requirements of section 2449 of the Civil Code of 1902. The mere recording in a deed record book of a deed containing simply a recital that the grantee is to satisfy a balance to an unstated amount due to an undesignated person upon an unidentified mortgage not even stated to be owing by the grantor in the deed would seem to come very far short of being a compliance with the statutory requirement that some written acknowledgment of the debt secured thereby must be 'recorded upon the record of such mortgage' in order that the same shall constitute a lien upon any real estate 'after the lapse of twenty years from the date of the creation of the same.' For these reasons, therefore, the first four exceptions by the plaintiff must be overruled.

[3] "There was, however, error by the referee, as complained in the sixth exception, in failing to find and conclude that the judgment or decree for the payment of the legacy aforesaid against the estate of Mary Hemphill in favor of the said Susan C. Kell was and is presumed to be paid from lapse of time and barred by the statute of limitations. More than 20 years had elapsed since the rendition of this judgment or decree, and, if not barred, it must certainly be presumed paid after that lapse of time.

"But there was no error in the failure by the referee to make any finding as to whether or not the title to the Fishing Creek Place and the Parish Place had reverted to the heirs of Mary Hemphill, as that is a question of law for determination upon the trial of the legal issues in this case. It may be remarked, however, that if the reversion of these lands, after the death of Susan C. Kell without issue, was in Mary Hemphill and was undisposed under her will, the same would have descended to Susan C. Kell, who was the sole heir of Mary Hemphill at the time of her death, according to concessions as to this fact made at the hearing. As-

already stated, however, these are legal issues of title for adjudication upon the trial herein upon the law side of the court, and no opinion can now be properly expressed thereupon. As to the matter referred to in the seventh exception, it is considered that the question as to who was in the actual possession of the Fishing Creek Place and the Parish Place at the time of the commencement of this action is immaterial to the determination of any equitable issue herein. As to whether it is material upon the trial of any issue as to the legal title is a question for the court before which that question may arise.

[4] "Coming now to the errors alleged in the conclusions as to matter of law set out in the eighth exception, there can be no doubt that the referee was right in holding that, in so far as the plaintiff is seeking to set up any title to the Fishing Creek Place through and under Susan C. Kell, the plaintiff is estopped by the warranty in the deed from Susan C. Kell to J. H. McMurray, of date November 20, 1880, from setting up any title in herself to the Fishing Creek Place claimed to have been derived by her as heir of Susan C. Kell, whether such title was held by Susan C. Kell at the date of the execution of the deed or subsequently acquired. This will not, of course, prevent the plaintiff from establishing at the trial of the legal issues herein any independent title which she may have to said land, not derived through Susan C. Kell subsequent to the execution of said deed. As to the remaining questions made by this exception, they are concluded by what has been said in disposing of plaintiff's fourth exception.

"As it has already been held that the claim of Susan C. Kell against the estate of Mary Hemphill, on account of the legacy referred to in the ninth exception, the same being the claim established by the decree already mentioned, was barred by the statute of limitations and stale by lapse of time, it follows that this exception cannot be sustained.

"With reference to the eleventh and twelfth exceptions, it is sufficient to say that it is shown by the evidence and conceded by the plaintiff that the defendants (excepting Eunice R. Cloud and Susan A. Boylston) are the owners of a two-thirds interest in the Fishing Creek and the Parish Places, and they are therefore entitled to two-thirds the rents thereof. In the tenth paragraph of the complaint the plaintiff avers that a two-thirds interest in the Parish Place is the defendants' (other than Susan A. Boylston and Eunice R. Cloud), and in the eleventh paragraph she alleges that the defendants Susan A. Boylston and Eunice R. Cloud are the owners of a two-thirds interest in the Fishing Creek Place, which interest the evidence shows has been conveyed by Susan A. Boylston and Eunice R. Cloud to their codefendants herein. It thus appears that the plain-

tiff claims only a one-third interest in each of these two places and in the rents and profits of the same, and, as has already been held, the question as to whether the plaintiff owns such one-third interest is a legal issue for determination on trial by jury. The conclusion of the referee, therefore, in so far as concerns the title to this remaining undivided one-third interest in these two tracts of land and as to the accountability of plaintiff for the rents and profits of such one-third interest, being dependent upon the issue as to the legal title to the said one-third interest, cannot be sustained for the reason that this question of title, being a legal issue, is triable by the court on its law side, and not by the referee under a submission of the equitable issues. So far, therefore, as the referee undertakes to determine that the title to anything more than a two-thirds interest in the Fishing Creek and Parish Places is in the defendants (the Kells) and so far as the referee undertakes to adjudicate that the plaintiff is accountable to the defendants (the Kells) for any more than the two-thirds part of the rents and profits of said two places received by plaintiff, the conclusions of the referee are overruled; the question as to the legal title of the plaintiff to a one undivided third interest in said two tracts and as to her consequent legal title to and ownership of one undivided third interest in the rents and profits thereof, since the death of the said Susan C. Kell, being reserved for determination by the court upon the trial of the legal issues herein.

"The remaining questions presented by the tenth and thirteenth to the twentieth exceptions, inclusive, embrace the chief issues in this case and those to which almost the entire argument at the hearing was directed.

"These exceptions raise substantially three questions, that is to say:

"(1) Whether there was error by the referee in the finding and conclusion that on the 27th day of October, 1902, the said Susan C. Kell was mentally competent to understand and did comprehend the nature, force, and effect of her act in signing the deed, dated on that day, conveying to Dr. B. E. Kell the Home Place, the Rocky Creek Place, and the Parish Place, and that said deed was duly executed and is a valid deed vesting the fee-simple title to the said lands in the grantee therein named.

"(2) Whether there was error by the referee in the finding and conclusion that said deed was voluntarily, willingly, and freely executed by the said grantor, Susan C. Kell, and was not procured or induced by any undue influence, fraud, cunning, duress, or artifice, and that there were no circumstances attending or surrounding its execution to raise a presumption of fraud or undue influence; and that said deed is therefore valid.

"(3) Whether there was error by the referee in the finding and conclusion that any presumption of fraud or undue influence

raised by the relationship existing between the grantor and grantee of this deed has been rebutted by the evidence, and that the said deed was supported by a good and valuable consideration, and is therefore valid.

"The plaintiff's contentions are, first, that at the date of the signing of this deed the said Susan C. Kell was insane, or at least mentally incapable in law of executing the same; and, second, that, even if she were not then so insane or mentally incapacitated to execute the deed, yet the execution thereof was procured by fraud or undue influence on the part of the grantee.

[5] "Considering first the question as to the mental capacity of the grantor, the rule of law with reference to this matter may be stated in general terms to be that, while the mental incapacity which will render one unable to make a contract or a valid gift need not be so great as entirely to dethrone the reasoning powers, there must be at the time of the act or contract such insanity or mental weakness or unsoundness as amounts to an incapacity or occasions an inability to understand or comprehend the subject of the contract or act and its nature and probable consequences, in order to render the act or contract void in law. 22 Cyc. 1206; Rippey v. Grant, 39 N. C. 443; Miller v. Craig, 36 Ill. 109; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Hay v. Miller, 48 Neb. 156, 66 N. W. 1115; Dewey v. Algire, 37 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468; West v. Douglas, 145 Ill. 164, 34 N. E. 141; Argo v. Coffin, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86; Mann v. Bank, 86 Fed. 51, 29 C. C. A. 547.

"In order to render a deed void upon the ground of the mental incapacity of the grantor, it must appear that there was on his or her part such mental infirmity as to render him or her incapable of understanding the nature of the act. The test is not whether the grantor's mental powers were impaired, but whether, at the very time of the execution of the deed, he had sufficient capacity to understand in a reasonable manner the nature and effect of the act which he was performing. Mere infirmity of mind or body, not amounting to an incapacity to understand the nature and consequence of the act done, will not render a person incapable of executing a valid deed. Nor will monomania or delusion existing in the mind of the grantor affect the validity of a deed, unless it be such as to actually influence his mind in the very transaction in question by rendering him incapable of appreciating the true nature and effect of the particular act in controversy. 13 Cyc. 573, 574; 16 A. & E. Enc. L. 624; 9 Id. 119, 123; 18 A. & E. Enc. L. 624 (2d Ed.); 9 Id. 123; Concord v. Rumney, 45 N. H. 428; Teter v. Teter, 59 W. Va. 449, 53 S. E. 779; Rippey v. Grant, 39 N. C. 443; Hovey v. Hobson, 55 Me. 282; Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383; Woodville v. Woodville, 63 W. Va. 286,

60 S. E. 141; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97.

"As is said in Rowland v. Sullivan, 4 De-saus. 520, there must be made to appear 'some incompetency of mind, showing an incapacity at the moment of executing the deed or will, or some imposition practiced upon the testator or donor must be proved, to authorize the court to exercise the high power of setting aside deeds or wills regularly executed.'

[6] "Considering the question as to the capacity of Susan C. Kell to make the deed here in question in the light of the principles adjudicated by these authorities, does it appear here that at the moment of the signing of this deed on the 27th day of October, 1902, she was mentally competent to understand and did in fact comprehend the purpose and effect of her act in signing this deed? It is shown by the evidence that at the date mentioned the grantor in this deed, an aged lady of intelligence and refinement, about 81 or 82 years old, twice widowed and having lost her last husband some months previously, having no children nor any who could be called near and intimate relatives, was living in the home of those who are the witnesses to the deed here in question. It further appears that the grantee of the deed, the nephew of her last husband and a physician of high character and repute, who had long bestowed upon her his most devoted care and attention, occupied that place in her heart and affections which would naturally have been held by a beloved son, had she been so fortunate as to possess a child by whom she might have been guarded and cherished in her declining years.

"It is beyond question that at this time Mrs. Susan C. Kell was not of strong mentality, was feeble in body and almost deprived of her eyesight, was subject at times to that forgetfulness and loss of memory which is frequently found to occur in the case of very aged persons, and was occasionally visited by certain delusions which recurred at more or less frequent intervals. The only particular delusion, however, which could strictly be characterized as recurrent, appears to have been the idea which at intervals took possession of her mind that her parents were still living, and that they might be found at a certain more or less definite place. But this belief was temporary and occasional. It was not persistent, and it readily yielded to the reminder that her parents were long since dead. According to the learned opinions of the experts, it further appears that Mrs. Kell was at intervals afflicted with a 'loss of orientation,' which is to say, that at such times she imagined herself to be at a different place, going to a different direction from that which was the fact. But this also is clearly shown to have been only occasional and temporary, not often recurring nor persisting, but easily

yielding to an acceptance of the truth of the facts when called to her attention.

"Much learning has been displayed in this case by the medical experts in the discussion of the question as to whether during the latter years of her life Mrs. Kell was suffering from senile dementia or merely from neurasthenia. The testimony upon these points by the doctors examined as experts, some of whom had little or no acquaintance with her, was based chiefly upon hypothetical inquiries as to what mental condition was indicated by particular acts or remarks attributed to Mrs. Kell upon various isolated and disconnected occasions. The opinions of some of these learned physicians are apparently based upon an aggregation of specific acts performed and words spoken by Mrs. Kell upon more or less widely separated occasions, assembled from the testimony of various witnesses and read by or recounted to the experts with a view of their predicating thereupon a theory as to her general mental condition and power of mind.

"After a very careful reading and consideration of their testimony, the conclusions of these experts appear to be based so largely upon conjecture as to the possible influence and effect of various events and occurrences in her life and as to the inference to be drawn from disconnected and in some instances unascertained acts and facts, in large measure remote from the time of the execution of the deed, as to render their evidence as to Mrs. Kell's probable capacity at that time of little if any value to the judicial mind. One expert concludes, although with some apparent doubt and hesitation, that, when last seen by him in 1898, Mrs. Kell was probably incapacitated by senile dementia from attending to business; while upon a hypothetical statement of practically the same facts, and by a substantially identical method of reasoning, another unquestionably learned expert comes to an opposite conclusion as to her mental capacity in 1902, his opinion being without support of any personal knowledge whatever as to the facts upon which it was based. While there is indubitable proof that at times Mrs. Kell suffered from aphasia and amnesia (to make use of the terms employed by the medical experts), yet those afflictions cannot be considered as necessarily establishing incapacity to convey property, as otherwise the writer of this opinion, in common with many others generally considered of sufficient mental power for the ordinary transaction of business, would be disqualified from disposing of property if the occasional exhibition of such comparatively trifling defects could be regarded as proof of mental incapacity. There is no satisfactory evidence that Mrs. Kell in 1902 was suffering from any such degree of mental impairment as is denoted by the term senile dementia, although some of the experts seem to imply or assert that

such was the case. As has already been remarked, however, the conclusions of these experts seem to have so little foundation of relevant facts to support them and appear to be based so largely upon mere conjecture, and their opinions are so irreconcilable and at variance the one with the other as to render them of no practical service in arriving at the truth as to Mrs. Kell's mental capacity at the date in controversy.

"Dismissing, therefore, the opinions and conclusions of the experts as offering no substantial aid in the determination of the question under consideration, and proceeding to an examination of the testimony of those witnesses who were well acquainted and who were frequently associated with Mrs. Kell, we find that while some of them testify to occasional acts and speeches of that lady (as already mentioned) tending to indicate that she was at times afflicted with aphasia, amnesia, and a delusive belief that her father and mother were still living, and perhaps that she was laboring more or less under the malady denoted by the term neurasthenia, yet there is found in the evidence no ground for supposing that these temporary and occasionally recurrent conditions had to any material extent impaired her general capacity to comprehend the nature and probable results of her act in signing the deed here in question. Nor is there any evidence that on the day of the execution of the deed she was laboring in any degree whatever under the burden either of aphasia, amnesia, delusion, neurasthenia, or senile dementia. On the contrary, the proof is full and the testimony without conflict that she was then in the complete enjoyment of her ordinary capacity for understanding such a transaction, that she did, in fact, understand the nature of the act performed in signing the deed in question, and that she comprehended the effect of her signature to that paper. This is the testimony of those witnesses provided by the requirements of law for the very purpose of attesting the capacity of the grantor, as well as the manual act of her signature, and it is also the testimony of others present at or near the time of such signing, and these witnesses alone, perhaps of all those examined in the cause, are qualified to speak positively as to her mental condition at the very moment in question. To the witnesses to this deed and to the others present at or about the time of its execution the referee pays the tribute of saying, upon his own knowledge of their characters, that no consideration whatever would induce any of them knowingly to make a misstatement of fact or consciously to engage in a misrepresentation of the truth. Their testimony, therefore, is entitled to the highest credence, and is alone sufficient to sustain the referee's conclusion upon the question against the mere opinion or suggestion of other witnesses who saw her occasionally at previous or

subsequent times when, in their opinion, she was incapable of understanding the nature and effect of such a transaction.

"When, in addition to this direct testimony as to her capacity, given by the members of the Brown family with whom she resided, there is considered the evidence as to her general understanding and powers of mind as contained in the depositions of such men as Dr. De K. Wylie, who had been her family physician and who may be said to have known her intimately, Mr. J. McC. Caldwell, Mr. W. C. Garrison, the two McCroreys, and other neighbors and friends, who saw her frequently near the time in question, it must be concluded that her general capacity to execute the deed has been established, notwithstanding the dissenting opinions of others who saw her at more or less infrequent intervals. It may be remarked, further, that Mrs. Mary E. Brown, whose high character is vouched for by the referee, testifies that upon one or more occasions after the execution of this deed Mrs. Kell referred in conversation to the fact that she had conveyed all her property to Dr. B. E. Kell by this deed and expresses satisfaction with her action in so doing; and Miss Bessie Brown, having a similar indorsement by the referee, testifies to substantially the same declarations made by Mrs. Kell after the execution of the deed.

"While it is quite true that a number of credible witnesses deposed to conditions of mind and memory exhibited and to acts done by Mrs. Kell on particular occasions, evidencing some degree of irrationality on her part at such times, which induced these witnesses to believe that she was then mentally incapacitated for the transaction of business, yet the testimony of those best acquainted with her and best qualified to judge as to her general capacity, and especially the testimony as to her mental condition while living at the Browns, and particularly at the time of the execution of this deed, is convincing and conclusive as to her capacity to understand and as to the fact that she did comprehend the nature and effect of her act in signing the deed of October 27, 1902. Mere temporary aberrations of mind, resulting from old age and ill health, existing during brief periods of time upon days more or less remote from the date in question, cannot be considered as necessarily so evidencing her incapacity at the time of the execution of the deed as to outweigh the uncontradicted and credible testimony of reliable witnesses who vouch for her capability and understanding of her act at the very moment of the making and delivery of the deed.

"Upon a consideration of the entire testimony in the case, and after careful attention to the learned and exhaustive arguments of counsel, both upon the law and the facts the conclusion has been unhesitatingly reached that the preponderance of the evidence es-

tablishes the fact that the conveyance here in controversy is the act and deed of one who was then fully capable of disposing of her property as she might see fit.

"It remains to consider the question as to whether there has been shown such pressure of inducement exerted upon the grantor in this deed, in procuring the execution thereof, as would amount to undue influence, or any such advantage taken of her in inducing the making thereof, as would amount to fraud, so as to require its cancellation by a court of equity.

"The principles of law applicable to the question of undue influence are well settled, and may be thus stated in general terms:

[7, 8] "Where a deed is procured by undue influence exerted upon the grantor, it will be set aside by a court of equity upon a proper and timely application on the part of the person injured or aggrieved thereby; but, in order to avoid the deed upon this ground, there must be shown such an influence exerted upon the grantor as to overbear her will and to make the act of execution not the carrying out of a real purpose or intention of the grantor, but the mere mechanical performance by her of the wish and design of some other person. Neither fair argument, nor mere suggestion, nor even persuasion, unaccompanied by other circumstances to show a substitution of the will or purpose of some other person for that of the grantor, will amount to undue influence. In order to make it undue, it must appear that the influence exerted was such as to overcome or destroy the free will of the grantor and to make the deed as executed the expression not of his purpose, but that of some other person. 13 Cyc. 285; 9 Cyc. 455; Revels v. Revels, 64 S. C. 272, 42 S. E. 111, and authorities there cited; Conley v. Nallor, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112. But 'the line between due and undue influence, when drawn, must be with full recognition of the liberty due every true owner to obey the voice of justice, the dictates of friendship, of gratitude and of benevolence, as well as the claims of kindred, and when not hindered by personal incapacity, or particular regulations, to dispose of his own property according to his own free choice.' Wallace v. Harris, 32 Mich. 380.

[8] "It is further an established principle of equity, well founded in right reason, that the acts and contracts of persons who are of weak understanding and who are thereby liable to imposition, and also all contracts or gifts between persons standing in confidential relations towards each other, will be closely scrutinized by the courts to discover whether or not any undue influence was exerted or any confidence was betrayed to the prejudice of the weaker party or of the one reposing such trust and confidence. 27 A. & E. Enc. L. p. 456; 29 Id. (2d Ed.) p. 102; Gaston v. Bennett, 30 S. C. 467, 9 S. E. 515; Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 260;

Wille v. Wille, 57 S. C. 413, 35 S. E. 804; Banker v. Hendricks, 24 S. C. 1; 9 A. & E. Enc. L. 124; Martin v. Taague, 2 Speer's Law, 268; Woodward v. James, 3 Strob. 552, 51 Am. Dec. 649; Farr v. O'Neill, 1 Rich. Law, 80; Pressly v. Kemp, 16 S. C. 344, 42 Am. Rep. 635; Price v. Railroad, 38 S. C. 215, 17 S. E. 732.

"Undue influence may be said to consist in any influence which is so far operative as to destroy free agency, so as to compel the person doing the act in question to do the same against his will. It is not material how such control was exerted, whether by physical force, threats, importunities, or any other species of mental or physical coercion, provided only it was so exerted as to destroy free agency and to make the act done not a true expression of the will of the person doing it, but in truth a carrying out of the purposes of some other person against that will. But the undue influence is to be proved and not to be presumed, unless the relation in which the parties stood with reference to each other is such as to raise a presumption of its existence. Yet, even where such a presumption arises, it is rebutted by evidence showing that everything between the parties was fair, open, voluntary, and well understood. See 29 A. & E. Enc. L. (2d Ed.) 102, 105, 119, 122; Means v. Means, 5 Strob. 167.

[10] "Applying the principles stated to the evidence in the case at bar, we find that the grantor in the deed here under consideration was a feeble old lady, past her four-score years of life, her mind and memory to some extent weakened and impaired by the troubles and afflictions of her previous life, and by the burdens of the years resting upon her, entertaining at times delusive momentary beliefs as to the continuing existence in her life of her long-dead parents and temporary beliefs at variance with facts as to then existing weather conditions and as to locality of places. It appears that she had none then standing towards her in the relation of her kindred or dear friends, excepting only the grantee in this deed, who was not her blood, but had long been holding the place of a devoted son, having laid aside a promising career in life in order to bestow upon her the skilled attention which his knowledge as a physician enabled him to give. It is shown by the evidence that the grantor was weak in body and doubtless to some extent enfeebled in her general mental powers, but that at the very moment of the execution of the deed she was not laboring under any delusion of mind, and was in fact engaged in the carrying out of a long-cherished purpose to dispose of her property as to insure its devolution upon her grantee. It is true that at or about the time of the signing of the paper in question she expressed sentiments of confidence in the belief that the grantee would continue to care for her during the remainder of her life, and it cannot be doubt-

ed that she executed the deed in the faith that he would not permit her to suffer by reason of her act. If he had failed to give her support, aid, and maintenance, the circumstances and relations of the parties were such as would well have warranted a court of equity in imposing upon the grantee the duty of providing for her support and comfort during the remainder of her life, at her instance and upon her application. But it does not appear that there was any abuse of that trust and confidence nor is there any evidence of a failure by him to discharge any duty in that particular.

"The testimony of the subscribing witnesses and of those present at the time of the signing by the donor is unanimous to the effect that she was then *compos mentis*; that she appreciated and understood the force and effect of her act; that she was not hoodwinked or deceived as to the nature of the instrument; and that she acted entirely of her own volition, although upon the suggestion of the grantee in the execution of the instrument. The voluminous mass of the evidence in this case has been searched in vain to discover any testimony of undue influence exerted by the grantee or by any other person, either before or at the time of the execution of this deed, in order to induce the making thereof. There is not the slightest evidence of even argument or persuasion employed to that end, and the testimony tends to show, and in my opinion does establish, the fact that the grantor therein had long entertained a fixed purpose to bestow the lands in question upon the grantee as ultimate owner.

"If it be the fact, as I think it is, that the relation of the parties to this transaction and the mental weakness and dependence of the grantor upon the grantee were such as to impose upon those claiming under the latter the burden of showing that no fraud was practiced nor undue influence exerted by or on behalf of the beneficiary under this gift, that there was no *suppressio veri* nor *suggestio falsi* operating as an inducement thereto, it is my opinion, after a careful examination of the entire record, that this has been affirmatively shown, and that it appears from the evidence that the conveyance was the voluntary act and deed of Susan C. Kell, was willingly executed by her in pursuance of a long-cherished intention, was not induced by any suppression or misrepresentation of facts, and that there was no fraud upon the part of the grantee thereof nor abuse of the confidential relations existing between the said grantor and grantee.

"The evidence shows that the act of signing was performed not only understandingly and without reluctance, but also with a desire and purpose on the part of the donor to dispose of her property to the donee named in the deed and for his own ultimate benefit. When the effect of her act was mentioned to her subsequently to such execution

of the deed, she expressed satisfaction with her act in so disposing of her property and a continued understanding of the purpose and effect of what she had done. She lived for nearly two months thereafter, and so far as the evidence discloses, although the fact of her having so disposed of practically her entire property was mentioned in her presence and in the absence of the donee, she never at any time, so far as appears, gave expression to any other feeling than that of satisfaction with the deed as effectuating her voluntary purpose and intention. If the transaction had been regarded at the time by the grantor as a business transaction, whereby she was conveying the property to the grantee in consideration of past services alone, or if there were evidence going to show that she viewed it in the light of a commercial transaction, then the question sought to be made as to the adequacy of the consideration mentioned in the deed would be a matter of serious importance. But as it was evidently understood by her as being a deed of gift, with but slight, if any, reference to pecuniary obligations existing between the parties, the transaction is to be considered as purely a matter of gift, and not of bargain and sale. So considering it, I am of the opinion that the validity of this deed must be sustained, and it is accordingly so adjudged. This disposes of the exceptions of the plaintiff to the report of the referee, all of which are overruled except in so far as the same have hereinbefore been sustained.

"As to the first exception by the defendants, relating as it does to a question of evidence, as it was not discussed or pressed in any way at the hearing, it does not appear to require especial consideration in view of the conclusions already reached. It may be remarked, however, that, if there was any error as is therein alleged, it appears to have been harmless error. In so far as the costs and disbursements of this cause in equity are concerned, in view of the fact that the burden of proof was properly upon the defendants here to show that no advantage had been taken of the confidential relations existing between the grantor and grantee of the deed in question, and especially in view of the fact that this deed does not appear ever to have been spread upon the records of the proper office, I overrule the exception by the defendants as to the matter of the payment of such costs and disbursements and direct the payment of the same in accordance with the recommendations of the referee.

"As to the conclusion of law by the referee as to the rents and profits collected by plaintiff from the Fishing Creek and Parish Places, the liability of the plaintiff to the defendants for such rents and profits to the extent of two-thirds thereof, and interest from the time of receiving the same, results from the conclusions already reached, but the liability for the remaining one-third

is yet to be determined by the result of the trial of the legal issues herein.

"Under the views already stated, the recommendation by the referee as to a dismissal of the complaint must be disapproved, and the cause must be retained for trial by jury of the legal issues of fact herein, and also for the purpose of stating the accounts as to the rents and profits. Leave is granted for an application to be hereafter made to the court, or to any circuit judge having jurisdiction at chambers after notice, for a recommittal of the report for such further accounting by any of the parties for the rents and profits of any of the lands in question, as may be necessary and in accordance with the conclusions of this decree, or may be rendered proper in the further progress of the cause, and for such statement of the accounts for rents and profits already found and of the interest chargeable thereupon as may be conformable to the conclusions of this decree and requisite to a final judgment herein as to said matters of accounting."

The following are plaintiff's exceptions:

"For the purpose of appeal, the plaintiff hereby excepts to the decree of Special Judge Ernest Moore, filed April 15, 1910, upon the following grounds:

"(1) That the honorable, the special judge, erred in not allowing the plaintiff's motion, made at the trial of the said cause before him, to amend the complaint so as to conform the same to the proof in the cause, by striking out the description of the Parish Place, in the first paragraph of the complaint, and by inserting the same after the description of the Fishing Creek Place, in the eleventh paragraph of the complaint; the effect of such amendment being to change the allegations of the complaint as to this Parish Place, so as to allege that Mrs. Susan C. Kell had a life estate only in the same, and that at her death the same passed to the plaintiff and her sisters, the defendants, Susan A. Boylston and Eunice R. Cloud, as tenants in common, and as such they are each entitled to one-third undivided interest thereof in fee, instead of the allegation that Mrs. Susan C. Kell died seised and possessed of the same, so as to conform the same to the proof as developed in the testimony and trial of the cause; whereas, the same should have been allowed for the reasons stated.

"(2) That he erred in overruling plaintiff's fourth exception to the report of the referee; and in so doing in holding: 'The evidence showed merely a purchase of this land by B. E. Kell, Sr., from J. H. McMurray, a payment by him of part of the purchase money in cash and an assumption of liability for the payment of a certain undesignated mortgage debt against the said land conveyed to him. There is no evidence whatever that any money belonging to Susan C. Kell was used in the purchase of this land, or applied in the payment of the purchase

money thereof.' And in further holding: That the fact that the mortgage debt was owing to Susan C. Kell would only amount to 'an acknowledgment of liability for the payment of any balance that might be due thereon, but would not constitute a using of the money of Susan C. Kell in the purchase of the land. Under such circumstances, there is nothing upon which a resulting trust can be based, as even the assuming of the payment of a mortgage debt due to the wife of the grantee would not operate to raise a resulting trust in land, but could occasion merely a liability by B. E. Kell, Sr., for the payment to her of the mortgage debt.' Whereas he should have sustained the said exception and held that B. E. Kell, Sr., the purchaser of the land, was the husband, agent, and trustee of Susan C. Kell, the mortgagee, and owner of the mortgage upon the said land referred to, and that this mortgage has never been paid or satisfied, and that the amount due upon the said mortgage constituted fiduciary funds used by the trustee in the purchase of property in his own name, and which he has not paid, and that Mrs. Kell had therefore an interest in the said lands, by way of resulting trust, to the extent of the funds so belonging to her used in the purchase of the land from McMurray by B. E. Kell, and that equity will not permit a trustee to employ the trust funds, in what shape soever they may be, for his own benefit and profit and to the loss of the cestui que trust.

"(3) That he erred in overruling plaintiff's eighth exception to the referee's report, and in holding: 'There can be no doubt that the referee was right in holding that, in so far as the plaintiff is seeking to set up any title to the Fishing Creek Place through and under Susan C. Kell, the plaintiff is estopped by the warranty in the deed from Susan C. Kell to J. H. McMurray, of date November 20, 1880, from setting up any title in herself to the Fishing Creek Place, claimed to have been derived by her as heir of Susan C. Kell, whether such title was held by Susan C. Kell at the date of the execution of the deed or subsequently acquired.' Whereas he should have held that B. E. Kell was the husband, agent, and trustee of Mrs. Kell at the time and in the very transaction by which he took the deed from McMurray, and being fully aware of the limited estate which McMurray had taken under his deed from Mrs. Kell, and of the mortgage and amount due thereon, given by McMurray as security for the unpaid portion of the purchase price of the place, which mortgage, representing funds of Mrs. Kell, was used in the purchase of the said lands by the trustee, B. E. Kell, from McMurray, and that the said B. E. Kell, and those claiming under him as devisees, are estopped from denying that Mrs. Kell, or her heirs at law, are entitled to the proportion of the land represented by the amount of the mortgage debt

so used by her husband, agent, and trustee in the purchase of the lands for himself, and the warranty in her deed to McMurray cannot bar Mrs. Kell, or her representatives and heirs at law, from asserting this interest in the said lands, and as against any after-acquired interest of Mrs. Kell therein that would pass by said warranty to McMurray and his assigns.

"(4) That he erred in overruling plaintiff's tenth exception to the referee's report, and in holding: 'That on the 27th day of October, 1902, the said Susan C. Kell was mentally competent to understand, and did comprehend, the nature, force, and effect of her act in signing the deed dated on that day, conveying to Dr. B. E. Kell the Home Place, the Rocky Creek Place, and the Parish Place, and that the said deed was duly executed' and is a valid deed, vesting the fee-simple title to the said lands in the grantee therein named.' And in further holding: That 'the preponderance of the evidence establishes the fact that the conveyance here in controversy is the act and deed of one who was then fully capable of disposing of her property as she might see fit.' Whereas, he should have held that at the time of the execution of said deed Susan C. Kell was mentally incapable of executing the same, and of knowing the force and effect thereof, and physically unable to sign the same unaided, and that she did not understand the force and effect of the same; and he should have held, further: (b) That, even though the said deed be valid as to the Parish Place, it could only convey to Dr. Kell, the grantee, the interest of Mrs. Kell, the grantor, therein, to wit, her life estate, as held under the will of Mrs. Jane Hemphill, and that upon her death the estate so conveyed ceased and determined, and that the defendants, the grantees of Dr. Kell, have no interest therein save such as was conveyed to them after Mrs. Kell's death by plaintiff's sisters, Miss Eunice R. Cloud and Mrs. S. A. Boylston, who at the death of Mrs. Kell, the life tenant, were the heirs at law of Mrs. Hemphill as well as of Mrs. Kell.

"(5) That he erred in holding: 'There is no satisfactory evidence that Mrs. Kell in 1902 was suffering from any such degree of mental impairment as is denoted by the term senile dementia, although some of the experts seem to imply or assert that such was the case.' And in further holding: '* * * That perhaps she was laboring, more or less, under the malady denoted by the term "neurasthenia.'" Whereas, he should have held that the clear weight of the undisputed testimony of the medical witnesses, who had seen and treated Mrs. Kell during the latter part of her life, was that she was then suffering from senile dementia, and had been for a long time, and that said disease manifests itself in its earliest stages in more violence and excitability of body and mind, which affects the physical conditions and

general health, but as the disease progresses the mind becomes more affected, and its blood supply is decreased, and it becomes less active and more passive, and the patient then becomes more quiet and less violent, and that finally the mind is entirely lost, while the health of body improves, and that just such conditions were shown to exist in the case of Mrs. Kell.

"(6) That he erred in overruling plaintiff's fourteenth exception to the report of the referee, and in holding: 'The voluminous mass of the evidence in this case has been searched in vain to discover any testimony of undue influence exerted by the grantee, or by any other person, either before or at the time of the execution of this deed, in order to induce the making thereof. There is not the slightest evidence of even argument or persuasion employed to that end, and the testimony tends to show, and in my opinion does establish, the fact that the grantor therein had long entertained a fixed purpose to bestow the lands in question upon the grantee as ultimate owner.' Whereas, he should have held: That from all the facts and circumstances surrounding the execution of the deed and the relation of the parties, as shown by the evidence, that actual undue influence as well as constructive or presumptive undue influence, from fiduciary relations of the parties, was clearly shown, and the deed should have been declared null and void and set aside.

"(7) That he erred in overruling plaintiff's thirteenth exception to the referee's report, and in holding: 'It is true that at or about the time of the signing of the paper in question she expressed sentiments of confidence in the belief that the grantee would continue to care for her during the remainder of her life, and it cannot be doubted that she executed the deed in the faith that he would not permit her to suffer by reason of her act. If he had failed to give her support, aid, and maintenance, the circumstances and relations of the parties were such as would well have warranted a court of equity in imposing upon the grantee the duty of providing for her support and comfort during the remainder of her life, at her instance and upon her application. But it does not appear that there was any abuse of that trust and confidence, nor is there any evidence of a failure by him to discharge any duty in that particular.' And in further holding, in effect, that because the grantee never neglected or failed to provide for Mrs. Kell, the grantor, and carried out the intention of the arrangement, which he holds, under the circumstances and conditions stated, to have been made between them, that there could be no undue influence; the error being that it is not necessary, in order to avoid a deed for undue influence, to show, in addition to actual undue influence, or undue influence from fiduciary relation of the parties, that the grantee so procuring the execution of such

deed failed to support or neglected or abandoned the grantor, whereas, he should have held that if the deed was procured by undue influence, actual or constructive, the court of equity will set it aside as against public policy, irrespective of whether or not the grantee in possession of the estate so conveyed provides for the grantor, or carries out the terms of the arrangement that grantor had been induced to make by reason of such undue influence.

"(8) Having held that the highest degree of confidence and trust existed in the relations between the grantor and the grantee, the latter being the physician and medical attendant of the former, who was an old lady of eighty-odd years old, of weak mind and memory, and subject to various delusions, and accustomed to rely upon the advice and direction of the grantee, and being at the time of the execution of the deed nearly, if not quite, blind, and that the deed was without consideration, in the nature of a gift of all her valuable estate, he erred in further holding that the validity of this deed must be sustained, and in so adjudging; whereas, he should have held that from the said facts and circumstances so found to exist at the time of the said conveyance that imposition or undue influence will be implied in law.

"(9) That, having held that the relations of the parties and the inadequacy of the price paid were such as in law to raise the presumption of undue influence, he erred in holding that such presumption can be rebutted by proof of the absence of actual fraud, persuasion, argument, or duress; whereas, he should have held that the only way to rebut such presumption of undue influence from the relationship of the parties is by clear proof, that the relation of the parties had no bearing or influence upon the transaction, that they dealt at arm's length, as strangers, in the transaction, and that the grantee had not been actively concerned in the preparation and execution of the deed, and that the grantor had the benefit of independent, disinterested advice, and that the conveyance was for adequate valuable consideration, or considered as a gift pure and simple, that the gift was such a one as the court of equity would permit to have been made out of a trust estate owned by Mrs. Kell, by her trustee, upon application, to a relative or friend for whom she entertained an affection, none of which have been shown, or attempted to have been shown, in this case.

"(10) That he erred in not holding that the said deed was obtained without adequate consideration, and while the grantor was mentally incapable of executing the same, and of knowing the force and effect thereof, while she was under duress, and under the care of parties employed by the grantee, and by means of undue influence, while the relations between her and the grantee were of the very closest fiduciary and confidential nature, and the day after the grantee had

informed her of her husband's death, and without the opportunity of independent advice, and upon the solicitation of the grantee, who came with the deed prepared for her to sign; and that the same is fraudulent, null and void, and should be set aside and cancelled by the decree of this court.

"(11) That he erred in not holding that plaintiff was and is entitled to one-third interest in all the lands described in the complaint, and in failing to decree partition thereof."

Halcott P. Green, Henry & McLure, and A. L. Gaston, for appellant. J. H. Marlon, Glenn & McFadden, and R. B. Caldwell, for respondents.

GARY, A. J. This is an action to set aside a deed for fraud and for other relief.

The facts are fully stated in the decree of his honor, Special Judge Ernest Moore, which, together with the appellants' exceptions, will be incorporated in the report of the case.

[11] The first question that will be considered is whether there was error on the part of the presiding judge in refusing the motion to allow the plaintiff to amend the complaint in the particular mentioned in the first exception. Amendments are within the discretion of the presiding judge, and an order refusing a motion to amend is not appealable, unless there was an abuse of discretion, which does not appear in this case.

We do not deem it necessary to consider the other exceptions specifically, as we are satisfied with the circuit judge's findings of fact, and the reasons assigned by him for his conclusions of law.

Affirmed.

JONES, C. J., WOODS and HYDRICK, JJ., concur.

(69 W. Va. 376)

AUSTIN MFG. CO. v. COFFMAN.

(Supreme Court of Appeals of West Virginia.
May 9, 1911.)

(Syllabus by the Court.)

EVIDENCE (§ 441*) — PAROL EVIDENCE—CONTRACTING WRITTEN CONTRACT.

A written contract cannot be added to or contradicted by oral evidence of different stipulation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.*]

Error to Circuit Court, Mercer County.

Action by the Austin Manufacturing Company against W. H. Coffman, trading as the W. H. Coffman Coke Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Harold A. Ritz, for plaintiff in error. McClaugherty & Peters, for defendant in error.

BRANNON, J. Austin Manufacturing Company, a corporation, doing business at Chicago, brought an action of assumpsit in the circuit court of Mercer county against W. H. Coffman, trading as W. H. Coffman Coke Company, to recover a balance of the purchase money of a stone crusher sold by the Austin Company to Coffman, and recovered a verdict against Coffman, on which the court rendered judgment, and Coffman brings the case to this court.

Coffman claims that the Austin Company had sold him, not only a stone crusher, but a boiler to be of 100 horse power and an engine of 75 horse power, and that the boiler was not of 100 horse power, and the engine was not of 75 horse power, and that they failed to do the work required of them; and he filed a notice of recoupment, seeking to abate for damage therefrom \$1,500. This case involves no law, not a single point of law, and only question of fact. The Austin Company claimed that it made no sale whatever of boiler and engine to Coffman, but only of a stone crusher. Such was the matter in contest before the jury. Coffman in an equivocal manner, which is the character of his whole evidence, if it is not against himself, stated that the Austin Company sold him boiler and engine. Ramsey, who sold as agent the crusher to Coffman and made the contract with him, swears flatly and definitely that the Austin Company sold no boiler or engine, but that Houston, Stanwood & Gamble sold them. Thus we have a direct conflict of oral testimony, and the decision of the jury must stand, on familiar principles. But it does not stand alone on that principle; for the written evidence and the action of Coffman are overwhelming to prove the rectitude of that verdict. It is proven that the Williams Contractor Supply Company, of Columbus, Ohio, is a sale agent for machinery manufactured by others; it manufacturing nothing. It sent Ramsey to see Coffman about the purchase of the crusher. The start of the matter is that Coffman wrote the Austin Company proposing to buy, not an engine and boiler, but only a crusher. In response the Austin Company wrote him a letter saying, "We are in receipt of your letter of the 30th ult. for stone crushing machinery," and sent him catalogues of stone crushers, and otherwise speaking of only a proposition to sell a stone crusher. As a postscript to the letter we find, "All our business in that section of the country is handled through our Columbus, Ohio, branch office, the Williams Contractor Supply Company, to whom we have referred your letter, with instructions for them to get in touch with you and which they will do promptly."

On this postscript Coffman would hang his case, seeking from it to show that he purchased from the Austin Company the boiler and engine. Ramsey was an agent, not of

the Austin Company, but of the Williams Supply Company. He went to make contracts of sale for machinery and other things for the Williams Supply Company, which simply took orders for things through Ramsey, and would then send those orders for filling to this, that, and the other manufactory according to the article wanted. The Williams Supply Company was a mere intermediary. It simply procured orders for machinery or other things and sent those orders to various manufacturers. Now, that postscript was a postscript of a letter written by the Austin Company to Coffman, in response to Coffman's letter saying that he wished to purchase a crusher. Coffman's letter to the Austin Company never whispered of a purchase of boiler or engine, but only of a crusher, and the response letter of the Austin Company never mentioned boiler or engine. Both letters must be read together, and they never mentioned boiler or engine, but mentioned only a crusher. And the postscript cannot possibly refer to anything beyond the article mentioned in both letters. Both letters were confined to a crusher. What Coffman relies on, the postscript itself, when read with the two letters, proves that this proposed purchase was only of a crusher. Not that only; when Ramsey went to Bluefield to see Coffman, Coffman gave a written order, signed by Coffman, addressed to the Austin Company, directing it to ship to him "1 No. 5 Austin gyratory stone crusher" and other things going with it, never mentioning boiler or engine. The order is a fully written contract, confined exclusively to a crusher and its accompanying utensils. This order contains the following clause: "It is fully understood that this order embodies the entire understanding; that it is not affected by any verbal statement or promises by whomsoever made." Thus we have a written contract containing all its stipulations, and Coffman would by his own oral evidence add to it a most material addition. He would contradict it. The law will not allow this.

That alone ends the case, if other considerations did not. On that same day, through Ramsey, Coffman made a written order, signed by Coffman, saying, "Purchase for W. H. Coffman with power plant for a No. 5 crusher boiler and engine from Houston, Stanwood & Gamble, Cincinnati, Ohio." Thus Coffman made an explicit order to buy the boiler and engine from Houston, Stanwood & Gamble, and he says it was shipped from their manufactory. The Austin Company never saw this order. It went to Houston, Stanwood & Gamble. It is absurd to say that the purchase of the boiler and engine was from the Austin Company. Not only that; but Houston, Stanwood & Gamble, as Coffman himself swears, sent him a bill for the boiler and engine, and he paid them for the boiler and

engine. Why did he pay Houston, Stanwood & Gamble for the boiler and engine, if he had bought them of the Austin Company? Coffman is an experienced man of business, of acute intelligence. Is it not absurd to say that he could be under the opinion that he bought the boiler and engine of the Austin Company, or that he would pay another firm for them? Another absurdity connected with his position arises from the fact that the crusher price was \$3,475, and the boiler and engine cost \$1,200; total \$4,675. The Austin Company never rendered a bill for anything but their crusher to Coffman. He knew the bill was only for the crusher. The bill rendered was for \$3,442.50, the original contract price for only the crusher, after a small abatement for a utensil belonging to the crusher of less length than at first contemplated. Never did the Austin Company make any demand for boiler and engine. If it had sold the crusher, boiler, and engine, why did it never render a bill therefor? And why did Coffman accept the bill for boiler and engine rendered by Houston, Stanwood & Gamble, and pay them for the boiler and engine, if the Austin Company was entitled to the money for a purchase from them of the boiler and engine?

Moreover, the Austin Company often wrote to Coffman for payment, dunning him. He made four payments, amounting to \$2,400, thus acknowledging the justice of the demand. He wrote letter after letter, asking indulgence and promising payment. Those letters did not speak of a boiler and engine. They related to the demand for the payment of the crusher. After the claim was put in the hands of lawyers, he promised payment repeatedly, and even after the action was brought it seems that he only asked a continuance of the case. He never mentioned the defect of the engine until the suit. In all the correspondence through months and months, in more than a dozen letters from him to the Austin Company and its attorneys, he never mentioned the defect. He said he did not discover the defect in the engine until recently. Why not? The verdict is clearly, plainly right on the evidence. The case is only one of evidence.

Therefore we affirm the judgment.

(28 W. Va. 374)

GOLDEN et al. v. O'CONNELL et al.
(Supreme Court of Appeals of West Virginia,
May 9, 1911.)

(Syllabus by the Court.)

CREDITORS' SUIT (§ 50*) — ENFORCEMENT OF LIENS — DECREE.

Pending a chancery suit to enforce various liens against a debtor's land, some of the lienors holding first liens agree in writing that the debtor may sell a part of a tract in lots, the proceeds to go into the hands of a trustee to be applied on liens. Before decreeing the debts

and sale of the balance of the debtor's land, the proceeds of such lot sales should be ascertained, and the trust fund applied on the lien debts.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. §§ 191-209; Dec. Dig. § 50.*]

Appeal from Circuit Court, Greenbrier County.

Bill by Paul Golden and others against Daniel O'Connell and others. Decree for plaintiffs, and defendant O'Connell appeals. Reversed and remanded.

R. S. Turk and Mollohan, McClintic & Mathews, for appellant. L. M. McClintic and Price, Osenton & McPeak, for appellees.

BRANNON, J. Paul Golden, having a judgment against Daniel O'Connell, brought a chancery suit against O'Connell and various other lien creditors by judgment and deeds of trust to enforce his lien against land of O'Connell. It is a lien creditors' suit. A decree was rendered in the case, fixing the amount of a very considerable number of lien debts against O'Connell, and subjecting his land to sale. He appeals.

A very important matter in this case, and one which has given us some perplexity, is this: O'Connell was owner of several tracts of land on which the liens rested. After report by a commissioner of a number of liens, a number of those lienors entered into an agreement in writing, reciting that O'Connell, out of a tract of 127 acres, called the "Drewry Place," at White Sulphur Springs, had set apart about 25 acres for town lots, streets, and alleys, to be offered for sale. They consented that O'Connell might sell them, and appointed W. E. Nelson their attorney, with power to execute releases of liens to purchasers of lots on receipt of the purchase price, the money arising therefrom to be applied upon the liens upon the land in their order as reported by the commissioner in the cause. This writing was signed by the creditors having the first liens in priority. Five lienors did not sign it. O'Connell filed an amended answer, introducing that paper into the case, and alleging that a large number of lots had been sold, realizing about \$5,000, and that a hotel had been sold for \$3,000, which sales were partly for cash and partly on credit, making up about \$8,000, and that the cash and notes had gone into the hands of Nelson. He asked that the case go to a commissioner to ascertain the amount in the hands of Nelson thus arising. It does not appear when this answer was filed. It is first mentioned in the decree of sale. No evidence substantiates this answer; but as no depositions could be taken until the answer was filed, and as the answer first appears in the decree of sale, we think that would excuse O'Connell for not taking such depositions. He virtually asked a continuance, by asking that the fund in Nelson's hands be ascertained. It is apparent that, as the first lien creditors con-

sented to this agreement, it should have been ascertained how much would arise from such lot sales applicable on the debts. The debts were decreed, regardless of any credit from such sales. True, no evidence proves those matters; but the court had before it that answer and the agreement taken for true, and that agreement showed that consent to such sale was given by the creditors; and, though it did not prove that such sales had been made, yet that agreement rendered the fact highly probable. That agreement rendered it plausible that there was a fund arising from the sale of those lots and that hotel of large amount, which should be applied on the liens, a trust fund dedicated by agreement of O'Connell and the lien creditors for the payment of their debts.

The decree did not sell the 35 acres, but sold the balance of the tract, reserving the sale of the 35 acres until further orders. We think that it was error to decree these debts against the balance of the land and sell it for the full amounts of the debts without first ascertaining and bringing in the funds arising from such lot and hotel sales. It seems to a court of equity inequitable to decree the whole amount of the debts and sell the balance of the land regardless of that fund. These lien creditors had solemnly agreed to let this property be sold for payment of their debts. It is error not to ascertain the true amounts of liens before decreeing a sale. It is true the lienors not signing that agreement are not bound by it; but they seem to be the subsequent lienors, and anyhow, though they may be delayed by our decision, yet equity always delays creditors enforcing liens until the amounts of the liens shall be ascertained.

It is hardly necessary to refer to other matters, as we see no other error, and those matters involve no legal principles.

We reverse the decree, and remand the cause to the circuit court for the purpose indicated above, and for other proper proceedings.

WILLIAMS, P., absent

(39 W. Va. 400)

CASTLE et al. v. CASTLE et al.

CASTLE v. GIBSON.

(Supreme Court of Appeals of West Virginia
May 9, 1911.)

(Syllabus by the Court.)

1. ACTION (§ 56*)—APPEAL AND ERROR (§ 964*)—REVIEW—CONSOLIDATION OF CASES.

The trial court has discretion in the matter of consolidating causes, and, to warrant a reversal of a decree on this ground, it must appear that such discretion has been misused to the prejudice of the party complaining.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 624-631; Dec. Dig. § 56.* *Appeal and Error*, Cent. Dig. § 3834; Dec. Dig. § 964.*]

2. Costs (§ 10*) — STIPULATION — CONSTRUCTION.

It is error to decree costs in favor of one of the parties to a suit against another, in the face of a binding agreement between them that the suit should be dismissed without costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 17-19; Dec. Dig. § 10.*]

3. Courts (§ 252*) — APPEAL — JURISDICTION.

An appeal will lie to this court for such an error as to costs which have been made the subject of agreement, when the amount thereof exceeds \$100.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 252.*]

Appeal from Circuit Court, Preston County.

Action by Mary C. Castle and others against George M. Castle and others, and by Joseph W. Castle against Milford C. Gibson. Suits were consolidated and a decree made, dismissing both, and Joseph W. Castle appeals. Affirmed in part, and reversed in part.

Wm. G. Conley, for appellant. N. J. Fortney, P. J. Crogan, and F. E. Parrack, for appellee Milford C. Gibson.

WILLIAMS, P. Two suits in equity were pending in the circuit court of Preston county, the first brought in June, 1897, by Mary C. Castle and others against George M. Castle and others, and the second brought in July, 1902, by Joseph W. Castle against Milford C. Gibson.

On the 28th of October, 1905, the two cases were heard together and a decree made, dismissing both. This decree required Joseph W. Castle to pay to Mary C. Castle all the costs in the first suit; the second suit was dismissed without costs to either party.

Joseph W. Castle, one of the defendants in the first suit and sole plaintiff in the second, has appealed, and assigns four grounds of error: (1) That it was not proper to hear the two causes together; (2) that it was error to decree costs against petitioner in the first of said causes; (3) that it was error to dismiss the second cause; and (4) that it was error not to decree specific performance according to the prayer of the bill in the second suit.

Milford C. Gibson was one of a large number of defendants to the first suit, and was the sole defendant in the second.

Pending the first suit, and after numerous depositions had been taken on both sides of the case, on the 15th of December, 1898, a written agreement of compromise was entered into between Joseph W. Castle, Mary C. Castle, M. C. Gibson, and others, in which it was agreed that the first suit was to be dismissed, "agreed," and that each party should pay his own costs. All matters in controversy between the parties involved in the suit, which was in relation to the title to a certain tract of land and the timber which had been cut from it, were "adjusted

and settled forever" by this agreement. The compromise agreement contained this contract between Joseph W. Castle and M. C. Gibson, viz.: "Joseph W. Castle hereby agrees that he will pay the defendant, M. C. Gibson, five hundred dollars (\$500 00) within thirty days from this date, and the said Gibson hereby agrees that when the five hundred dollars above mentioned are paid he will execute and make the defendant, Joseph W. Castle, a deed of special warranty for all his interest in the farm, in the bill mentioned of one hundred and twenty-nine acres on which John Hartman lived and died." It was to specifically enforce this contract between Joseph W. Castle and M. C. Gibson that the second suit was brought. Depositions were taken by both plaintiff and defendant in the second suit. On the 6th of December, 1904, while the second suit was pending, and before any order of dismissal was made in the first suit, Joseph W. Castle and M. C. Gibson, who were the only parties to the second suit, made a second written agreement, by which Gibson was to pay Joseph W. Castle \$500 and execute to him a deed with special warranty, granting all his right in the John Hartman farm, "saving and reserving to himself all of the coal lying under the vein known as the 'Three Foot Vein' now open on said place." The money was to be paid and deed executed by Gibson upon the dismissal of the Mary C. Castle suit, and the contract recites that her authority in writing for the dismissal had already been given. Joseph W. Castle was then to execute to Gibson a quitclaim deed for all right claimed by him in the coal reserved by Gibson. The contract then closes as follows: "It is further agreed between the parties hereto that the said two suits are to be dismissed at the December term, 1904, of the said court, 'agreed,' each party to pay his own costs incurred therein." The foregoing statement shows the relation between the two suits, and all the facts essential to a review of the decree appealed from.

[1] There is nothing prejudicial to appellant in his first assignment of error. It is largely a matter of discretion with the chancellor whether or not it is proper to hear two causes together. *Beach v. Woodyard*, 5 W. Va. 231; *McKittrick v. McKittrick*, 43 W. Va. 117, 27 S. E. 303; *Wyatt v. Thompson*, 10 W. Va. 645; *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144; 8 Cyc. 591-593. The first agreement of compromise did not appear in the first suit, but it was the basis of the second suit, and was made an exhibit with the bill. By consolidating the two suits, the court could consider its effect upon the rights of the parties in the first suit; otherwise it may have required an amendment of the pleadings in that suit to put it before the court. We do not see that the court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

has violated its discretion by consolidating the suits, or that appellant is prejudiced by such consolidation.

[2] As to the second point of error assigned: The decree directs that Joseph W. Castle pay to the plaintiff, Mary C. Castle, all the costs of said first suit. Generally speaking, the control over costs in equity suits is a matter largely within the discretion of the chancellor. Section 10, c. 138, Code 1906; *Nutter v. Brown*, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. (N. S.) 1083. But in the present case the costs had been made the subject of an agreement between the parties, which took it out of the court's discretion. Both of the compromise agreements expressly stipulated that each of the parties should pay his own costs in the first suit. The decree holds that these contracts are binding; and we do not see how the court could have then disregarded the stipulation as to costs, which appears to be as binding as any other portions of the agreements.

[3] The matter of costs being thus taken out of the discretion of the court by agreement of the parties, and the amount thereof decreed to be paid by Joseph W. Castle to Mary C. Castle being shown by the supplement to the record to be in excess of \$100, after deducting the costs which he himself incurred and for which he is liable, the decree, as to costs, becomes an appealable decree. *Nutter v. Brown*, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. (N. S.) 1083. It was error to disregard the agreements concerning costs, and to decree all the costs in favor of Mary C. Castle against Joseph W. Castle.

Third: The second suit was brought to specifically enforce the agreement for the purchase of the land which was in controversy in the first suit. Joseph W. Castle and M. C. Gibson were the only persons interested in that portion of the compromise agreement thus sought to be enforced. Consequently, it was not necessary that any of the other parties to the contract should have been made parties to that suit. The court did not err in refusing the prayer of the bill and in dismissing the second suit, in view of the second compromise contract of December 6, 1904. This contract abrogated the first one, in so far as it related to the contract for the purchase of the land. This last-mentioned agreement was not a matter in litigation. It appears in the record of the second suit only as matter of evidence; and was put in evidence by plaintiff himself as an exhibit in support of his objection, made on the 23d of February, 1905, to any further taking of testimony by the defendant. By the terms of this agreement, both suits were to be dismissed, "agreed," and each party was to pay his own costs. There is no proof that this second contract was ever canceled by the parties, or that it was superseded by any other agreement. Neither does

it appear that it was not, at the time of the decree, a valid and binding contract. The court could not have granted the prayer of Joseph W. Castle's bill without disregarding this contract which plaintiff had, by his counsel, placed before the court. This reason is also a sufficient answer to the fourth assignment of error.

It is insisted by counsel for appellant that, inasmuch as there is no order of court showing the filing of the answer of M. C. Gibson in the second suit, his answer cannot be considered as a part of the record. This is true. *Park v. Petroleum Co.*, 25 W. Va. 108; *Sims v. Bank*, 8 W. Va. 274; *Handy v. Scott*, 26 W. Va. 710. And in view of the fact that Gibson filed no answer, the depositions taken on his behalf cannot be read. *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266; *Edgell v. Smith*, 50 W. Va. 349, 40 S. E. 402. But the contract is not a part of the defendant's evidence; plaintiff's counsel vouched the contract in support of his objection to any further taking of depositions by the defendant, and therefore, the plaintiff being responsible for the contract's appearance in the record, he cannot be heard to say now that it ought not to be read. It is a part of his own evidence, and it proves him out of court.

We do not interpret the language of the decree, wherein it recites "that the contracts heretofore made are fair and binding upon the parties thereto," to be an adjudication upon the rights of Joseph W. Castle and M. C. Gibson under the contract of December 6, 1904, because the decree expressly says that "the dismissal is without prejudice to the rights of the parties under the contract of December 6, 1904, if any they have."

In so far as the decree appealed from directs Joseph W. Castle to pay all the costs of the first of said suits to Mary C. Castle, it will be reversed, and a decree entered here that each of the parties to said suit pay his own costs; and in all other respects the decree will be affirmed, but without prejudice to any right of suit upon, or defense to, the contract of date December 6, 1904, concerning which we express no opinion.

Appellant, having substantially prevailed, is entitled to costs in this court.

(59 W. Va. 391)

CHANDLER v. AMERICAN CAR & FOUNDRY CO.

(Supreme Court of Appeals of West Virginia.
May 9, 1911.)

(*Syllabus by the Court.*)

1. MASTER AND SERVANT (§ 206*) — ASSUMPTION OF RISKS.

The servant assumes the risks of all dangers incidental to his employment, whether the work be dangerous or otherwise.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 550; Dec. Dig. § 206.*]

2. MASTER AND SERVANT (§§ 101, 102, 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

It is the duty of the master to furnish his servant reasonably safe means and appliances with which to work; but if the servant knows the purpose and condition of a particular machine or appliance, and undertakes to use it when some of its parts are wanting, he assumes the risk of using it in its incomplete condition.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 178, 584; Dec. Dig. §§ 101, 102, 217.*]

3. MASTER AND SERVANT (§ 222*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

The servant is not obliged to obey his master's order when it exposes him to a known danger; if he does so, he assumes the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 648, 651; Dec. Dig. § 222.*]

4. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—PRESUMPTION OF NEGLIGENCE.

Negligence by the master is not to be presumed from the mere fact of injury to the servant, except in those cases wherein the doctrine of *res ipsa loquitur* is applicable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 881; Dec. Dig. § 265.*]

Error to Circuit Court, Cabell County.

Action by Garfield Chandler, by his next friend, against the American Car & Foundry Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Anderson, Strother & Hughes, for plaintiff in error. Holt & Duncan, for defendant in error.

WILLIAMS, P. Plaintiff, a boy 20 years of age, was injured while in the service of defendant company, and sued, by next friend, in the circuit court of Cabell county, and recovered a judgment for \$2,000 against defendant for negligently causing his injury. He was employed to work about the yards of defendant's car shops in the city of Huntington, and, at the time of his injury, he and four other boys were engaged in hauling a truck load of iron angle bars from a certain place in defendant's grounds to the shops. The angle bars weighed about 75 pounds according to plaintiff's testimony; were about nine feet in length, by about five-sixteenths of an inch thick; they had the form of a half open book, and, if flattened out, would be about eight inches wide. They could be easily loaded upon the truck by two boys, one lifting at either end of the bar. The truck on which they were loaded was not over 21 inches high, was flat on top, and was drawn by a horse upon tracks laid throughout the yards for that purpose. The angle bars had been hauled to the defendant's yards on the railroad, and thrown off in a pile, to be thereafter carried upon the truck to any point about the yard, or buildings, where they might be needed in the manufacture of cars. Plaintiff had been working for defendant only four days; and, at the time of his injury, he and four other

boys had been ordered by defendant's foreman to load the angle bars on the truck, and to take them to one of the shops. Plaintiff testifies that after they had put on what they thought was a sufficient load the foreman, Mr. Chalmer, told them to put on all that were in the pile, and that they then loaded on the balance of the pile, about 50 more bars; that this made too much of a load for the horse, and that they were then told by the foreman to push on the truck to assist the horse, and did so; that plaintiff was pushing at one side of the truck when they came to a curve in the track which made the car harder to pull; that the horse gave a sudden jerk which jostled the load and caused some of the angle bars to fall and catch his left hand, severely mashing and lacerating it and cutting off the ends of two of his fingers.

The negligent acts complained of are: (1) That defendant did not provide a proper, safe, and suitable track on which to operate its truck, nor a reasonably safe and suitable truck; that the track was uneven, being lower on one side than on the other, and that the truck was not provided with suitable standards or sideboards. (2) That it did not use proper care in the selection of a foreman of its work, but negligently employed a reckless and incompetent foreman. (3) That it did not use sufficient motive power to draw the truck, that the horse had not the strength to draw it evenly and smoothly when loaded.

As to the first negligence complained of: It appears from the testimony of Bradford Burns, one of plaintiff's witnesses, that there was a sharp curve in the track, and at this place the track was not level; the inner rail being about one inch the lower. The plaintiff himself, when asked what made the iron fall, answered: "The horse jerked it [meaning the car] on that curve." The fact that the outer rail of the track at the curve was higher than the inner one by about an inch does not show negligence in its construction. The testimony of Bradford Burns is the only proof offered by plaintiff to show that the track was not in a proper condition, and it does not prove it. Moreover, it is proven that plaintiff had hauled other kinds of iron over the track before the accident, and therefore it must be presumed that he knew its condition; and, knowing the condition of the track, he assumed the risk.

[1] It is admitted that there were no standards, or sideboards, on the truck; and there is conflict in the testimony as to whether the truck was constructed with a view to such appliances. But, assuming that it was provided with a place for standards, and that defendant failed to supply them, that is not such an act of negligence as would make defendant liable for the injury which happened to plaintiff. Plaintiff could foresee

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the consequences liable to follow from piling the angle bars on the truck, without standards to support them, as well as any one else. He assisted in loading the truck, and had as good an opportunity to know whether the angle bars were piled too high to be safely hauled without standards as any one else had. We must presume that he possessed ordinary intelligence, and such intelligence is all that was necessary to enable him to anticipate and to guard against any danger from the angle bars rolling down upon him.

[2] The danger was so obvious and patent that he must be held to have assumed the risk as one incidental to his employment. To say that he could not have foreseen the danger would be to charge him with an unusual degree of ignorance. If plaintiff saw that standards were intended to be used on the truck, and undertook to use it without them, he assumed the risk. 1 Labatt on Master & Servant, § 265. This court said: "A servant having knowledge of danger to himself must use diligence and care to protect himself from harm." Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999.

[8] The only evidence tending to prove that defendant was negligent in not providing a competent foreman is that the foreman ordered plaintiff and his collaborators to put on all the angle bars in the pile, after they thought the truck had been sufficiently loaded. Granting that it was an error of judgment in the foreman to give this order, still it is not sufficient to prove negligence by defendant in employing him. But even if it had been proven that the foreman was not competent, and that defendant knew it, or should have known it by the exercise of reasonable diligence, still it was necessary to prove that his incompetency was the proximate cause of the injury, and this plaintiff has not done. Core v. Railroad Co., 38 W. Va. 456, 18 S. E. 596; Bailey's Master's Liability, 70. The consequences liable to follow from the overloading of the truck, and then undertaking to push against it to help the horse, were as well known to plaintiff as they were to the foreman; and, if plaintiff thought it was dangerous to obey these orders of the foreman, he was not compelled to do so; in obeying the orders, he assumed the risk of known dangers. 1 Labatt on Master and Servant, § 442. The foregoing argument also applies to show that plaintiff assumed the risk of such accidents as were likely to follow from the use of a horse to draw the truck.

The direct and proximate cause of plaintiff's injury was the piling of too many angle bars on the truck, and then undertaking to push it after it was heavily loaded, and taking a dangerous position by the side of the truck, where the iron in falling would fall upon him. These were plaintiff's own acts; everything which contributed to his injury

was open and visible, and, according to the evidence now before us, he must be regarded as being fully cognizant, at the time, of all accidents likely to result from the use of the means and appliances employed in the work at which he was engaged, and to have assumed the risk of such accidents. The means and appliances, according to the evidence, were all reasonably safe; the injury resulted from plaintiff's own lack of proper care.

[4] The master is not an insurer of his servants against injury; and "the mere fact of injury received by a servant raises no presumption of negligence on the part of the master." Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999; Richards v. Iron Works, 56 W. Va. 526, 49 S. E. 437.

Plaintiff's work was easy, and the instrumentalities used—a truck to be drawn upon tracks by a horse—were of the simplest kind, and plaintiff must be held to have assumed the risk of the accident which resulted in his injury; it was an incident of his employment. He has failed to prove even a prima facie case of negligence against defendant. In view of what we have said, it was error to refuse defendant's peremptory instruction to find in favor of defendant.

It was not error to refuse defendant's instructions Nos. 7 and 8, because they relate to the failure to warn against danger; and it is not averred in the declaration that defendant was negligent in failing to warn plaintiff of the danger incident to the work at which he was engaged. True there is some evidence in the case tending to prove that defendant's foreman had told plaintiff not to push at the side of the loaded truck, but this evidence was wholly irrelevant, inasmuch as the declaration does not aver that defendant was negligent in that regard. In view of the want of such an averment in the declaration, instruction No. 8 becomes a question of abstract law, and it was not error to refuse it.

The judgment of the lower court will be reversed, the verdict set aside, and, in view of the fact that we are unable to see that plaintiff may not be able to make out a better case on another trial, we will remand the case for a new trial.

(69 W. Va. 383)

NATIONAL BANK OF WESTON v. LYNCH
et al.

(Supreme Court of Appeals of West Virginia.
May 9, 1911.)

(Syllabus by the Court.)

1. PLEADING (§ 246*)—AMENDMENT OF DECLARATION.

A declaration may be amended, in form, or in substance, so long as the identity of the cause of action is preserved.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 676-683; Dec. Dig. § 246.*]

2. JURY (§ 12*)—RIGHT TO JURY TRIAL—USURY AS TO DEFENSE.

The right to plead usury, and to have the issue thereon tried by a jury, as provided by section 6, chapter 96, Code 1906, is a substantive right, of which a defendant can not be deprived.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 12.*]

3. BANKS AND BANKING (§ 270*)—NATIONAL BANKS—USURY—RIGHTS OF MAKER OF NOTE.

In an action by a National Bank against the maker of a note, defendant has the right, by sections 5197 and 5198, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3493) to reduce the amount of the recovery by the amount of usurious interest which the note bears on its face, or which is included and carried therein; but he can not off set usurious interest actually paid; his remedy for illegal interest actually paid being by action under said section 5198, to recover back twice the amount actually paid.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1023-1053; Dec. Dig. § 270.*]

Error to Circuit Court, Gilmer County.

Action by the National Bank of Weston against Thursey M. Lynch and others. Judgment for plaintiff, and defendant Thursey M. Lynch brings error. Reversed and remanded.

Charles E. Hogg, for plaintiff in error.
Robert L. Bland, for defendant in error.

MILLER, J. [1] The first point of error is, that the court below permitted plaintiff to amend its declaration, charging the note sued on to be the joint note of defendants, instead of joint and several, as charged in the original declaration. The only case cited for this proposition is, *Postmaster General v. Ridgway*, Fed. Cas. No. 11,313. In that case plaintiff had declared against one obligor alone as jointly and severally bound. The plea was *non est factum*. The bond offered on the trial was the joint bond of defendant and another. On objection, on account of variance, the court in its opinion says: "It is no doubt true that amendments may be made, not only in form but even in substance. But surely the court is not to be put to sea; nor is this privilege to be so construed as to introduce suddenly, and on the trial, new parties and a new cause of action." This was the real point in the case. No authority is cited for the court's conclusion. The amendment made in the case at bar was not in the midst of the trial, but before trial, by amended declaration, regularly filed, and process thereon, and regularly matured at rules. The cause of action was the same, not a new and different cause of action from that alleged in the original declaration. Besides our statute, section 8, chapter 131, Code 1906, authorizes such amendments, even in the midst of the trial. The authority of the court to permit amendments exists independently of statute. *Travis v. Peabody Ins. Co.*, 28 W. Va. 583. Allegations may be

changed and others added, so long as the identity of the cause of action is preserved. *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700; *Hanson v. Blake*, 63 W. Va. 560, 60 S. E. 589. Other cases justifying the amendment are, *Gilchrist v. Oil Co.*, 21 W. Va. 115, 45 Am. Rep. 555; *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26. The point of error is overruled.

[2] The next point is that the court below rejected defendants' plea of usury. The plea tendered was in general terms, such as is provided for by section 6, chapter 96, Code 1906. The statute says defendant may plead such plea, a substantial right, we think, given by law, and of which a defendant, if not otherwise precluded, can not be deprived. Upon the filing of such plea this statute requires the court to direct a special issue to try three things: (1) Whether or not, the contract, assurance or other writing is usurious; (2) if so, to what extent; (3) whether or not the interest has been paid on such contract, assurance or other writing, above six per cent, and if so, to what extent. It is further provided that if the verdict upon the plea of usury be for the defendant, judgment shall be rendered for the plaintiff for the principal sum due, with interest at the rate of six per cent per annum, and if any interest has been paid above the rate of six per cent per annum, the excess over and above that rate shall be entered as a credit on the sum due, and if nothing be found due after applying all credits, and all excessive interest, judgment shall be entered for the defendant.

We think, a defendant, if he so elects, has the right to file this plea of usury, and have the issues thereon tried, without interposing any other plea to the action. In the case at bar, however, the action being debt, defendants were permitted to demur to the declaration, and to file a general plea of nil debet, in writing, without counter affidavit filed, and without objection on that ground, but their plea of usury was rejected. It is suggested in brief of defendants' counsel that the court below may have rejected this plea for want of a counter affidavit; if so, it is argued, the affidavit of the plaintiff accompanying the declaration, does not appear to have been filed at rules, or by any order of the court, so as to cut off defendants' plea. The point we think immaterial, for whether or not plaintiff's affidavit was filed, the plea of nil debet, a plea to issue, entered without objection, operated as a waiver by the plaintiff of its right to require a counter affidavit and to set aside the office judgment, and admit the pleas. *Williamson & Co. v. Nigh*, 58 W. Va. 629, 53 S. E. 124; *Parfitt v. Sterling Veneer and Basket Co.*, 69 S. E. 985, 992. The judgment below rejecting this plea we think was clearly er-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

aneous. The plea should have been received, and the issue, as the statute provides, directed and tried by the jury. The right given by the federal statute does not supersede the right given by the state statute.

[3] The briefs and arguments of counsel, however, are mainly devoted to the question whether defendants have the right, as against plaintiff, a national bank, to cut down recovery on the note sued on, to the extent of the usurious interest charged or borne by the note. Such rights as the defendants have are given by sections 5197 and 5198, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3493). It seems to be settled law that a defendant cannot offset against principal, usurious interest actually paid by him; that his only remedy for illegal interest actually paid is the right given by the statute to recover back twice the amount so paid, the penalty prescribed by section 5198, for the unlawful taking of usurious interest. *Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Bank v. Boylen*, 26 W. Va. 554, 53 Am. Rep. 113; *Lynch v. Bank*, 22 W. Va. 554, 53 Am. Rep. 113; *Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153, and cases cited.

It is earnestly insisted, however, that although the note sued on does not bear on its face a usurious rate of interest, or in fact any interest, nevertheless, there is included in the note usurious interest, not paid, but agreed to be paid, and that, within the meaning of said section 5198, it carries with it usurious interest, not recoverable as principal, in said action; and that defendants' general plea of usury, under the state statute, fairly presents this issue, and was improperly rejected on that ground. As we have already concluded the judgment must be reversed for rejecting this plea, we need not, and do not, decide the question, whether it is good as a plea under the federal statute. In *National Bank v. Lewis*, 75 N. Y. 516, 31 Am. Rep. 484, defendant seems to have combined his defenses under state and federal statutes, in the same plea. In *Bolles on the National Bank Act* (4th Ed.) page 264, referring to this case, and to *National Bank v. Orcutt*, 48 Barb. (N. Y.) 256, 257, and other cases, strongly indicates that the plea under the federal statute must be specific; while in *Bank v. Littell*, 46 N. J. Law. 507, the court holds that if the maker of a note is entitled to set up the usurious interest contract between plaintiff and the endorser, it is not necessary to plead the federal statute specially, but that he may avail himself of it under the general issue. In *Brown v. Bank*, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. Ed. 801, Justice Harlan says: "No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture

clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which has been agreed to be paid." But as we have said we do not decide the question of pleading; for the benefit of court and counsel on another trial, we refer to the authorities found on the subject.

Returning to the main question, may a defendant, where the note, on its face, or in fact carries usurious interest, interpose the plea of usury, and thereby reduce recovery by the amount of the usurious interest carried in the note? The law seems to be well settled that he may do so. *Brown v. Bank*, supra; *Danforth v. National State Bank*, 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622; *Bank v. Stauffer* (C. C.) 1 Fed. 187; *Bank v. Bradford*, supra; *Bank v. Hoagland* (C. C.) 7 Fed. 159; *Shafer v. Bank*, 53 Kan. 614, 36 Pac. 998; *Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925; *McGhee v. Bank*, 40 Neb. 92, 58 N. W. 537; *Hall v. Bank*, 30 Neb. 99, 46 N. W. 151. If, however, the usurious interest has in fact been paid his only remedy is by action to recover it back; he can not off set it against the principal of the note.

For the reasons above given the judgment below will be reversed and a new trial awarded.

(69 W. Va. 380)

J. W. ELLISON, SON & CO. v. FLAT TOP GROCERY CO.

(Supreme Court of Appeals of West Virginia.
May 9, 1911.)

(Syllabus by the Court.)

1. SALES (§ 119*)—DEFECT IN QUALITY—RIGHT TO RESCIND.

In case of a contract for the sale of 200 car loads of hay of given quality to be delivered and paid for in monthly installments of 17 car loads running through a year, the purchaser generally has no right, after the contract has been partly executed, to rescind for defect of quality of some of the hay, but must recoup from the purchase money or sue for damages for such breach.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 293; Dec. Dig. § 119.*]

2. SALES (§ 116*)—CONTRACT—BREACH—RIGHT TO RESCIND.

Where a purchaser of chattels has right to rescind the contract for breach of it, the breach must be in a material matter.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 290; Dec. Dig. § 116.*]

Error from Circuit Court, Mercer County. Action by J. W. Ellison, Son & Co. against the Flat Top Grocery Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ritz & Ritz, for plaintiff in error. Sanders & Crockett, for defendant in error.

BRANNON, J. J. W. Ellison, Son & Co. and the Flat Top Grocery Company, both corporations, made a written contract by which the Ellison Company sold to the Flat Top Company 200 car loads of hay, 180 of which were to be No. 1 timothy, and 20 No. 1 mixed; the hay to be good. The contract contained the clause: "The party of the first part agrees to take the full amount of hay within twelve (12) months, commencing October 1st, 1907, said shipment to be made at the rate of seventeen cars per month, which shipment is to be made on regular terms, payable ten days from date of shipment." The hay was to be shipped as ordered by the purchaser. The Ellison Company began shipment of hay September 10, 1907, and continued these shipments until late in June, 1908, when the Flat Top Company refused to receive any further shipments on the ground that the contract had been broken by the plaintiff by reason of the fact that some of the hay was of inferior quality. Under this contract 123 car loads of hay had been then shipped; there remaining to be shipped 77 car loads when the Flat Top Company rescinded the contract. Of the hay shipped some was inferior. Up to the 1st of February, 1908, there were shipped 55 cars, and from that date to the cancellation of the contract by the Flat Top Company 68 cars. The Flat Top Company paid for the 123 cars of hay. From time to time during the delivery of such cars, nine cars contained some bad hay. Complaint was made by the Flat Top Company of this bad hay, and the parties met, and the Flat Top Company was allowed a rebate, and that matter was adjusted to the satisfaction of both parties, and the delivery of hay was continued. Eight of the cars containing bad hay were shipped before February 1, 1908, and the other one in March. In June, 1908, two cars contained some bad hay. One of these cars, however, need not be considered, as it was accepted by the purchaser from the Flat Top Company. It seems not in question. As to the other car the Ellison Company took it back on complaint being made. And on complaint about these two cars the Ellison Company offered to take them both back and replace them with good hay; but the Flat Top Company refused this proposition and canceled the contract, and then the Ellison Company brought the suit we have in hand against the Flat Top Company to recover damages for the breach of the contract, and recovered a verdict against the Flat Top Company for \$4,463.40, and the court refused a new trial and rendered judgment therefor.

[1] A question has been much debated between counsel as to whether this contract is one deemed an entire or a severable contract, in the language of the courts and law books. Is it such a contract, an entire contract, as would authorize the purchaser of the hay, at any point during the process of

delivery, to cancel the contract for the delivery of some bad hay, without liability to damages for breach? Or is it a severable contract denying such power of cancellation and compelling the purchaser to execute it and look to the seller for compensation in damages for bad hay delivered? I remark that each contract must stand upon its nature and circumstances. Upon this question there is a wilderness of authority through many, many years, and conflicting. Here is a contract not to deliver a single specific thing at one time. Here is a contract of present sale of chattels to be delivered in future by installments covering a considerable time, not to be executed by one single delivery. We have to take the contract that is in our hands. Can the Flat Top Company receive 123 car loads of hay, and then cancel the contract, leave the undelivered hay on the hands of the Ellison Company, and be immune from damages? "A contract for property to be delivered in installments, where each installment is to be paid for separately, is not entire. The vendor will be entitled to recover for any delivered installment, irrespective of default in the delivery of others. In contracts for the future delivery of goods, to be subsequently or concurrently paid for, the delivery being a condition on the performance of which the right to payment depends, if the contract is entire there must be a delivery of the whole to fulfill the condition. But where delivery is to be made in parcels or installments, severable not only in bulk but prices and times of delivery, the delivery of each parcel is a condition only to payment *pro tanto*. Nor will a default in respect to one severable part entitle the other party to rescind, unless there is then a renunciation of the entire contract, persisted in afterwards." Sutherland on Damages, vol. 3, pp. 1851, 1852. "A contract to deliver 50,000 tons of coal in a year, at the rate of 6,000 tons a month, at the buyer's option, upon monthly notice of the quantity required for the next month, is severable, and where the contract has been partly performed, and the portion delivered has been paid for and consumed, but a portion of the coal so delivered and consumed was of inferior quality to that demanded by the contract, no right to rescind the contract is raised, but in an action by the vendor for a breach of the contract the defendant may set off his damages by reason of such substitution." *Scott v. Kittanning Coal Co.*, 89 Pa. 231, 33 Am. Rep. 753. "Where A. contracts to cut and deliver at B's mill a million feet of merchantable logs within the year, at an agreed sum per thousand feet, to be scaled and received as each 100,000 feet are placed in a certain creek, the contract is divisible and not entire." *Tenny v. Mulvaney*, 8 Or. 129.

We find in Benjamin on Sales, 579, the following: "In *Simpson v. Crippen*, the defend-

ant had agreed to supply the plaintiff with 6,000 to 8,000 tons of coal, to be delivered in the plaintiff's wagons at the defendant's colliery 'in equal monthly quantities during the period of twelve months from the first of July next.' During the first month, July, the plaintiff sent wagons for 158 tons only and on the 1st of August the defendants wrote that the contract was canceled on account of the plaintiff's failure to send for the full monthly quantity in the preceding month. The plaintiff refused to allow the contract to be canceled, and the action was brought on the defendants' refusal to go on with it. Held that, although the plaintiff had committed a breach of contract by failing to send wagons in sufficient number the first month, the breach was a good ground for compensation, but did not justify the defendants in rescinding the contract, under the rule established by *Pordage v. Cole*. Two of the judges (*Blackburn and Lush, JJ.*) declared that they could not understand *Hoare v. Rennie*, and declined to follow it." We find in 9 Cyc. 648, the following: "Where the installments are numerous, extending over a considerable period, a default either of delivery or payment would not appear to discharge the contract, although it must necessarily give rise for an action for damages." In *Blackburn v. Riley*, 47 N. J. Law, 290, 1 Atl. 27, 54 Am. Rep. 159, it is held: "On a contract for sales of goods by successive deliveries and payments, a default in respect to one or more will not discharge the other party unless it is evident that the defaulting party intends no longer to fulfill." In *Geril v. Poidebard Co.*, 57 N. J. Law, 482, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611, it is held: "Upon a sale of goods delivered in installments there is no right of rescission by the purchaser for a failure to deliver one of the installments, unless the seller, by his conduct, indicates his intention to abandon the contract, or a desire no longer to be bound by its terms. Hence, under a contract to sell 30 bales of silk, to be delivered in specific installments, at times designated, the failure or inability of the seller to deliver the first installment at the time agreed upon does not release the purchaser from the whole contract. He remains under obligation to receive the other installments when tendered to him, if the usefulness to him of any installment did not depend on prompt delivery of the prior installments, and full indemnity for the failure to deliver the first installment could be secured by action based thereon." "Where there was a contract for the purchase of a cargo of flour, and a portion of it was delivered, paid for, and used by the purchaser, he cannot repudiate the contract, upon the ground that the brand upon the flour was not that for which he contracted." *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847. The court also said: "When an article is warranted and the warranty is not complied with, a purchaser who has re-

ceived and paid for and used a portion of the article, and derived a benefit from it, cannot then rescind the contract. He may receive it and bring a cross-action for the breach of warranty."

Much more authority in this line could be given. See *Huyett & Smith Co. v. Chicago Edison Co.*, 167 Ill. 233, 47 N. E. 384, 59 Am. St. Rep. 279, for full authority. Of course, authorities contra could also be given. We think that those authorities are apt in the case we have in hand, defect in quality. It might be different for failure of the purchaser in payment. It might be different on failure to deliver on time when time is material under the circumstances. But we have a case where, after a large part of the contract had been executed, the purchaser rescinds for defect in quality to a limited extent of hay. I would say that the contract in such a case is severable, and that the purchaser cannot abruptly cancel the contract, but must look to damages. Great stress is placed by the defense on the case of *Norington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 308. There was a failure to deliver iron rails at a certain stipulated time and failure in quantity of shipment, and the court held that the purchaser could rescind. They were first deliveries. That case is different. The seller failed to ship the first shipments—I say the first shipments, a material matter—at the time stipulated, and, as soon as the purchaser learned that the quantity to be shipped had not been shipped, he canceled the contract. Time was the essence there. The opinion says so, and Justice Gray said: "Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February." *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372, differs from this case. There was a failure to ship the pig iron from Glasgow to New Orleans. And the court held that shipment from Glasgow was a material part of the contract, and that the buyer could refuse to accept iron shipped from Leith arriving at New Orleans earlier than it would have arrived if shipped from Glasgow. Here was premature delivery. Many of the authorities, as will be seen in *Williston on Sales*, § 467, say that the purchaser may rescind if the circumstances show an intent or inability on the part of the seller not to complete his contract. He says the late English authorities so hold; that is, they deny the right of rescission, and require the party to look to damages, unless such intention to abandon the contract by the party who should perform it appears. So says 7 Am. & Eng. Ency. L. 150. But in this case the Ellison Company was ready, willing, and able to complete its contract and begged, but was refused, leave to do so. Thus amid conflicting authority, on

this case as it is, for each must stand on its own facts, I would hold that there would be no right of rescission, but the purchaser must allow the contract to be completed and sue for damages for defect in quality of the hay delivered.

There is another view against the defendant. It had received 123 car loads. Its repudiation of the contract would leave 77 car loads on the hands of the plaintiff, which must be supposed to have made purchases of farmers and bound itself in order to be able to comply with its contract with the Flat Top Company. Could that right be exercised when the Flat Top Company had received more than half the hay and could not return it, could not place the Ellison Company in statu quo? The fact that it could not do so is an argument against the right of rescission. When one party can make the other whole, it is often different. "The contract must be rescinded in toto; cannot be rescinded in part and affirmed in part." Clark on Contracts, 350. A contract must be wholly rescinded, or not at all, is said in *Buskirk v. Peck*, 57 W. Va. 372, 50 S. E. 432. *Manns-Bruning Co. v. Prince*, 51 W. Va. 510, 41 S. E. 907, to same effect. As is said in note to 30 L. R. A. at page 72: "And the court held that in case of a failure to comply with the contract in reference to the first shipment the purchaser might refuse to accept and rescind the contract, but this might not be so if the breach was in a subsequent shipment, since then the seller could not be put in statu quo." In *Kauffman v. Baeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247, a Circuit Court of Appeals held: "Where one party to a contract has received and retained the benefits of a substantial partial performance thereof by the other party, he cannot rescind it, but the contract must stand, he must perform his part of it, and his remedy for the breach of complete performance by the other party is limited to compensation therefor in damages. A breach of an independent covenant, a covenant which does not go to the whole consideration of a contract, but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, or warrant its rescission by the injured party. The latter is still bound to perform his part of the contract, and his remedy for the breach is compensation in damages."

But, be the above holding as it may, the decision of this case is not alone governed by it. And why? Because there was no *substantial breach* of the contract by the Ellison Company. There was only one car having bad hay in it that was made the basis of the repudiation of the contract by the Flat Top Company. The nine cars that contained bad hay had been arranged. The parties were satisfied by mutual agreement for abatement as to them. Thereafter there was only one car containing some bad hay. It would seem unjust that this small item should al-

low the purchaser to annul the contract and leave 77 car loads of hay on the hands of the seller, and make it suffer a loss by having to hunt another purchaser, and sell it at a loss, as the evidence shows that, when the defendant canceled the contract, hay was falling and materially fell in price. This repudiation of the contract did not take place at the opening of its execution by the Ellison Company. It might well happen that, in so large a quantity of hay having to be gathered here and there from farmers, there would be some bad hay. The Flat Top Company so regarded it because it allowed the Ellison Company to atone for nine car loads of bad hay by a rebate therefor. It did not then regard this so material a matter. Why did it not then treat defect in the nine car loads of hay as ground for cancellation? It did not do so, but allowed the Ellison Company to go on under the contract, and months later the Flat Top Company repudiated the contract for some bad hay in *one* car load. Now, what does the law say even in those cases of contracts where the right of rescission exists for breach? I quote from *Williston on Sales*, § 467: "Accordingly the general rule governing bilateral contracts must be applied. If either buyer or seller, therefore, has committed a *material* breach of contract, or has by repudiation manifested an intention to commit such a breach, the other party should be excused from the obligation to perform further. If, however, the injured party knowingly accepts defective performance of the contract, or accepts further performance after he is aware that a breach of contract has been committed, such conduct will operate as a waiver of his right to refuse to go on with the contract, though not necessarily of his right to recover damages for the breach committed by the other party. These principles are reasonably well settled in regard to contracts generally, and should furnish a sufficient guide in regard to installment contracts; but, unfortunately, the English courts, though at first seeming to accept these views, in later decisions seem to deny the injured party the right to refuse to continue performance irrespective of the materiality of the breach, unless the breach or some act or conduct of the wrongdoer 'amounts to an intimation of an intention to abandon and altogether to refuse performance of the contract.'" I quote from 24 Am. & Eng. Ency. L. 644: "Generally the failure of performance, in order to constitute a ground for rescission, must be total; such as to defeat the object of the contract or render it unattainable. The right to rescission does not exist where there had been a substantial though not literally a complete performance."

[2] Under this authority, I ask: Did this failure as to one car deprive the Flat Top Company of the benefit of the contract? Was it not sure that it could and would get for the balance good hay? It had gotten good

hay up to the date of its repudiation of the contract. The contract had been so far made good to it, and it had every reason to be sure that the balance of the contract would be properly executed. It would lose nothing, suffer no detriment. But, aside from that, there was no material or substantial breach. The Ellison Company had furnished 123 cars, and could and would furnish the balance, and it would be most unreasonable to say that this small failure as to one car should break the contract. Williston says, in section 467, that: "As a matter of theory the excuse of an innocent promisor in a contract should depend on whether he will receive, if he goes on with the contract, substantially what he bargained for. If he will not receive substantially what he bargained for, he ought not to be required to perform the contract." His text makes the right to rescind, even if that right exists, dependent on the materiality of the omission.

The plaintiff's two instructions complained of were consistent with the legal principles above stated, and we see no error in them. As they are long, and as the legal principles are above stated, and the case will not go back for trial, we need not insert them.

The defendant's instructions Nos. 1, 2, 3, 4, and 9 are based on the right of rescission in this case and are not good according to the principles above stated. We need not insert them at length, as the legal principles have been stated. They are of great length.

The defendant's instruction No. 5 would have told the jury that, if the hay already shipped did not comply with the terms of the written contract, and the plaintiff had notice thereof, the defendant had right to presume that the 77 car loads thereafter to be shipped were of the same kind as those previously shipped, and it had a right to cancel the contract. In the first place, the bulk of the hay that had been shipped was good, and as to that that was bad it had been adjusted, and thus far the instruction did not suit the case; but, further, the fact that there had been some bad hay shipped would not justify the defendant in assuming that more would be shipped, especially as the parties had agreed as to the bad hay that had been shipped, and the subsequent shipments and the eagerness of the Ellison Company to comply with the contract as to quality would justify the inference that bad hay would not be shipped; anyhow, it would not justify the mere assumption that the contract would in future be violated. The defendant could not anticipate this.

The defendant's instruction No. 6 says that if the jury believe from the evidence that part of the hay shipped was not of the quality required, and that the hay which the Ellison Company had for shipping upon the remainder of the contract was of inferior quality, then the defendant had right to cancel the contract. Now, there was a great deal of evidence to show to the contrary. There was

no evidence to justify the theory that the hay thereafter to be shipped was bad. The instruction was not apt to the evidence, and only tended to mislead from the justice of the case. The justice of the case did not demand it. Besides that, an instruction of the plaintiff, No. 2, told the jury that the hay thereafter to be furnished must be such as the contract required.

The defense claims that an instruction for the plaintiff would allow as a measure of damages a recovery on 77 car loads of hay the difference between the contract price and the market price at the dates of delivery, and that for the month of September, 1907, only 4 cars were shipped when 17 should have been, and in October, when 17 cars should have been shipped, only 7 were shipped, making 23 cars shortage in those months, and that these failures were attributable to inability to get cars except in two instances. Now, in the first place, for the month of September only one car load was demanded by the contract and four were delivered. In the next place, the contract excuses for inability to get cars. In the next place, it is clearly proven that the defendant failed to give orders for shipment in several instances, though requested to do so. Counsel for defendant say that, as the defendant did not give shipping instructions for as many as 17 cars in several months, and 28 cars were behind at the time of the cancellation, the plaintiff, by continuing to ship after such failure of shipping orders, waived its right to require the defendant to take the cars which should have been but were not ordered during each month, and that the instructions for the plaintiff to the extent that they make no allowance for these cars are erroneous to the extent that the failure to ship these cars was due to the omission to give orders for them. We do not see that there is any strength in this. The reason why these 28 cars were not shipped in those months was the failure of the defendant to give orders for them. This is not disputed. Is this a claim for damages by recoupment or failure to ship in those months? If so, no notice was given of it. But, at any rate, orders were not given for shipment of those 28 cars at the time stipulated. No fault is found with the principle laid down by the court as to the measure of damages, in a general sense.

The defendant complains that witness Ellison was asked if the plaintiff had sold the 77 car loads of hay which it had on hand for delivery to the defendant as No. 1 timothy and No. 1 mixed hay, and was allowed to answer that it had been sold as No. 1 hay. Now, the plaintiff had right to show that those 77 cars were good hay; and we fail to see that evidence of their sale as No. 1 in the market would be inadmissible. Counsel for defendant say that such sale was *res inter alios acta*; that is, a transaction to which the defendant was not a party and not bound. But we think that such sale in the

open market was a circumstance tending to show that the hay was good, as the plaintiff had right to show, though not called upon to show it, perhaps.

The same may be said as to the evidence of witness Hoge.

An assignment of error is as to witness Larrick in allowing him to say that he attempted to purchase some of the hay delivered to the Flat Top Company as No. 1 hay. This only went to prove—was only a mode of proving—that this hay was of good quality as called for by the contract. Surely there can be no solid objection to this.

The main point in this case is as to the right of rescission under the contract. These other matters touching the measure of damages and the evidence of Ellison, Hoge, and Larrick are inconsequential, cutting no important figure in this case, surely not ground for reversing a fair trial on the merits of the case doing justice. People contracting ought to live up to their contracts. It would surely be contrary to justice and law to allow the Flat Top Company, after this contract had been largely executed, with honest intent on the part of the Ellison Company to honestly execute it, to break it off for some bad hay in 1 car out of 200, especially when the Ellison Company asked pardon and took that car back and offered to replace it with another car of good hay. Counsel for the defendant do not base the right of rescission on anything but the presence of some bad hay in that one single car. The case leads us to say that there was no substantial breach of the contract on the part of the Ellison Company, and that the fact that hay was falling greatly in price was the inducement to the Flat Top Company to repudiate the contract, and not the breach of it by the Ellison Company.

We affirm the judgment of the circuit court.

(99 W. Va. 337)

KERFOOT v. DANDRIDGE et al.

(Supreme Court of Appeals of West Virginia.
May 9, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 870*)—REVIEW—INTERLOCUTORY DECREE—FINAL APPEAL.

A decree, prematurely entered, pending exceptions to a commissioner's report undisposed of, and which does not finally adjudicate the controversies between the parties to the cause is interlocutory, and not appealable, and a subsequent decree disposing of such exceptions, and finally adjudicating all matters in controversy, brings with it, for review on appeal, all errors in the former decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3487-3512; Dec. Dig. § 870.*]

Appeal from Circuit Court, Jefferson County.

Appeal by John P. Kerfoot, as trustee,

against A. S. Dandridge and others. Decree for plaintiff, and Hugh A. White, executor, and others, appeal. Affirmed.

Brown & Brown and Beckwith & Bushong, for appellants. Beltzhoover & Beltzhoover, for appellees devisees of Craven Trussell.

MILLER, J. This is a second appeal in this cause; the first was by Serena C. Dandridge, from a decree of March 9, 1898; opinion reported in 45 W. Va. 673, 31 S. E. 947. The present appeal is by Hugh S. White, executor of Blackburn Hughes, deceased, and J. W. Gardner, committee administrator of said Serena C. Dandridge, deceased, from a decree of October 29, 1907.

The decree now before us brought the cause on for hearing on the reports and supplemental report of the commissioner, to whom the cause had been referred, to state and settle the accounts in accordance with the decree and mandate of this court on the former appeal. Sundry exceptions to said reports, by Craven Trussell's executor, were sustained, because of errors therein, and because said reports, in the opinion of the court, did not "trace the full disposition of the fund so as to enable the court to arrive at a correct conclusion and disposition of the case." Without, however, committing the cause to the commissioner, the court, of its own motion, adopted and filed, in lieu of a report by a commissioner, a "Detailed Statement," made by counsel for the heirs at law of said Craven Trussell, deceased. Finding from this statement that there was due Sarah P. Hughes, deceased, the sum of seven hundred and twenty-eight dollars and twenty-nine cents, and that said Serena C. Dandridge, to whom, by decree of May 18, 1901, the last distribution had been made, had been overpaid seven hundred and five dollars, it was decreed that Hugh S. White, executor of Blackburn Hughes, deceased, sole distributee of said Sarah P. Hughes, deceased, recover of J. W. Gardner, sheriff, committee, and administrator of said Serena C. Dandridge, deceased, the sum so overpaid her, to be credited on the sum so found due said Sarah P. Hughes, leaving a balance due her of ninety three dollars and twenty-nine cents, and that said White, executor, should recover from each of the five several heirs of said Craven Trussell, deceased, to whose executors, by decree of December 2, 1903, the last preceding distribution had been made, the sum of eighteen dollars and sixty-six cents, to make up said balance.

The first point of error relied on by counsel for the estate of Serena C. Dandridge is, that the decree appealed from deprives that estate of the benefits of a decree adjudicating the rights of decedent, of May 28, 1901. The latter decree, although it brought the cause on to be heard on the reports of said Green, commissioner, and the several excep-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tions thereto, sustained by the decree now before us, in terms reserved the questions presented by said exceptions; but finding "from the orders entered in the cause and from the reports of the special commissioner of sale, showing the amount of moneys that have come into the cause," that there was due said Serena C. Dandridge "from the fund in the cause an amount greatly in excess of her purchase money bond," then held by special commissioner Trapnell, dated October 13, 1891, for seven hundred and ninety three dollars and ninety-four cents, it was thereby decreed, that said special commissioner "do cancel said bond, and deliver the same," to her or her attorneys, and that he also "execute and deliver" to her "a deed for the land purchased by her in this cause."

By the same decree the cause was "again referred to commissioner T. C. Green," and who was directed thereby to report: First, the amount due Hugh S. White, executor of Blackburn Hughes, deceased, sole distributee of said Sarah P. Hughes, deceased, after charging her interest with all debts chargeable thereto; second, the amount of the payments, with interest on the same, on account of the interest of A. S. Dandridge, Jr., and L. P. Dandridge, in excess of their share, and to whom such excessive payments were made; stating further such other matters as he might deem pertinent, or that any party should require.

That decree of May 28, 1901, was never appealed from. Was it final or appealable as to the matters adjudicated against the estate of Serena C. Dandridge, in the decree now before us? If so, the latter decree is erroneous, and should be reversed. That decree did find, not upon the reports of commissioner Green, and the pending exceptions thereto, but "from orders entered" and "reports of the special commissioner of sale" that there was then due Miss Dandridge from the fund in the cause an amount greatly in excess of her purchase money bond, and ordered her bond canceled and surrendered to her, and that a deed be made to her by the special commissioner. But the court did not find what amount was due her as distributee, nor undertake to finally adjust and settle the accounts between the distributees and creditors, and to which the exceptions to the reports of commissioner Green related. Some of these exceptions related particularly to errors and omissions in the account of Serena C. Dandridge, affecting seriously the rights of other distributees. True the decree does direct cancellation of her bond, and that a deed be made, but it recommends the cause to the commissioner, assuming perhaps, that after crediting her with her distributive share, and deducting debts for which she was liable, a balance would be due her as distributee. The sale to her had already been confirmed, and on

payment of all purchase money she was entitled to cancellation and surrender of her bond, and to a deed; but it appears from the decree that she in fact paid nothing on the bond cancelled, unless the court rightfully determined that she was entitled as distributee to an amount in excess of her bond. Whether she was or not, and how much, was a question, in part at least, left undecided by the decree. Besides the record then showed that all, or practically all, of the money had been distributed, except the balance due from Miss Dandridge on her bond, and that on a proper adjustment of the accounts between distributees a very considerable sum was due to the estate of Sarah P. Hughes, and that excessive payments had been made to some of the other distributees, or their credits. How can it be said then that this decree adjudicated or settled all matters in difference between the parties, or the principles thereof, controlling the court in the decree now under review? Could appellees have appealed from that decree? We do not think so; it did not finally dispose of their rights. In *Garrett v. Bradford*, 28 Grat. (Va.) 609, it was decided that a decree which overruled certain exceptions, and confirmed the report of a commissioner, as to the questions involved in those exceptions, but recommitted the report as to matters involved in other exceptions, was nevertheless a decree settling the principles of the cause as to the questions involved in the exceptions overruled and from which an appeal would lie. But Judge Snyder, in *Hoy v. Hughes*, 27 W. Va. 778, 783, referring to this decision says: "I am very doubtful whether such a decree would be considered appealable in this state." Citing *Laidley v. Kline*, 21 W. Va. 21. The decree in the latter case, did not differ materially from that in the *Virginia* case. It involved exceptions to a commissioner's report, overruled and sustained, and did not, we think, differ very materially in this respect from the decree we are considering, except that it contained no order of recommittal. Judge Snyder says of it: "This decree shows on its face that it does not adjudicate the principles of the entire cause nor is it otherwise such a decree as can be appealed from to this court. The record here shows no other decree in the cause, but it does show that a number of claims other than those of the appellants were reported by the commissioner, and as those claims were in no manner considered or passed upon by the court, and the commissioner's report not having been confirmed, the appeal must be dismissed as prematurely and improvidently awarded." In *Smith v. Evans*, 42 W. Va. 352, 26 S. E. 347, the point decided was, that a decree prematurely entered, pending a commissioner's report undisposed of, and which does not finally adjudicate the controversies between the parties to the cause, is interlocutory, and not appealable. Citing *Shirey*

v. Musgrave, 29 W. Va. 131, 11 S. E. 914; Hill v. Als, 27 W. Va. 215; Laidley v. Kline, supra; and Camden v. Haymond, 9 W. Va. 680. The decree in Smith v. Evans adjudged that the bill "in so far as it is to be regarded and taken as a creditors' bill, or as a bill for the specific performance of a contract is dismissed; but, on motion of plaintiff, the bill is retained as to the feature of advancements." This court regarded the bill neither a creditors' bill, nor one for specific performance, but one to ascertain and distribute the estate of a decedent, and held that the decree in no wise adjudicated the merits of the cause, but left the merits wholly unadjudicated. The case of Shirey v. Musgrave is a leading case; it reviews most of the prior decisions. A balance of purchase money different from that found by a commissioner was decreed against Musgrave, and each party was decreed to pay his own costs, the court declining to then act upon the commissioner's report, and reserving all other questions.

It was said of that decree, as it may be said of the decree now before us, that it is only necessary to understand the object of the suit, and the matter which it called upon the court to determine, to see that among the questions reserved, are some of the most important principles of the cause, and of course the decree is not appealable. The point of the syllabus applicable here is, that the statute authorizing an appeal, where there is a decree adjudicating the principles of the case, is available only where the decree appealed from adjudicates all questions raised in the cause by pleadings or otherwise. Other cases illustrating the application of the rule, and which we think justify our conclusion as to the decree of May 28, 1901, are referred to in the cases already cited.

It follows, that if that decree was not an appealable decree, the statute of limitations does not apply, and that, on principles announced in Keck v. Allender, 42 W. Va. 420, 26 S. E. 437, Smith v. Evans, and Laidley v. Kline, supra, the court below, regardless of that decree, had jurisdiction to finally adjust and adjudicate the accounts between the parties, and that all matters not finally adjudicated and disposed of by that decree are now before us for review on the present appeal.

This brings us to the consideration of the alleged errors in the decree of October 29, 1907. Was there error in the decree of May 28, 1901, which the court below could correct by that decree? Though relying on the conclusiveness of that decree, as to the status of the account of Miss Dandridge, counsel nevertheless insist there was no error in her favor therein, or prejudicial to the rights of the other distributees. On the contrary they insist that the record demonstrably shows that decree to have been clearly right. They undertake to show, by reference to particular items, errors and omissions in the reports

of commissioners, and dealt with in the present and in prior decrees, which, when readjusted according to their views, will show the status of the account of Miss Dandridge practically as recited in the decree of May 28, 1901, and said "Detailed Statement" correspondingly erroneous. Reference is first made to disbursements on account of the so called Porter debt; the first, by decree of December 4, 1883, of \$1,822.00; the second, by decree of March 1, 1886, of \$697.66; the third, by decree of May 20, 1887, of \$1,200.00; the fourth, by decree of December 12, 1889, balance, \$53.79. As we understand counsel, the argument, based on these decrees of disbursement is, that in none of them, except the last, did the court undertake to apportion the several payments on debts among the several distributees liable therefor, but directed payment out of the common fund in the hands of the special commissioners; wherefore, they say, there is nothing in the record negating their theory, that the court may have devoted the dower interest of Mrs. Serena C. Dandridge, Sr., wife of Adam S. Dandridge, Sr., in these funds, to the payment of those debts. Our reply, in part, is, that we can not see from the records before us that this dower money was in fact so applied; or that the decree now under review is erroneous or correctible in this particular. Counsel did not bring up the entire record, either on this appeal, or on the former appeal. On the former appeal it was assumed, we think justifiably, though we are criticised by counsel for having done so, that the court below, and distinguished counsel, would not undertake to distribute funds to creditors, before a decree adjudicating the principles of the cause, and fixing determinately the rights of the parties, the failure to do which has caused all the trouble encountered on this and on the former appeal. Apropos to the argument relating to the dower money, we find by reference to the report of commissioner Moore, in the record of the former appeal, that disbursements were made on account of the Porter debt, and on other debts, prior to December 4, 1883, which may have absorbed all the dower money.

Another item, equally affected by the argument based on the appropriation of the dower money, is the item of \$198.37, a portion of the debt of the First National Bank of Jefferson, charged against the estate of Miss Dandridge, disbursed under an order of June 11, 1881. But it is also argued that it appears from the record that this bank obtained a judgment against Lemuel P., A. Stephen, and Serena C. Dandridge, jointly, in the order named, and that, without other evidence of the fact, the court should assume, from the order in which defendants were named in the judgment and petition filed, that Serena C. Dandridge was the last endorser on the note sued on, and lastly liable, and only liable, if at all, in the event the dis-

tributable shares of the two other judgment debtors should be found insufficient to discharge the debt. Neither the note nor the judgment are found in the record. It would be going too far, we think, to find error in a decree on such a record. We can not do so.

A complete answer, we think, to the argument relating to all disbursements made prior to or subsequent to May, 1885, is that presented by counsel for appellees, namely, that by decree of May 26, 1885, the court undertook to and did adjudicate the rights of the parties, fixing the amounts of the various debts decreed against the several distributees, and their priorities, and the proportions in which they were respectively liable, and this, so far as the record shows, was the only decree that did so. This decree we understand is the basis of the "Detailed Statement" of counsel, adopted in lieu of a commissioner's report, and of the final decree of October 29, 1907. That decree adjudged, with respect to the Porter debt and other debts with which the account of Serena C. Dandridge, Jr., should be charged as distributee, that the executors of said Porter be paid the sum of sixteen hundred and sixty-four dollars and fifty-seven cents, with interest, out of the distributive shares of A. S. Dandridge, A. S. Dandridge, Jr., E. P. Dandridge, L. P. Dandridge, Serena C. Dandridge, and Sallie P. Dandridge, and adjudged the same to be a second lien as to E. P. Dandridge and Serena C. Dandridge, a thirteenth lien as to A. S. Dandridge, and a sixteenth lien as to L. P. Dandridge, the Serena C. Dandridge, referred to, being Serena C. Dandridge, Jr. And with respect to the debt of the National Bank of Martinsburg, it was decreed that the sum of five hundred and twenty-four dollars and forty-six cents, found due to it, be paid out of the interest of Lemuel P. Dandridge, A. Stephen Dandridge, Jr., and Serena C. Dandridge. How can we go back of this decree to readjust accounts as between distributees, or creditors? We cannot do so. The rules and principles which counsel invoke to support the finality of the decree of May 28, 1901, inapplicable to it, are applicable to the decree of 1885, and preclude us from reconsidering on this appeal any errors therein.

The only other point of error relied on and covered by the "Detailed Statement," and the decree appealed from, relates to the item of \$194.19, charged against the account of Miss Dandridge, her one-third share of the judgment of the National Bank of Martinsburg. It is conceded that the decree of May 26, 1885, makes this debt a charge and lien upon the distributive share of Miss Dandridge, without distinction as to priority; but it is claimed that because the decree of distribution of March 1, 1886, provides that the sum of \$582.58 be paid said bank in full of its debt, and directs that \$529.22 thereof be paid

out of the interest of L. P. Dandridge, and \$53.36, out of the interest of A. S. Dandridge, Jr., in apparent modification of the prior decree of May 26, 1885, no part of that sum can be charged against the interest of Miss Dandridge. Why this apportionment was made by the decree of March 1, 1886, is not apparent. It is in conflict with the final decree of May 26, 1885; and a very pertinent fact about that decree is that while it fixes the amounts and priorities of the other debts decreed against the several distributive shares of the distributees, it decrees this debt of the National Bank of Martinsburg, against Lemuel P., A. Stephen, Jr., and Serena C. Dandridge jointly, without priority as to liability. That decree, we think, fixed the status of the parties, and justified the court in final settlement, in charging the estate of Miss Dandridge with her one third proportion of that debt. At all events we are unable to see error justifying reversal of the decree on that ground.

This we believe disposes of all errors assigned. Great inequalities may exist in the distribution of the funds disposed of in this cause; if so, this court is not responsible for them, the fault must be chargeable to those who had the management of the cause in the court below. It is much to be regretted that so little attention was given to necessary details, and that the record has become so involved in confusion that even and exact justice cannot be administered. To now attempt to correct supposed errors in the decree appealed from would be a hopeless undertaking. Finding no error therein we affirm the decree below.

(39 W. Va. 399)

PEOPLE'S NAT. BANK v. BURDETT,
Judge.

(Supreme Court of Appeals of West Virginia.
May 9, 1911.)

(Syllabus by the Court.)

1. JUDGMENT (§ 142*)—SETTING ASIDE—APPEARANCE OF UNKNOWN DEFENDANT.

The right of a party to a suit or action, proceeded against as an unknown party or non-resident defendant, to appear and make defense, within the time, in the manner and upon the conditions, prescribed by section 14 of chapter 124 and section 25 of chapter 106 of the Code of 1906, is absolute, and the duty of the court to admit him, for such purpose, upon showing a proper status and compliance with the conditions, ministerial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 253; Dec. Dig. § 142.*]

2. MANDAMUS (§ 4*)—WHEN GRANTED—SETTING ASIDE JUDGMENT.

Mandamus lies to enforce such right, when it has been denied.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9-34; Dec. Dig. § 4.*]

3. MANDAMUS (§ 14*)—WRIT FOR REHEARING OF JUDGMENT—SUFFICIENCY OF PETITION.

The filing of a proper petition for rehearing, under said sections, is a demand for such

right, and rejection thereof by the court a default or refusal, sufficient for an application for a mandamus to compel enforcement thereof.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 44-46; Dec. Dig. § 14.*]

4. JUDGMENT (§ 151*)—NONRESIDENT DEFENDANT—BOND FOR COSTS—PETITION—FILING.

Neither the bond for costs, required by said provisions, nor the defenses of the applicant for admission, need be filed or tendered with such petition.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 151.*]

Robinson, J., dissenting.

Petition by the People's National Bank for a writ of mandamus to S. C. Burdett, Judge. Writ awarded.

Morgan Owen and E. B. Dyer, for petitioner. J. W. Kennedy and J. F. Cork, for respondent.

POFFENBARGER, J. Alleging rejection of its petition to have certain chancery causes reheard as to it, agreeably to the provisions of section 14 of chapter 124 and section 25 of chapter 106 of the Code of 1906, the plaintiff, a nonresident party to said cause, proceeded against by order of publication, asks a writ of mandamus to compel the circuit court of Kanawha county to permit it to make defense to said suits.

The second equity suit was one to quiet title to land, and the plaintiff here claims to have had an interest or right respecting the subject-matter thereof. Necessity therefor grew out of failure to make the applicant here and other interested persons parties to the previous suit, the purpose of which was enforcement of a vendor's lien. Edward Gebhart conveyed the land, affected by these suits, to S. W. Shrader, retaining a vendor's lien for \$12,000. Shrader sold and conveyed part of the surface of the land and all the coal thereunder to the Southern Coal & Coke Company. That company executed a deed of trust on its purchase to the Kanawha Banking & Trust Company, to secure an issue of bonds, amounting to \$90,000. To obtain satisfaction of his lien for the original purchase money, Gebhart brought a suit to enforce it, inadvertently overlooking the deed of trust. Neither the trustee nor the bondholders were made parties. Having procured a decree of sale of the property, he became the purchaser. To cure the defect, occasioned by the omission of parties, he brought a second suit, to which he made the trustee a party by name and the holders of the bonds as unknown persons interested in the cause, and sought, by way of alternative relief, confirmation of his title by foreclosure of the equities of the parties interested under the deed of trust, redemption of the land by payment of his lien, or a resale thereof. The trustee answered, denying any duty on its part to pay the debt or, in any way, protect

the rights of the bondholders, and, in default of any appearance by the bondholders or defense of any kind, a decree confirming the title of the plaintiff was entered.

Claiming to be the owner of five of the bonds, secured by the deed of trust, the plaintiff here tendered its said petition in the circuit court, and an order was entered, filing the same and requiring notice of a hearing thereon to be given to the plaintiff in said chancery causes. On the day so fixed, the latter appeared and demurred to the petition, on the ground, among others, that it did not show sufficient interest in the petitioner. An attack upon the petition for indefiniteness as to the identity of the bonds and the date of the acquisition thereof having been made, the petitioner tendered and filed an affidavit, showing the same had been acquired before the institution of said second suit. Thereupon the court dismissed the petition.

[1] The right accorded by the statutory provisions under which the petition was filed in the circuit court is to make defense. It is a limitation of the power conferred upon a plaintiff to obtain relief in judicial proceedings without actual service of process upon the defendant. A judgment or decree without such process is left open to a right of review in the trial court, upon the application therefor within the time prescribed by the statute. The extent and method or mode of review is also prescribed. The applicant is admitted to make defense against the judgment or decree "as if he had appeared" in the case before the same was rendered, except that the title of any bona fide purchaser to any property, real or personal, sold in the proceedings, shall not be brought in question or impeached. The plain object of the statute is to give the applicant a day in court, agreeably to the fundamental principle of all judicial proceedings. It is a right to go into the case, not merely to review for error, apparent upon the face of the record, but also to set up and assert any defense which the party might have made, if he had been personally served with process and appeared in the action or suit. *Duty v. Sprinkle*, 64 W. Va. 39, 60 S. E. 882. By the great weight of authority throughout the country, the right to admission into the cause for such purpose is held to be an absolute right which the court cannot deny. *Johnson v. Ludwick*, 58 W. Va. 464, 52 S. E. 489; *Buskirk v. Ferrell*, 51 W. Va. 198, 41 S. E. 123; *Taylor & Co. v. Hanson*, 36 Ark. 591; 1 Black, Judg. 813; *Freeman*, Judg. § 105; *Boeing v. McKinley*, 44 Minn. 392, 46 N. W. 766; *Brown v. Brown*, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640.

From this conclusion it follows necessarily that the trial court has no discretion or power to deny the prayer of the petition, if the applicant shows himself to have been an unknown party or other defendant, within

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

the meaning of the statutory provisions. The statute says that, on giving security for costs, he shall be admitted to make defense. It is therefore mandatory in form, and the nature of the right, as already defined, makes it one for denial of any discretion. It is fundamental in character. The right to defend is like a right to property or liberty. Denial or delay thereof may be highly or irretrievably injurious and prejudicial. Hence we are clearly of the opinion that the duty of the court upon such an application is ministerial. This construction protects the interest of the applicant and does the parties resisting the application no injury or wrong, in the legal sense of the terms. It takes away from them nothing the law has given. All rights acquired by the judgment or decree were subject to this reserved right in the defendant.

[2] A refusal or denial of this right is no doubt correctible by an appeal; but, in this state, we do not deny an extraordinary remedy in a proper case, merely because the party may avail himself of another remedy. Though a void judgment may be reversed by a writ of error, prohibition lies to prevent execution thereof. In *King v. Mason*, 60 W. Va. 607, 56 S. E. 377, the wrong complained of could have been redressed by an appeal, without any doubt whatever. Nevertheless this court awarded a mandamus. This writ does not lie to correct error; but it does lie in all cases to compel and enforce performance of ministerial duties. The test, therefore, is not whether a right may be obtained by some other remedy, but whether it is of such character as brings it within the province of the remedy by mandamus. The slow process of appellate review is not adequate to the vindication or enforcement of absolute rights such as the one involved here. The delay incident to that sort of procedure in such cases is not only useless, but also prejudicial and injurious. For that reason, they are within the remedy by mandamus, although, if the party see fit to incur the delay and the risk of injury, he may sometimes have relief by appellate procedure. We think the appropriateness of the remedy is clear beyond doubt.

Whether the applicant is entitled to make defense, and therefore within the statutory provisions here under consideration, is a preliminary question and does not make the duty of the court discretionary in passing upon the application. The determination of that question involves an inquiry as to the status of the applicant only, and does not extend to matters of defense in the suit. If such an inquiry barred the remedy by mandamus, it would wholly destroy it, for, in every instance of demand for the performance of a ministerial duty, the party upon whom the demand is made, whether a court or a purely ministerial officer, must make

such an inquiry. Hence it is manifest that necessity for such inquiry and determination of preliminary facts does not make the duty judicial or discretionary.

[4] Objection is made here to the bond for costs, tendered with the petition. We do not think the statute requires it to be tendered or filed with the petition. It must be filed before the applicant is admitted to make defense; but the statute does not require it to be tendered or filed with the petition. The facts disclosed by the petition and alternative writ and return show clearly that no bond would have been accepted by the court. The sufficiency of the bond was not in question, and we do not pass upon it.

[3] The court below dismissed the petition and denied admission to make defense under the impression that the petitioner had shown no right to do so. In this view we cannot concur. It was proceeded against as a party and the petition, together with the affidavit, which may be treated as an amendment thereof, clearly show that the petitioner was a holder of five bonds at the time the suit was instituted, and therefore a party among those designated in the bill as "the unknown owners of those certain bonds" in the bill mentioned and described.

The remaining contention is that the plaintiff here did not properly demand admission as a party to the cause, because it tendered no defense thereto. In other words, it did not offer to demur to the bill, or tender an answer or otherwise present defenses, which the court refused to admit. This amounts to denial of a sufficient demand on the part of the plaintiff and default on the part of the court. This position is, in our opinion, wholly untenable. The beneficiary of the decree in the cause, by his demurrer to the petition and demand that it be stricken from the files, virtually asked the court to refuse to entertain such defenses, and the court, by its dismissal of the petition, clearly signified its determination not to entertain them. We think the order showing all this makes a plain case of demand and refusal.

For these reasons, the peremptory writ of mandamus asked for will be awarded.

ROBINSON, J., dissents.

(69 W. Va. 327)

KIRTLEY v. CABELL COUNTY COURT.
(Supreme Court of Appeals of West Virginia.
May 9, 1911.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 180*)—NOTICE TO LANDOWNER.

A county court has no warrant in law to order that a land owner be proceeded against by a suit for condemnation of a right of way for a proposed road through his land, and later to order that a road be built thereon, without

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

first giving him notice to appear and show cause against the road undertaking.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 489; Dec. Dig. § 180.*]

2. EMINENT DOMAIN (§ 180*)—PROCEEDINGS TO ESTABLISH—NOTICE TO LANDOWNERS.

Proceedings of a county court for the establishment of a road, had without notice to the owner of the land proposed to be taken as prescribed by Code 1906, c. 43, § 36, and in which no opportunity was afforded him to be heard before an order directing a condemnation suit against his land, are erroneous, illegal, and reversible.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 489; Dec. Dig. § 180.*]

3. MOTIONS (§ 7*)—COUNTY COURTS—SPECIAL SESSION—NOTICE.

An order of a county court made at a special session is a mere nullity if the record does not show that the court acquired jurisdiction to make the order by the promulgation of the notice of the special session as required by law and the inclusion in that notice of the subject to which the order pertains.

[Ed. Note.—For other cases, see *Motions*, Dec. Dig. § 7.*]

Error to Circuit Court, Cabell County.

Action by Sidney Kirtley against the County Court of Cabell County. Judgment rendered for defendant, and plaintiff brings error. Reversed and remanded.

Blackwood & Saunders, for plaintiff in error. Geo. S. Wallace and Jean F. Smith, for defendant in error.

ROBINSON, J. Kirtley seeks the reversal of proceedings purporting to establish a road through his land.

The county court, on a petition of citizens, appointed viewers to go on the land and make a report on the proposed road. When the viewers made their report, the county court, without the notice to parties for which the statute provides, and without any appearance by Kirtley, whose land was to be taken, immediately ordered that the prosecuting attorney institute proceedings for the condemnation of that part of Kirtley's land which it was proposed to take for the road. At a later term, Kirtley appeared and moved that this order be set aside, on the ground that the county court was without jurisdiction to make it, since no notice and opportunity to be heard had been given him. The county court overruled this motion, refused to set aside the order, and Kirtley saved an exception on the record. At a still later term, a special one, the county court ordered that the road be built, and this order was followed at another term by one directing that Kirtley remove the fencing on the land which the county court was assuming to take. From these proceedings Kirtley obtained an appeal to the circuit court. On the appeal, a so-called plea was filed on behalf of the county court, in the nature of a motion to dismiss the appeal. That plea set up the

record of the condemnation proceedings that had been carried to a termination in the circuit court over the continued protest and exception of Kirtley as a party thereto. This record of the condemnation proceedings showed that the right of way had been condemned and a judgment entered in Kirtley's favor for the amount of compensation found. The circuit court dismissed Kirtley's appeal, and thereafter he obtained the writ of error now before us.

It is proper to observe that the writ of error calls for a review of the proceedings in the county court only. The appeal to the circuit court, which has been carried here by writ of error, relates alone to the orders of the county court. We have before us only what the circuit court had on appeal. We must say whether the circuit court erred in dismissing the appeal, and in order to determine that question must necessarily act upon the record of the county court just as the circuit court should have done. The proceedings had in the condemnation case in the circuit court are, therefore, not before us for review, because they were not brought before the circuit court for review by the appeal. They were no part of the proceedings appealed from, for they were not proceedings in the county court.

The circuit court could not properly pass on the appeal by a reference to what had been done in the condemnation suit. The so-called plea invoked the record of the suit in condemnation to justify a dismissal of the appeal. But as the condemnation proceedings were not a part of the record appealed from, they could have no proper part in determining the case on appeal. The question to be determined on the appeal was simply and solely whether the county court erred in the orders for the establishment of the road, and not whether the circuit court acted properly in the condemnation case which the county court may have erroneously directed to be instituted and prosecuted in furtherance of erroneous and illegal initial proceedings. So we have only to do with the propriety of the order of the county court directing the institution of the condemnation suit, and the other orders which followed that one in relation to the establishment of the road. A review of the regularity of the proceedings in the condemnation suit can only properly come by a writ of error in that particular case.

It is submitted that the question to be determined is a moot one, and that the writ of error should be dismissed for that reason. The county court claims that it has shown by the so-called plea to the appeal that a road has been established through Kirtley's land by the condemnation proceedings, and that, therefore, a reversal of the county court proceedings can avail nothing. It claims that the road is on the land by the force of the

condemnation and must stay there whatever we may do with the proceedings that were had in the county court. But the answer to all this contention is that a county road cannot be established by a condemnation suit. The statute has not prescribed that method of establishing a public road. It has prescribed condemnation proceedings solely for the acquiring of land and the ascertainment of compensation, and only when it becomes necessary to resort thereto. The establishment of the road is a distinct and primary thing. The county court must do the establishing; that court must give to the proposed road a legal status as a public road. The circuit court may simply lend its powers for the taking of land and for the ascertainment of compensation for the land taken, so that the county court may perfect the legal status of the road. But if a proposed way is not regularly made a public road by orders of the county court, no mere condemnation of the land comprising the proposed way can ever make it such. That condemnation may erroneously vest title to the easement in the public, but it cannot give the land taken the legal status of a public road.

Let us repeat that the sole question presented is one which comes primarily from the county court and is based alone on the record of that court. It is this: Did the county court have warrant in law to order that Kirtley be proceeded against by a suit for the condemnation of a right of way through his land, and later to order that a road be built through his land, without first giving him notice to come in and show cause against the making of such orders?

The proceedings which we must review are anomalous. And they are quite as erroneous as they are anomalous. The plainly prescribed statutory procedure for the establishment of a road has not been followed. The land owner has had no opportunity to be heard.

[1] It was error for the county court to order the institution of the proceedings for condemnation, before notice to Kirtley to appear and show cause against the establishment of the proposed road. An opportunity to correct the error was given the county court when Kirtley appeared, contesting the jurisdiction, and asked that the order be set aside. But again the county court erred in denying this motion. The statute expressly provides that the land owner shall be given notice to show cause against "the proposed work"; that is, to show cause why a road should not be established through his land. Code 1906, c. 43, § 38. It also plainly provides that there shall be a hearing of the land owner, if he appears in answer to the notice, and on such hearing a decision to undertake the establishment of the road, as well as a failure to agree with the land owner as to compensation for the land to be taken, before proceedings to take the land

and to ascertain compensation therefor are warranted. Code 1906, c. 43, § 38. [2] It cannot be determined whether proceedings to take the land and to ascertain compensation are warranted until the land owner is called in to answer the proceedings for the establishment of the road. If the land owner is given the notice required, he may prove to the county court that the establishment of the proposed road should not be undertaken, or he may agree readily as to compensation, and thus in either event the necessity for condemnation proceedings would be wholly precluded. But if the land owner is given no opportunity to be heard, how can the county court determine properly that proceedings to take the land and to ascertain compensation are at all necessary? The statute gives no power to the county court to institute proceedings in condemnation until they have heard the land owner, or have given him an opportunity to be heard. The right of the land owner to show cause against the institution of condemnation proceedings cannot be denied him. True, after the ascertainment of compensation in a case where the proceedings are warranted and properly carried on, the county court may abandon the work of establishing the road which it has decided to undertake; but, this right to abandon the work does not preclude the necessity for notice at the very initial steps. In the case at hand, the county court did not abandon the work, but carried the undertaking through without the initial notice to which Kirtley was entitled. It decided that he should be brought into a condemnation case, before it had taken the steps to ascertain that such a case would be justified or even necessary. Kirtley had the right to an opportunity to show that the road should not be undertaken as proposed, and that proceedings to take the land were therefore not warranted. He at least had the right to an opportunity to show that the proceedings were not necessary. If notice had been given him, he might have shown that he was willing for the land to be taken and to agree on the compensation therefor. Regardless of his rights, the county court subjected him to proceedings in the circuit court, the propriety of which, and the necessity for the same, the county court had not determined in the manner provided by law. All this erroneous action was reviewable on the appeal and should have been reversed. Plainly the circuit court erred in dismissing the appeal and not reversing the order which unlawfully subjected Kirtley to condemnation proceedings.

Proceedings in the county court for the establishment of a road are indeed proceedings to take the land which is necessary for the road. They are proceedings to divest the land owner of rights. Certainly no material step can be taken to divest one of his rights without notice. "No man shall be condemned unheard." This principle is fundamental. The

county court cannot, for road purposes, divest the land owner's title, unless the owner is given an opportunity to be heard against the establishment of the road. He has the right primarily to resist the taking of his land by showing that the road is wholly unnecessary and should not be established, or by showing any other pertinent fact that will save his land from the public use. *Coffman v. Griffin*, 17 W. Va., at page 184. This right has been safeguarded to him by the statute. The statute must be strictly followed, otherwise the land owner's title is not divested for the public use. In commenting on the same provisions of the statute which we are now considering, Judge Green said: "If these provisions for the protection and benefit of the land-owner are not strictly complied with, the proceedings will be ineffectual to divest the land-owner's title. They are not only conditions precedent, which must be complied with, before the land-owner's property can be disturbed; but the party seeking to divest him of his right of property against his will must show affirmatively such compliance with these conditions." *Herron v. Carson*, 26 W. Va. 62.

We need not say what is the effect of the unauthorized proceedings in condemnation against Kirtley's land. That question does not properly arise upon the record to which we may look. It suffices to say that the condemnation proceedings, carried on without the previous steps prescribed by the statute to warrant them, do not legally establish a road on the land.

[3] The order of the county court which embodies its final decision that the road be established is erroneous, for reasons additional to the fact that the proceedings leading to that order are illegal and invalid. The order was made at a special session of the county court. The record does not show that the county court had jurisdiction to make the order at that special term. The record shows nothing as to the purposes for which the special session was called, and nothing as to the manner of giving notice of the special session if any was given. The holding in *Mayer v. Adams*, 27 W. Va. 244, applies. The order establishing the road must be regarded as a nullity.

The judgment of the circuit court dismissing the appeal will be reversed; and this court will enter the judgment which the circuit court should have entered in the premises. There will be judgment here that the order of the county court for the institution of condemnation proceedings, the order for the establishment of the road, and the order for the removal of fences by the land owner be wholly reversed, set aside, and held for naught; and that the case be remanded to the county court to be there proceeded in according to the statute relating to proceedings for the establishment of roads.

(60 W. Va. 246)

MYLIUS v. RAINE-ANDREW LUMBER CO.

(Supreme Court of Appeals of West Virginia.
May 9, 1911.)

(Syllabus by the Court.)

1. BOUNDARIES (§ 3*)—ESTABLISHMENT.

In the trial of an action, involving title to land, dependent upon the location of boundary lines and application of the title papers to their subject-matter, it is not error to instruct the jury to give controlling influence to lines and corners marked upon the ground and identified, in so far as the lines were actually surveyed, and to courses and distances, in those instances in which the lines were not actually surveyed nor marked upon the ground.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 3*)—ASCERTAINMENT.

It appearing that a large tract of land was subdivided into a number of lots and a plat thereof made, in accordance with which deeds were executed, and which is referred to in the deeds for the description of the lots, and that the exterior lines were only partially surveyed and only a few of the interior lines actually run, and there is inconsistency between the plat and some of the lines so surveyed, the court may properly instruct the jury that, in locating any lot, it is to be governed and controlled by the plat, except in so far as it is in conflict with the lines actually run and marked upon the ground.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 34-37; Dec. Dig. § 3.*]

3. TRIAL (§ 253*)—INSTRUCTIONS.

Instructions to a jury must be broad enough in their scope and effect to present all material phases of the issue to which they relate. By whomsoever prepared, they are the instructions of the court, and, if they obviously tend to mislead the jury by reason of their narrowness, though correct as to one or more phases of the case developed by the evidence, it is error to give them.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

4. TRIAL (§ 253*)—INSTRUCTIONS.

On the trial of an issue as to which there is conflict in the evidence, the instructions, if any, must submit the conflicting theories the evidence tends to prove. Presentation of one of them and silence as to the other are tantamount to a comment on the weight of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

5. TRIAL (§ 253*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Instructions confined to a subsidiary and inconclusive issue, founded upon the evidence, and ignoring the direct and vital issue, tend to mislead the jury and cannot properly be given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

6. DEEDS (§ 111*)—CONSTRUCTION—INCONSISTENT DESCRIPTION.

If a deed contain a general description of property, conforming to the manifest intention of the parties, as shown by the situation and circumstances surrounding them and the purpose they had in view, and also another description, clearly inconsistent with such circumstances and purpose, and false in that it applies wholly or partially to property not owned by the grantor, nor intended to be conveyed by him, but already owned by the grantee and not intended to be purchased by him, such latter description must be rejected as false and as hav-

ing been inserted in the deed by accident or mistake.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 809-815; Dec. Dig. § 111.*]

7. DEEDS (§ 119*)—CONSTRUCTION—QUESTION FOR COURT.

The construction of a deed, not dependent in any way upon extrinsic evidence, and also of a deed dependent upon extrinsic evidence, when the facts are undisputed, is a question for the court and not for the jury.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 842, 843; Dec. Dig. § 119.*]

8. BOUNDARIES (§ 33*)—ESTABLISHMENT—BURDEN OF PROOF—CLAIMANT UNDER INCLUSIVE GRANT.

The rule requiring a claimant under an inclusive grant to show that the land in controversy lies without the boundaries of the land excepted from the grant, as having been previously surveyed, as well as within the boundaries of the grant, has no application, if the grant has been subsequently forfeited for nonentry for taxation and sold in a judicial proceeding, at the instance of a commissioner of forfeited and delinquent lands, as a whole, and without exception of any portion thereof, and it does not appear that the excepted lands were granted between the date of the inclusive grant and the date of the commissioner's deed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 146-152; Dec. Dig. § 33.*]

9. PUBLIC LANDS (§ 186*)—ILLEGAL SALE OF WASTE AND UNAPPROPRIATED LANDS—STATUTES.

By virtue of the provisions of section 19 of chapter 105 of the Code of 1906, a deed made, by a commissioner of forfeited and delinquent lands, under such judicial proceeding, constitutes a new grant by the state, passing to the grantee all right and title of the state to the land, whether held by reason of its never having been previously granted, or its subsequent acquisition by forfeiture or purchase.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 186.*]

10. PUBLIC LANDS (§ 186*)—ILLEGAL SALE OF WASTE AND UNAPPROPRIATED LANDS—STATUTORY PROVISIONS.

Deeds made by commissioners of school lands, ineffectual to pass title to waste and unappropriated lands, for want of legislative authority to dispose of them in the manner in which forfeited lands were sold, are validated by section 19 of chapter 105 of the Code of 1906.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 186.*]

11. EVIDENCE (§ 506*)—OPINION EVIDENCE—SUBJECTS OF EXPERT EVIDENCE—LOCATION OF BOUNDARY LINE.

The opinion of a surveyor as to the true location of a boundary line is inadmissible as evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.*]

12. BOUNDARIES (§ 35*)—ASCERTAINMENT—ADMISSIBILITY OF EVIDENCE.

If, in an action involving title to land, admissions and conduct of one of the parties, relating to locations and boundary lines, are relied upon, it is not error to permit him to introduce an agreement with a third party, concerning the land, which tends to nullify the effect of such admissions and conduct.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 35.*]

Error to Circuit Court, Randolph County.
Action by Charles E. Mylius against the Raine-Andrew Lumber Company. Judgment

for plaintiff, and defendant brings error. Reversed and remanded.

Fred O. Blue, C. H. Scott, and Harding & Harding, for plaintiff in error. W. B. Maxwell and D. H. Hill Arnold, for defendant in error.

POFFENBARGER, J. Charles E. Mylius recovered a judgment against the Raine-Andrew Lumber Company, a corporation, for \$8,000, in an action of trespass *quare clausum fregit*, in the circuit court of Randolph county, which has been brought here for review on a writ of error.

The declaration charges the cutting and carrying away of a large amount of timber, and the defense is want of title in the plaintiff to the land on which the timber grew. The question for determination, therefore, is as completely one of title as if this were an action of ejectment. A large tract of land, 19,000 acres, was granted by the commonwealth of Virginia to Henry Phillips September 22, 1795. Having become forfeited for nonentry for taxation, prior to the year 1840, it was sold, as forfeited land, under judicial proceedings regularly had, so far as the record shows; but, before sale, it was divided, by the commissioner of forfeited and delinquent lands, into 23 lots, numbered from 1 to 23, respectively. In making this division, the commissioner actually ran some of the lines, but others were not run, and some lots were entirely, and others partially, platted on paper, without actual survey, and all were sold according to the plat. L. D. Morrall became the purchaser of lots Nos. 11, 12, 14, 15, 22, and 23, containing, respectively, 800, 1,000, 500, 800, 540 and 921 acres and John Wyatt purchased, among others, lot No. 13, and these sales were confirmed and deeds made, referring to the plat. Lots Nos. 11 and 15 passed to Baker Bros. by successive conveyances prior to 1879. E. D. Parren, prior to 1875, became the owner of lots Nos. 14 and 22. The title to these last two lots was forfeited and sold, under judicial proceedings, on March 27, 1876, one Isaac Baker becoming the purchaser of lot No. 14, and T. J. Arnold of 848 acres, part of lot No. 22, adjoining lot No. 14. The Bakers, having become owners of lots Nos. 11, 14, and 15 prior to August, 1879, conveyed the same to Charles E. Mylius and others. Afterwards, Kupfer and Farnsworth became interested in these lands. Mylius, by a partition deed dated March 1, 1891, conveyed to Kupfer 748 acres out of the northern ends of lots Nos. 14 and 15; the southern line of this conveyance extending east and west across the same, and he having previously conveyed to Kupfer an undivided one-fourth of lots Nos. 11, 14, 15, and 20. He, Farnsworth, and Mylius, by deed dated June 1, 1898, partitioned the same, and Farnsworth thereby became sole owner of

495 acres, cut off of the southern end of lot No. 11, and Mylius and Kupfer owners of the residue of lot No. 11 and the whole of lots Nos. 14 and 15. In connection with the conveyance from Mylius to Kupfer, a plat was made, known as the "Sherwood plat," which was referred to in the deed and also in the partition deed above mentioned. The western part of lot No. 13, adjoining lot No. 14, became the property of the defendant, the Raine-Andrew Lumber Company, by a deed from Jennings Bros., dated May 22, 1901; they having obtained it by deed from Jacob Carr and others, dated June 26, 1900. Kupfer conveyed to the defendant all the 743 acres except a small parcel thereof at the northwest corner, by deed dated April 27, 1901, and Mylius conveyed to it 160 acres, adjoining the Kupfer land and also the Jennings-Carr lands, by deed dated October 29, 1901. This land came out of lots Nos. 14 and 15, and probably No. 11, as shown by the Goff plat, and lies on the east side of what is called "Gladly Fork." The defendant cut and removed timber from a part of lot No. 14, which, it is charged, was not included in any conveyance to it.

The plaintiff brought two actions, one on the 27th day of May, 1903, in which he laid his damages at \$3,000, and the other on the 24th day of June, 1905, in which he laid the damages at \$10,000. As these two actions involve the same timber, and the second covered the subject-matter of the first, they were consolidated and tried as one, and the controversy is whether the timber cut was within the boundaries of the lands retained by Mylius, and this turns partly upon a dispute as to the location of lot No. 14; all the timber in controversy having been taken from 172.5 acres of land, lying within its boundaries as platted by Goff, Commissioner, and partly upon the location of the land conveyed to the defendant by Jennings Bros. and Mylius, respectively. The corner called for in the deeds made by David Goff, who made or caused the original plat to be made, according to which they were executed, designated, as the common corner of lots Nos. 11, 12, 14, and 15, a maple. While no maple is found on the ground, the defendant claims the one referred to in the plat and deeds stood at a point near the middle of lot No. 11, as it is located by the courses and distances specified in the Goff plat, and there is evidence tending to sustain this contention. Insisting upon this as the true location of the common corner, it claims the entire plat must be shifted south about 162 poles and west about 100 poles. This would practically draw lot No. 14 away from the territory in dispute and deny title in Mylius to the timber in controversy.

In general form, the tract of land, though irregular, is rectangular, its greatest length being north and south, and the division lines run nearly north and south and east and west. As we have said, Commissioner Goff

did not actually survey all of the lines, neither the exterior nor the interior. According to his report, he commenced at the well defined and admitted southeastern corner and ran to the southwestern corner, and then ran up the irregular western line, calling for a chestnut, beach, and maple on top of Shaver's Mountain, corner to lots Nos. 4 and 8, a hemlock and spruce pine, corner to lots Nos. 8 and 9, and two hemlocks and a beech, corner to lots Nos. 9 and 17. Here he stopped, after having run something more than half of that. His next surveying was of interior lines and will be stated later. After running them, he went back to the beginning point and ran the eastern line a distance of 500 poles to two small beeches and stopped on that line. Afterwards, he ran some more interior lines from that point. His first running of inner lines was as follows: Commencing at the two hemlocks and beech in the western line, he ran easterly 320 poles to a hemlock, and then 320 poles to two hemlocks and a service, and then 320 poles to a maple, corner to lots Nos. 11, 12, 14 and 15. Though he does not say, in his report of survey, that the hemlock and the two hemlocks and service are corners, he had indicated on his plat a hemlock as the corner of lots Nos. 9, 10, 16, and 17, and two hemlocks and a service as the corner of lots Nos. 10, 11, 15, and 16. From the maple, he turned south and ran 400 poles to a spruce pine (corner of lots Nos. 6, 7, 11, and 12 according to the plat, but not so designated in the report); thence west to two beeches and a linn on the north bank of Big Run (corner to lots Nos. 7, 8, 10, and 11, on the plat, but not so designated in the report); thence south again to eight beeches, two sugars, and an ash (corner to lots Nos. 4, 5, 7, and 8), and stopped. On the other side, after having run north 500 poles on the eastern line, he turned into the body of the tract and ran 320 poles to two beeches and a maple, a corner to lots Nos. 1 and 2. Then he turned south and ran 485 poles, the division line between lots Nos. 1 and 2, to the exterior southern line, where he made a corner indicated by two beeches. This is all the surveying he did on the whole boundary. Commencing at the western outer line, he actually ran the northern boundaries of lots Nos. 9, 10, and 11, the southern boundaries of lots Nos. 15, 16, and 17, the eastern and southern boundary of lot No. 11, the western line of lot No. 12, the western boundary of lot No. 7, the eastern boundary of lot No. 8. On the other side, he ran all the lines of lot No. 1 and the eastern and southern lines of lot No. 2. He ran none of the lines of lot No. 14. His report calls for nothing affecting lot No. 14 but the maple corner. Every line thereof shown on the plat stands unaffected by any actual surveying done, except in so far as they may be influenced, if at all, by the location of the maple as a corner.

The evidence seems to leave no doubt that

the Goff plat is founded upon the boundaries of the original grant, and radically conflicts with some of Goff's actual surveying. The southern line, southeastern corner, eastern line, northeastern corner, and a western corner of the original grant are admitted, and there is evidence strongly tending to establish them. The beginning corner of the old grant was a large maple, north of a road, and there seems to be no controversy about its location. Goff began his survey at a "maple stump in John Wyatt's garden." The old grant then calls for a course N. 76 W. and a chestnut and cucumber corner, 782 poles distant. Goff's plat calls for the same course and corner and deviates from the distance to the extent of 18 poles, making it 800. At the northwestern corner, the old grant and Goff's plat call for the same timber, a large sugar tree and ash, and for substantially the same courses and distances. The courses and distances lead to the same northeastern corner also, and a very ancient corner is found there. But Goff's surveying on the western side, covering more than half the length of the western line, is about 100 poles outside of the grant, as shown by his plat. This circumstance and the location of the line, run partially through the tract by Goff from the two hemlocks and beech on the western side, give birth to a number of contentions, and important questions cluster around them. In tracing this old line, timber was found, indicating that it had been run, not between lots Nos. 9, 10, and 11, on the south, and 15, 16, and 17, on the north, as indicated by the plat, but, on the contrary, right up through lots Nos. 9, 10, and 11, as located by the plat. Moreover, the maple called for at the eastern end thereof, instead of being at the corner of lots Nos. 11, 12, 14, and 15, as laid down on the plat, is actually closer to the center of lot No. 11, as shown by the plat, than to any of its corners or lines. This line is farther south than the plat line, according to this evidence, by about 162 poles, and its terminus farther west than the plat indicates by about 100 poles. The evidence, indicating the actual running of this line through lots Nos. 9, 10, and 11, as they are located on the plat, instead of immediately north of them, is so strong that the plaintiff, in his testimony, admits it, but he claims the plat was made without reference to this line, or that the platting of the whole tract was correctly done as to all except the lots bordering upon this line, and that the mistake, whether in the plat or in the survey, cannot affect the location of any other lots. There seems to be little or no evidence tending to show that the platted line from west to east, from the two hemlocks to the maple, was ever run upon the ground. In addition to the testimony, relating to this uncertain line, or discrepancy between the plat and Goff's actual surveying, and the exterior lines, there is much more concerning the lo-

cation of other lots and some conflicting grants, not affecting lot No. 14; but its bearing upon the real issue is not so direct as that of the evidence above referred to. For this reason, time and space will not be consumed in setting it forth here.

But there is a mass of evidence in the case, bearing upon another phase of the issue. It is contended that, even though lot No. 14, as sold and conveyed by Goff, should be located by the plat, and the inconsistent actual surveying and location of lot No. 11 and others may not preclude the location of lot No. 14, as it is laid down upon the plat, Mylius never obtained title to the lot as so located. Goff conveyed lots Nos. 14 and 22 to Granville E. Jarvis. Jarvis conveyed these lots to E. D. Parren, in whose name they became delinquent for nonpayment of taxes and were sold by the state. George W. Yocum, commissioner of school lands, instituted proceedings in the circuit court of Randolph county in 1875, under which they were sold to Isaac Baker. In this proceeding, Nicholas Marsteller, surveyor of Randolph county, made a report, purporting an actual survey of these lots, and they were conveyed according to the description set forth in his plat and report. The boundaries, as set forth in this deed under which Mylius claims, and the only one purporting to confer title upon him to said lot No. 14, are said to be in accord with the location thereof as claimed by the defendant. The description calls for courses and distances and stakes upon the ground and the maple corner of lots Nos. 11, 12, and 15. The supposed lines of the Marsteller survey have since been run by Coberly, the present county surveyor, and he testifies, in this case, that he found timber all around the lot as located by the defendant, bearing marks corresponding in date with the Marsteller survey. Another circumstance relied upon to show the location of lot No. 14, in accordance with the claim of the defendant, as conveyed by Yocum, is the relation thereof to a tract of land known as the Arnold and Taylor tract, as shown by Marsteller's plat. The commissioner said in his report that this Arnold and Taylor land covered a part of lot No. 22, and had been taxed and was, therefore, not subject to sale. Accordingly, only so much of lot No. 22 was sold as was not covered by the Arnold and Taylor land. The Marsteller plat and report show that the Arnold and Taylor land, a long narrow strip, composed of two adjacent tracts, crosses lot No. 22 diagonally, leaving only a small portion of the northwest corner and a large portion of the eastern and southern parts uncovered. As platted in connection with the Goff plat, this Arnold and Taylor survey bears an entirely different relation to lot No. 22. Said lot goes farther north and east upon the Arnold and Taylor land. All this imports that the surveyed location of lot No. 14, not as Goff conveyed it to Jarvis, but as Yocum

conveyed it to Baker, and Baker to Mylius, commences at the maple, located at the eastern terminus of the interior line, run from west to east, to a point near the center of lot No. 11. Lot No. 13 lies immediately east of lot No. 14. Goff conveyed this to John Wyatt. Wyatt conveyed it to Carr, and Carr a portion of it, along with a portion of lot No. 23, to Jennings Bros., and the Jenningses to defendant, the Raine-Andrew Lumber Company. The defendant purchased the 743 acres conveyed by Mylius to Charles Kupfer out of the northern end of lots Nos. 14 and 15, by deed dated March 1, 1891. The deed from Mylius to Kupfer refers to what is called the Sherwood plat and conveys lots Nos. 8, 9, 10, and 11, as designated on said plat. This plat seems to conform to the location of lot No. 11 and lots Nos. 14 and 15, as contended for by the defendant. It is also said that Mylius represented to the agent of the defendant company, before it purchased from Kupfer, that lots Nos. 11, 14, and 15 were to be located by reference to the maple contended for by the defendant as the corner. After the partition between Mylius and Kupfer, there was some apprehension, on the part of the latter, of loss of a part of the land conveyed to him by superior outstanding title, and Mylius covenanted to make the loss good in that event. Mylius also conveyed to Nancy Dyer a portion of lots Nos. 11, 14, and 15 by a deed in which he recognized the line of the land conveyed by him to Kupfer, and by Kupfer to the defendant company. Lot No. 15 had originally been conveyed to the Bakers by Squire B. Ward, and the Bakers conveyed to Mylius. In the deed from Ward to Baker, lot No. 15 is described as cornering on two hemlocks and a service, just as in the Goff plat. If lot No. 14 is located according to the Goff plat, the land conveyed to Kupfer, if located in lot No. 14, as located by the Goff plat, would, so far as we can see from the evidence, seem to cover the land in controversy here and give title to the defendant, for this controverted land lies in the northern portion of lot No. 14, as so located. Lots Nos. 10 and 11, of the Sherwood plat, seem to be also in the northern end of lot No. 14; but the evidence shows that, notwithstanding this, they are actually located, for the most part, west of lot No. 14, according to the Goff plat. Mylius conveyed these lots as if they were in lot No. 14, when, in point of fact, they are not, if it is to be located by the Goff plat, but are, if it is to be located according to the survey apparently made for the deed in the Yocum land sale proceeding. In addition to these circumstances, Mylius, in his testimony, admits that, in his dealings with Farnsworth and Kupfer, they recognized the maple corner as contended for by the defendant. When asked if his conveyance to Kupfer stated the truth, when it called for the northern line of lots Nos. 14 and 15, as laid off by Goff, he admitted that

this was, in part, a mistake, and said: "Part of the land that is true, but not as to all the northern part of No. 15 as laid down by Goff. It is all of No. 15 as laid down by the Sherwood plat." And further, speaking of Kupfer: "When we divided the land, he got the best part of the land, and on account of the discrepancy at this maple he would not take up here. Neither would Farnsworth, and he taken his share under the Sherwood plat and then give me a contract that I was to have. I would not divide anyway—anything outside, north of that line, of the deed of the lot as laid down by Sherwood, of the northern and eastern line." It is shown that Mylius pointed out the maple corner as claimed by the defendant to the defendant's agent, as being the corner of lots Nos. 11, 12, 14, and 15. There is much evidence by conduct and admission of his recognition of this as the true corner.

Five instructions were given at the instance of the plaintiff, over the objection of the defendant, all of which embody the theories of the plaintiff already stated. Instruction No. 1 told the jury that, in locating lot No. 14, they should ascertain it to be located at the place indicated on the Goff plat, unless they should believe from the evidence Goff had actually surveyed it and designated the lines and corner thereof from such actual survey. Instruction No. 2 told them that, if they should believe, from the evidence, Goff had actually surveyed lot No. 11, and thereby designated the lines and corners thereof, and did not actually survey, but only designated the location of, lot No. 14, by a plat thereof in connection with all the other lots, the plat of said lot No. 14 must govern the location thereof, and that the actual survey of lot No. 11 does not control the location of lot No. 14. It is to be observed here that Goff's report shows he actually ran three lines of lot No. 11 and marked all four of the corners thereof on the ground. Instruction No. 3 told the jury that, if they believed from the evidence Goff had done such surveying upon the ground, as to identify the whole 19,000 acres, and then made a plat thereof, showing the subdivisions thereof into lots, and made the plat a part of the record of his proceedings, the plat so made must govern the location of the lots shown thereon, unless they should believe Goff, as part of the same transaction, actually surveyed the lots, or some of them, and, by such actual survey, designated the lines and corners of the lots so surveyed, such survey should not control the locations of the lots not actually surveyed, but that they should be located by the plat. Instruction No. 4 told them that, if they should believe from the evidence the outside boundary of the whole tract was correctly shown by the plat lines on the plat used in the trial, and that Goff did not actually survey any of the lots or subdivisions shown on said plat except lots Nos. 1 and 11, as shown by the

red lines upon said plat (the locations claimed by the defendant, a considerable distance south and west of the locations as claimed by the plaintiff), and designated all of the other lots shown upon said plat without having actually surveyed the same, they should be governed in the location of any of the lots shown upon said plat, other than lots Nos. 1 and 11, by the plat, made by Goff. Observe here that Goff's report shows he ran all the lines of lot No. 1 and three of the lines of lot No. 11, as stated. Instruction No. 5 told the jury that, if they believed from the evidence Goff actually surveyed lot No. 11, and located it upon the ground in accordance with the claim of the defendant, but, by mistake, located it 162 poles farther south than it should have been located, as shown by his plat, the mistake in the location of lot No. 11 does not control or govern the location of lot No. 14, as made by him.

[1] The purpose of these instructions was to controvert and nullify the claim of the defendant that the mistake or discrepancy indicated by the evidence must have the legal effect, if established, of shifting the location of all the lots on the plat about 162 poles to the south and 100 poles to the west, and thereby throwing lot No. 14 almost entirely without the bounds of the disputed territory. Although they laid the basis or groundwork of power in the jury to destroy this contention of the defendant, it is obvious that the court could properly give them, if the evidence tended to support the hypotheses embodied in them, and they were not forbidden by any rule of law, nor other evidence in the case. That there was evidence to sustain them is beyond doubt.

[2] The exterior boundaries of the whole tract, as shown on the Goff plat, are indicated by evidence found upon the ground, as we have shown. The exterior lines, with their courses and distances, must be located by the jury in accordance with the Goff plat, if they believe this location is correct. In settling this question, they could give effect to admitted corners and the courses and distances. The exterior lines of the Goff plat seem to be the lines of the old grant. The contradiction and inconsistency relate to the lines run and marked on the ground by Commissioner Goff and seemingly ignored or disregarded in his plat, if the admitted original corners are correct locations. There is strong evidence that the exterior lines are governed and controlled by the plat; but, in locating lots, actually surveyed, the marked lines necessarily control the plat. Every portion of the description of lot No. 14, except the southwestern corner, is found on the plat, and not elsewhere. There is no evidence of their ever having been marked upon the ground. It follows, therefore, that the north, south, east, and west lines rest upon nothing but the plat, which, in the main, is based on the exterior lines. These lines were first fixed. They were establish-

ed before the delinquency or sale—before the issuance of the patent—and presumably rest upon an actual survey then made, while some of the interior lines were never surveyed. By courses and distances, lot No. 14 can be reached and located from the exterior lines. The maple in controversy is not the sole, nor the best, index to its location. Though the maple, if standing and identified, would be a natural object, marked as a corner, it would not be superior in any sense to the other natural monuments found in the exterior lines, plainly indicating a location of lot No. 14 at a place different from that indicated by the maple. If the surveyor made the maple the corner of lot 11, and erroneously described it as the corner of No. 14, never having run the lines of that lot, nor located its corner, nor made any corner at that place by any mark upon the ground, we know of no rule of law which forbids a finding of the jury in accordance with the fact, whatever the result may be to the parties.

These instructions are, in a certain sense, a concession to the defendant. They tell the jury they may depart from the plat in certain respects. At the same time, they warn them against doing violence to the descriptive matter in the deed further than is necessary to adjust it to the surveying actually done. The objection to them seems to rest upon the view that, on establishing the east and west line as claimed by the defendant, the jury must then reconcile the conflict, not in location, but in effect, between this line and the established outer lines, by making the former prevail over the latter and destroy their effect. We do not understand this line of argument. If the jury are satisfied the outer lines of the plat are based upon admitted corners and were made without reference to inconsistent surveying actually done, they are bound to make this application and find accordingly. If, in addition to this, they find certain interior lines on the plat do not correspond with lines surveyed upon the ground, what rule of law says they shall then determine that they shall prevail over other lines equally well, if not better, established in another portion of the plat? We are not aware of any, nor has any been brought to our attention. On the contrary, it is well established that, in this state of the evidence, the jury are at liberty to find that, in making the plat and deed, the survey was disregarded. On this subject we cannot do better than quote the law as declared in *Mining & Mfg. Co. v. Coal Co.*, 8 W. Va. 406, points 1 to 5, inclusive, of the syllabus of which are as follows: "Generally, when, in a deed, lines and corners are described, or when from the statement of courses and distances or other descriptions, in connection with circumstances existing and manifest, or ascertainable, at the time of the execution of the deed, it is presumable that such lines or corners are those referred to in the deed, the statement of courses and distances

is, in construction, controlled by the actual lines and corners referred to. But the mere circumstance that lines and corners are known to have been run and marked, or are found marked near where the courses and distances mentioned in the deed run, is not conclusive that they are the lines and corners of the land referred to in the deed. And when there is no such approximation in the courses or length of the lines, or the marks on the corners, to the description in the deed, as to warrant the presumption that they are the boundaries of the land to which the deed relates, such marked lines should be disregarded. Lines and corners may be marked with the purpose to adopt them in a contemplated deed; but afterwards the marked lines and corners may be abandoned, and mere courses and distances from certain objects or points may be substituted. There is no uniform rule that the length of one line, as mentioned in a deed, shall control the course of another line, or that the latter shall control the former. Other circumstances will determine the adoption of the one or the other. Though the quantity of the land mentioned in the deed will not control the boundary, when ascertained by the description, with other paramount circumstances, nevertheless, the correspondence of quantity given by a line in question, with the quantity mentioned in the deed, or an approximation to such correspondence, may be considered as tending to establish such line as the true one."

But this does not dispose of the ruling on these instructions. We have said there is nothing in the law which precluded the submission of the hypotheses they state, on the evidence relating to the Goff plat and the actual surveying done by Goff. But there was other evidence in the case, of which they take no notice. The plaintiff, Mylius, does not claim lot No. 14 under any deed made by Goff directly to him or to any one from whom he purchased. He derives his title from the deed made by Yocum, commissioner of school lands. As we have seen, there is a claim that the deed, when applied to its subject-matter, locates the land it conveys in accordance with the contention of the defendant. Although it contains no call for any marked trees or other natural monuments and makes no reference to the Goff deed or plat, there is evidence in the case showing the existence of trees, evidently marked about the date of the survey made by Marshtiller in the Yocum land sale proceeding, and these trees stand on lines traced from the maple, claimed by the defendant, as the corner of lot No. 14, agreeing with the courses and distances recited in the deed from Yocum to Baker. This evidence of an actual tying down upon the ground at this place of the land conveyed by Yocum is not found in the deed, and it is to be taken in connection with some additional facts. Yocum, the commissioner of school lands, instituted his proceeding for the sale of lots Nos. 14 and 22

of the Goff sale. In his report to the court, he so describes the land, and so does the surveyor in his report of survey. The decree of sale refers to the report and plat. The commissioner, in his report of sale, describes the lot sold as lot No. 14, and the court confirmed the sale and directed a deed to be made, and the deed refers to the court proceedings. On this evidence, the defendant founds the contention that these instructions do not cover the entire case, but, on the contrary, completely ignore, and shut out from the view of the jury, evidence and factors in the case highly important to the defendant. That they take no notice of it is obvious; but we think it alone constitutes no defense and did not justify the giving of an instruction for the defendant. Conceding the facts to be established, it shows two repugnant descriptions, disclosed by extrinsic evidence, one of which is general and true, the other particular, by metes and bounds, but false. The state owned the Goff lot No. 14, but no part of lot No. 15. The latter has never been forfeited or delinquent, since the conveyance by Goff, so far as the record shows. At the time of the Yocum conveyance, it was owned by the Bakers, one of whom purchased No. 14 from Yocum. These lots were adjacent. The true location of the latter is east of the former; the false description, if followed, would locate it almost wholly within lot No. 15, which the state, the vendor, did not own, and which Baker, the vendee, did own, at the time of the Yocum sale. In all such cases, the false description must be rejected. The criterion for the construction of a deed is the intention of the parties. *Chapman v. Coal Co.*, 54 W. Va. 193, 199, 46 S. E. 262; *McDougal v. Musgrave*, 46 W. Va. 509, 33 S. E. 281. Of course there must be some language in the deed, disclosing the intention adopted. It cannot be read into the instrument, in the absence of words indicating it. Here, we have terms indicating lot No. 14, located by the Goff plat, as the subject of conveyance. We have also, in the description by metes and bounds, aided by extrinsic evidence, terms indicating other land as the subject of conveyance. It is obvious that the vendor did not intend to sell, nor the vendee to buy, the latter, because the former did not own it, and the purchaser did already own it. Therefore, as applied to the subject-matter, the description of the lot by name, in the record of the proceedings under which the deed was made, is a true description, and the only one that will carry into effect the obvious intention of the parties. In cases of repugnance in description, when both apparently apply, that which is most certain prevails.

[8] When a deed contains two contradictory descriptions of the same premises, one of which is particular and definite, showing the precise location and bounds of the land, and the other general in its terms, the former controls, because that description which

undertakes to set out the specific boundary is more likely to have been carefully attended to by the parties and, therefore, to reflect their real intention, than the general one; but this principle is operative only in those cases in which either description may be taken without doing violence to the manifest intention of the parties. It does not apply when one of the descriptions is baldly false and must have been inserted by mistake. A description of a town lot by its number and the number of the block, followed by a description by metes and bounds, including only a part of it, carries the whole lot. *Rutherford v. Tracy*, 48 Mo. 325, 8 Am. Rep. 104; *Masterson v. Munroe*, 105 Cal. 431, 38 Pac. 1106, 45 Am. St. Rep. 57. A conveyance describing the land as the grantor's home farm, and then setting out a particular description of the parcel of which it is composed, but omitting several acres, passes the whole farm. *Andrews v. Pearson*, 68 Me. 19; *Marshall v. McLean*, 3 G. Greene (Iowa) 363. A description of a lot by number will control a reference to adjacent streets. *Nash v. Railroad Co.*, 67 N. C. 413. See, generally, *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094; *Smith v. Chapman*, 10 Grat. (Va.) 445; *Heaton v. Hodges*, 14 Me. 66, 30 Am. Dec. 731, and note; *Nash v. Railroad Co.*, 67 N. C. 413; *Devlin on Deeds*, §§ 1017-1020. This law fits this case exactly. The description by metes and bounds covers only part of the land owned by the grantor; the general description covers all of it.

[7] The facts being uncontroverted, the construction of a deed is a question for the court, not the jury. *Snooks v. Wingfield*, 52 W. Va. 441, 44 S. E. 277. Hence, if the court had been asked to instruct the jury, concerning the construction of the deed, in the light of the evidence, tending to show that it contemplated conveyance of the land, located otherwise than by the Goff plat, it would have been compelled to say the jury could not do so, and that they must treat it as calling for lot No. 14 of the Goff sale and locate the land accordingly.

The next inquiry is whether the evidence of admissions, and representations already mentioned, was such as to demand recognition in the instructions. If the evidence thus far analyzed were all the record discloses, it might not be material. But there is additional evidence which we think clearly renders it so. The defendant claims under two deeds, one or both of which may cover some parts of the alleged trespass or all of it. Whether they do or not depends upon the location of the lands granted by them. One of these is the deed from Jennings Bros., and the other the one from the plaintiff himself. The plat and evidence disclose two alleged locations of the land conveyed by the former, one almost wholly in lots Nos. 13 and 23 of the Goff plat and the other almost wholly in lots Nos. 14 and 22 of that plat, and the admissions of the

plaintiff, made before the purchase from Jennings Bros., tend to establish the latter, provided the muniments of title leave any uncertainty as to the boundary lines. Respecting the location of this land, the evidence and claims of the defendant are indefinite and vague; but there is probably enough to make the admissions material. However this may be, the plaintiff's own deed to the defendant clearly connects them with the issue. It covers land in the region of the trespass. Its boundaries are general and the quantity and location of the land it conveys in controversy. In his dealings with Farnsworth and Kupfer, the plaintiff proceeded upon the location theory of the defendant. It was then to his interest to place the lands he conveyed to them as far west and south as possible, and, in so doing, he asserted, by his conduct, exactly the opposite of his present contentions. Having separated his holdings from theirs by partition, it is now to his interest to press his claims northward and eastward as far as possible. His course respecting the land he conveyed to the defendant is the same that he pursued in his transactions with Farnsworth and Kupfer. The further south and west he can locate that land, the more he will retain in the north. This attitude, however, was not hostile to Farnsworth and Kupfer. They shared in his acquisitions. To some extent, the observation applies to his relations with the defendant also. Inimical to its interests in the north, the plaintiff's representations and former contentions avail it in the south. The peculiar situation of the defendant compels it also to take inconsistent positions. It bought land of Jennings Bros., the location of which, to subserve some of its purposes, must be in lots Nos. 13 and 23, and, to subserve others, in lots Nos. 14 and 22. This may account, in part, for the failure to develop fully the evidence, relating to these lands as well as the tract it obtained from the plaintiff, constituting the real issue in the case. On this issue, namely, whether the trespass is covered by either or both of the conveyances to the defendant, the admissions of the plaintiff are relevant and material.

The description of the land in the deed from the plaintiff to the defendant, reads as follows: "All that portion of his (plaintiff's) land lying on Shaver's and Middle Mountain in said Randolph county, which is situated and which lies on the east side of Gladly Fork and bounded on the west by said Gladly Fork, on the north by the Carl Kupfer land, on the east by the Jennings-Carr land and on the south by the Fridley land." This includes all the land between Gladly Fork and the Jennings-Carr land and all south of the Kupfer land, both now owned by the defendant; but the Kupfer land does not lie north of the trespass. It lies south and east of it, for the most part. The defendant says the deed conveys only two or three

acres, if limited by the Kupfer land on the north, a quantity entirely disproportionate, in its opinion, to the purchase money, \$1,650, and wholly at variance with plaintiff's representations as to identity and quantity, carrying all the land he had lying east of Gladly Fork, amounting to 160 acres. This statement suffices, we think, to show the materiality of the representations, the descriptions in these two deeds, and the evidence, respecting the location of the lands conveyed by them, none of which is referred to by any instruction given in the case.

It bears more directly on the real issue than that relating to the identity and location of the lots of the Goff plat and conveyances. The trespass may be in lot No. 14 and yet belong to the defendant. Hence the location of that lot is not at all conclusive, nor necessarily vital in the case.

[5] Nevertheless, the instructions given apply to it only, and leave wholly out of view that which is more decisive in character. They also repeat the same proposition several times in different forms. Thus they gave undue prominence to partial and inconclusive evidence, and were obviously liable to mislead the jury. Though not binding in form or effect, they were so drawn as to make the hypothesis embodied in them apparently controlling, and, in our opinion, this was highly prejudicial.

[4] On the trial of an issue as to which there is conflict in the evidence, the instructions, if any, should submit the conflicting theories the evidence tends to prove. Presentation of one of them and silence as to the other virtually amount to a comment on the evidence.

[3] While the instructions are usually prepared by the attorneys, they are the directions of the court and must present the issues fairly. Ordinarily, this result is accomplished by the work of the attorneys on both sides, approved by the court; but presentation of both phases is none the less necessary, when the instructions are prepared by the attorney for only one of the parties or by the court. Of course a case may properly be submitted without any at all; but, if instructions are given at the instance of anybody, they must present the case fairly, else the court, by its action, misleads the jury and thereby errs. *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 59 S. E. 634; *Bice v. Wheeling Elec. Co.*, 62 W. Va. 685, 59 S. E. 626; *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *Storrs v. Feick*, 24 W. Va. 606; *Webb v. Packet Co.*, 43 W. Va. 800, 29 S. E. 519; *Fisher v. Railroad Co.*, 39 W. Va. 371, 19 S. E. 578, 23 L. R. A. 758. Thus viewed in the light of the evidence and the rules of procedure, the instructions, given at the instance of the plaintiff, were erroneous and prejudicial. They, or one of them, should have been so modified as to direct attention to the evidence we have been discussing, or an additional instruction, em-

bracing it, should have been given along with them.

[8] The refusal of the court to give two instructions requested by the defendant is ground of further complaint. By them the defendant attempts to apply here the rule declared in *Stockton v. Morris*, 39 W. Va. 432, 19 S. E. 531, requiring, in the case of what is called an inclusive grant, the plaintiff to prove the land he seeks to recover, lies, not only within the boundaries of the grant, but also outside of the tract excepted from it. The grant to Phillips excepted prior surveys containing 800 acres and declared that it should be no bar, in either law or equity, to the confirmation of the title of prior claimants to said 800 acres by grant. If nothing further appeared in the case, the rule invoked would apply; but another important element is disclosed. This whole tract of land, without any exception, was afterwards sold by the state in the proceeding instituted by Commissioner Goff. The deeds, made in that proceeding and conveying every particle of land within the boundaries of the original grant of 19,000 acres, constituted a new grant by the state, without exception. Had the state any title to the land excepted from the original grant? Certainly, if the excepted surveys were never granted, but such title did not accrue from forfeiture of the Phillips grant, which did not include them. The state still held her title as sovereign, provided the excepted surveys had not been subsequently granted. Did the Goff deeds pass that title? No, for the lands were waste and unappropriated, which commissioners of the revenue had no power to sell. They were not subject to sale by judicial procedure, as delinquent and forfeited lands were. They passed only by survey, entry, and grant. Code of 1819, vol. 1, c. 86; Code of 1849, c. 112. For that reason, the deed of a commissioner of the revenue would not pass them. *Levasser v. Washburn*, 11 Grat. (Va.) 572. No statute vested jurisdiction in the court, or conferred authority upon the commissioner, to dispose of them in that way. But the Goff deeds covered this land, and were defective only in respect to authority to convey a particular title.

[9] The Legislature had power to remedy this defect, and did so by the curative and validating provision of section 19 of chapter 105 of the Code of 1906, saying: "Whatever right, title, interest and estate the state of West Virginia had to any lands at the date of the sale thereof, or instrument purporting to convey the same heretofore made by said state through and by the commissioner of school lands of any county, under an order or decree of the circuit court in any suit or proceeding under said chapter one hundred and five of the Code, however derived or claimed, shall be deemed and held to have passed to and vested in the grantee thereof; whether the land so sold was pro-

ceeded against as forfeited, escheated, or waste and unappropriated land, notwithstanding any irregularity or error in such proceeding or informality in such sale or conveyance or purported conveyance, or want of jurisdiction in the court to decree such sale."

[10] This clearly validates the Goff deed and makes it pass this land as waste and unappropriated. The deed did not do so of itself on account of lack of jurisdiction or power in the court to sell it as such; but this statute declares the deed shall do so, notwithstanding the want of jurisdiction or the form of the sale or proceeding. It operates as a legislative release or transfer of state title to the grantees in deeds which did not pass it, because of lack of prior authority in the state's selling agents to do so. This conclusion is within both the letter and the spirit of the statute. So interpreted, it makes a just and equitable provision for a meritorious case and is in perfect accord with the prior and subsequent policy of the Legislature respecting the public domain and land titles emanating from the state. *State v. West Branch Lumber Co.*, 64 W. Va. 673, 63 S. E. 372; *State v. Snyder*, 64 W. Va. 659, 63 S. E. 385; *State v. Jackson*, 56 W. Va. 558, 49 S. E. 465; *Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. 214; *McClure v. Maitland*, 24 W. Va. 561; *State v. Harman*, 57 W. Va. 447, 50 S. E. 828; *State v. King*, 64 W. Va. 545, 546, 610, 63 S. E. 468, 495. Can the want of jurisdiction relieved from by this provision be other than such as appears here? To say it means want of jurisdiction of the former owner of the land would make the clause very narrow in its effect and of little or no practical value. To make it cover this defect of authority relieves the state of the injustice and embarrassment of holding title against her own grantee, rendering it necessary for him to give up the land or buy it over again from her, in the same way and from the same state agencies through which he had already purchased it; there having been no other mode of disposition thereof at the date of the passage of the act nor since. We may well suppose the Legislature intended to provide against a consequence so anomalous, unjust, and inimical to the prosperity of the state, and the terms used in this clause clearly express such intent. The provision quoted is from the section, as amended by chapter 42 of the Acts of 1905. As it stood immediately before that amendment was made, it was more direct and specific as to the intent, leaving no possible ground for doubt. See section 19, c. 105, Code of 1899.

Another view of the case sustains the action of the court in refusing this instruction. Lot No. 14, in which the trespass may be, and part of lot No. 22, were subsequently conveyed by Yocum, commissioner of school

lands, in 1879, under a decree in a school land proceeding, and under a statute materially different from that under which the Goff sale of the same land had been made. Chapter 134 of the Acts of 1872-73, in force at the date of that proceeding, sale, and conveyance, provided for the disposition of waste and unappropriated lands in the same manner as forfeited and purchased lands. That method of disposing of them was adopted about the year 1865, and has been maintained ever since. Section 8 of chapter 105 of the Code of 1868 provided that the deed, in such a proceeding, should pass "all the interest of the state" in the lands thereby conveyed, not merely such title as had been acquired by forfeiture or the particular forfeiture ascertained in the cause. The Yocum deed, therefore, clearly passed any title the state had at the date thereof, and, if the land excepted from the Phillips grant had not been previously granted, the state's original title to lot No. 14 and part of lot No. 22, as sovereign, was thereby conveyed to Baker. No prior grant thereof has been shown. If it had been, it would have been superior to these school land deeds and the rule in question no doubt applicable; but, in the absence thereof, we think it clearly inapplicable and the rejection of the instruction proper.

[11] Exception was taken to the admission of the opinion of a surveyor who had run certain exterior lines of the 19,000-acre tract, to the effect that the lines thereof, laid down on the surveyor's plat, were the true lines. Ordinarily, such evidence is inadmissible. The location of boundary lines is not a subject for expert testimony. It always depends upon facts and circumstances which the jury are presumed to be capable of understanding without the aid of expert testimony. The court should have excluded this statement.

[12] Complaint is also made of the admission of an agreement between Mylius and Kupfer, whereby the former bound himself to compensate the latter for any land he might lose out of that conveyed to him by the partition deed, by reason of conflict between it and another tract of land, known as the "Hare land." Mylius put this agreement in evidence to negative the effect of his admission, arising by implication from his transactions with Kupfer, and as a part of his conduct relating to the location of the lands as conveyed by Goff. We perceive no error in the admission thereof. It properly goes to the jury with all the evidence of admissions and conduct, bearing on the questions of location.

For the error in giving plaintiff's instructions in the form in which we find them in the record, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(136 Ga. 282)

SOUTHERN RY. CO. v. PHILLIPS.
(Supreme Court of Georgia. May 11, 1911.)

(*Syllabus by the Court.*)

1. PLEADING (§ 208*)—SPECIAL DEMURRER.

Where a paragraph in a petition contains both relevant and irrelevant allegations, it will be purged of the irrelevant matters on special demurrer pointing out such; but if the demurrer goes to the paragraph as a whole, without specification of the irrelevant matter, the demurrant cannot complain that the entire paragraph was not stricken.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 513-519; Dec. Dig. § 208.*]

2. CARRIERS (§ 319*)—DAMAGES (§§ 171, 181*)—PUNITIVE DAMAGES.

According to the plaintiff's testimony, she was a passenger on defendant's road, and entitled to continuous passage from B. to E. She was accompanied by a small child and carried a valise. The terminal point of the train upon which she traveled was Jesup, where she was to change cars. She was told by the conductor, as the train was approaching the station of Odessa, which was within five miles of Jesup, that this was the place for her to get off. The plaintiff alighted as directed, and did not discover her mistake until after the train had left. There were no station facilities, and there were some negroes near by. It was about 10 o'clock at night, and she became frightened, because she was apparently without protection or a place to spend the night. She inquired of the negroes for direction to a house where she could spend the night. They directed her to a place. And on the way there she met a white youth, who invited her to spend the night with his mother, by whom she was hospitably entertained, and on the following morning she continued her journey to destination; the railway company accepting her original ticket. If the jury should find these circumstances to be true, then the plaintiff would be entitled to compensatory, but not to punitive, damages.

(a) Even if the plaintiff had been entitled to punitive damages, the charge that the jury could consider the worldly circumstances of the parties in assessing such damages was erroneous.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1338-1345; Dec. Dig. § 319.* Damages, Cent. Dig. §§ 474, 498, 499; Dec. Dig. §§ 171, 181.*]

Error from Superior Court, Wayne County; P. E. Seabrook, Judge.

Action by Mrs. Georgia C. Phillips against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Bennet, Twitty & Reese and Littlefield & Poppell, for plaintiff in error. W. M. Clements, W. W. Bennett, and D. M. Clark, for defendant in error.

EVANS, P. J. Mrs. Georgia C. Phillips brought suit against the Southern Railway Company to recover damages for being put off at a wrong station. The plaintiff, having purchased a ticket, boarded the passenger train of the defendant company at Brunswick on a journey to Empire. It was necessary for her to change cars at Jesup. She was accompanied by her small child and carried a small valise. After she had been traveling for some time, and as the train

was slowing up for a station, the conductor announced that it was the place for petitioner to leave the train, at the same time taking up the package and directing her with her child to follow him; and, acting upon the direction of the conductor, she left the train, which, as soon as she disembarked, rapidly moved away, leaving her in darkness. The place where she was put off was Odessa, a place five miles south of Jesup, without depot accommodations or other provisions for her comfort or safety. It was 10 or 11 o'clock at night when she left the train, and for some time the only persons she saw were several negroes. She was very much frightened, and after some time had elapsed a white boy was called to her by the negroes, whom she asked if there were any white people in the community, and he finally secured a place for her to spend the remainder of the night. The plaintiff alleged that the conduct of the conductor in causing her to leave the train at a point other than her destination at a strange place, in the nighttime, was gross negligence and wanton and willful misconduct. The defendant demurred generally and specially to the petition. The demurrer was overruled, and the case proceeded to trial.

On the trial the plaintiff testified that she purchased a ticket over the road of the defendant company, entitling her to a passage from Brunswick, Ga., to Empire. The train upon which she took passage left Brunswick at about 8 o'clock at night. When the conductor took up her ticket, she asked him if she did not have to change at some place between Brunswick and Empire, and he said, "Yes, you change at Jesup," and told her that the train was due to arrive at Jesup at about 10 o'clock. Near that time the conductor came through the coach and called out the station, and she understood him to say Jesup. She was intending to ask some one before the train stopped if the station was Jesup, when the conductor took up her valise and hat box and said, "Here is where you get off at," and when the train stopped the conductor assisted the plaintiff to alight. She thought she was at Jesup until the train had left. She saw some negroes around the station, and also a white lady, who got off the same train she did. When she got off the train, she saw a switch light and started in that direction, thinking it was the depot. She asked the lady who got off the same train with her where she was going, and she replied that she was going home, and she asked her where to go to take the next train, and she said, "Go down there and ask them," waving to the place where some negroes were. She asked them where to go to take the next train, and they replied that there would be no train until the next morning, and said, "You think you are at Jesup, but this is Odessa." She inquired of them

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

where she could spend the night and they directed her to the "captain's house." On their way they saw a young white boy named Carl Moody, who, being informed by the negroes that the plaintiff wanted to spend the night somewhere, invited her to spend the night with his mother. She accompanied Carl Moody to his mother's, a short distance from the depot, and spent the night with her. She did not get to sleep until about 4 o'clock in the morning, on account of the fright brought about by having been put off the train under the circumstances she narrated. The next morning she boarded the train and presented her ticket to the conductor, and explained that she was put off at Odessa when intending to leave the train at Jesup, and she was carried on this ticket to her destination. The servants in charge of both trains treated her civilly and politely. Upon her return home she sent Mrs. Moody \$1 for her night's lodging.

The defendant submitted testimony tending to show that the train upon which the plaintiff was traveling as a passenger was a local train, scheduled to stop at Jesup; that when the train was approaching Odessa, a station five miles from Jesup, the conductor announced that station; and that the plaintiff, believing that she had arrived at her destination alighted from the car, being assisted by the conductor. The conductor testified that he did not tell the plaintiff that she had reached her station at the time she left the car at Odessa. The plaintiff boarded another train of the defendant railway company the next morning, and was carried on her ticket to her destination, where she was met by her father. The jury returned a verdict for the plaintiff for \$250. The railway company made a motion for new trial upon the grounds that the verdict was excessive, and that the court erred in giving certain instructions. A new trial was refused and the defendant excepted.

[1] 1. The plaintiff's allegations were in some instances redundant, but in the different paragraphs to which special demurrers were directed there were allegations of fact appropriate to the plaintiff's cause of action. The special demurrers moved to strike the entire paragraphs as being immaterial and impertinent; but as some of the allegations in each paragraph criticised were not open to this objection, the court did not err in refusing to strike the entire paragraph. As against a general demurrer the petition set forth a cause of action.

[2] 2. On the subject of damages the court charged as follows: "If you find, in addition to nominal damages, that the facts and circumstances at the time of this transaction were such as to justify the assessing against the defendant of punitive damages, while the law fixes no arbitrary standard by which you can be controlled in that regard, no definite rule fixed by which you can ascertain an amount, the law leaves it to the enlight-

ened consciences of impartial jurors to determine the amount of damages, if any, that should be allowed by the jury. Upon this theory, punitive damages, the law fixes no arbitrary standard to guide you, except that it is left to the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, if any, and all the attending facts and circumstances, should be weighed in determining upon the amount, if you should decide recovery is justifiable upon this theory of the case under the law and facts and circumstances. The jury should at all times be reasonable and just, and not oppressive." The exception is that the evidence did not authorize a charge on the subject of punitive damages, and because there was no evidence of the worldly circumstances of the parties. "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." Civil Code 1910, § 4503.

We are at a loss to see, from the facts as narrated by the plaintiff, any circumstances of aggravation authorizing a recovery of punitive damages. According to her own testimony the agents of the railway company were civil and courteous in their treatment of her, and her being put off at the wrong station was the result of a mistake. It is her contention that the conductor told her that she had arrived at the place where she was to change cars and invited her to get off, and that she got off at the wrong station on his invitation. If the conductor's version of the incident be accepted as true, the plaintiff misunderstood the station announced "Odessa" to be "Jesup," and voluntarily left the train. Be that as it may, it is clear from both viewpoints that the plaintiff's leaving the train at Odessa was the result of a clear mistake. There is not a line in the evidence which indicates that any servant of the defendant company was influenced by any improper motive, or impelled by any desire to injure or to willfully discommode the plaintiff. The charge on the subject of punitive damages should not have been given. *So. Ry. Co. v. O'Bryan*, 119 Ga. 147, 45 S. E. 1000; *Central Ry. Co. v. Wood*, 118 Ga. 172, 44 S. E. 1001; *So. Ry. Co. v. Harden*, 101 Ga. 263, 28 S. E. 847; *So. Ry. Co. v. Davis*, 132 Ga. 812, 65 S. E. 131; *Yazoo & M. V. R. Co. v. Hughes* (Miss.) 50 South. 627; *Moss v. Missouri Pac. Ry. Co.*, 128 Mo. App. 385, 107 S. W. 422; *Tenn. Cent. R. Co. v. Brasher's Guardian* (Ky.) 97 S. W. 349; *Cleveland, C., C. & St. L. Ry. Co. v. Quillen*, 22 Ind. App. 496, 53 N. E. 1024.

Again, the charge was erroneous, in that it instructed the jury that they might consider the worldly circumstances of the plaintiff. In a tort of this character the worldly cir-

cumstances of the plaintiff are not the subject-matter of inquiry; and, even if the evidence had justified the charge on the subject of punitive damages, the charge as given was erroneous. *Atlanta Con. St. Ry. Co. v. Hardage*, 93 Ga. 457, 21 S. E. 100.

Judgment reversed. All the Justices concur.

(136 Ga. 340)

BOYD v. STATE.

(Supreme Court of Georgia. May 12, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§ 339*)—CRIMINAL LAW (§ 673*)—APPEAL—HARMLESS ERROR—EXCLUSION OF TESTIMONY—ADMISSIBILITY OF EVIDENCE—MURDER.

The state introduced testimony that the defendant stated before the coroner's inquest that he undertook to take a gun from the deceased, and that, "in tussling over the gun, the gun went off." *Held*, that the refusal of the court to permit the defendant to prove by the witness delivering such testimony that, in the statement about which he was testifying, the defendant also stated that the shooting of the deceased was an accident, was not error requiring a new trial, in view of the fact that the court subsequently reversed such ruling and permitted the defendant to make such proof by the witness.

(a) When the defendant was allowed to prove by the witness that, in the statement referred to in the preceding note, the defendant also stated that the discharge of the gun was an accident, it was error for the court to rule: "I don't allow these words about it being an accident to go in to show it as a fact, to show it was an accident, but as a disclaimer of guilt. The court allows it to go in only to that extent."

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 339;* *Criminal Law*, Cent. Dig. §§ 1872-1876; Dec. Dig. § 673.*]

2. HOMICIDE (§ 309*)—MURDER—INSTRUCTIONS—INVOLUNTARY MANSLAUGHTER IN COMMISSION OF LAWFUL ACT.

The evidence required a charge on the subject of involuntary manslaughter in the commission of a lawful act without due caution and circumspection, and the court committed error in failing to charge upon that subject.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

3. CRIMINAL LAW (§ 778*)—HOMICIDE (§§ 146, 269, 340*)—MURDER—INSTRUCTIONS—BURDEN OF PROOF—EVIDENCE—PRESUMPTIONS—MALICE.

Whether or not it would require the grant of a new trial that, in the trial of one indicted for murder, the judge charged the jury that "the law presumes every homicide to be felonious, until the contrary appears from the circumstances of alleviation, or excuse, or justification, and it is incumbent upon the prisoner to make out by a preponderance of the evidence, if a homicide is shown to have been committed by him, such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him," this court does not commend the use of the expression that it is incumbent upon the accused to make out his defense by a preponderance of the evidence; and especially is this true where the defense was that the homicide was accidental, rather than intentional.

(a) If a homicide is proved, and the evidence adduced to establish it shows neither mitigation

nor justification, malice will be presumed from the proof of the homicide; but the presumption is rebuttable, and may be overcome by evidence of alleviation or justification. If the evidence adduced to establish the homicide presents two conflicting theories, one of malice and the other an absence of malice, it becomes a question of fact to be decided by the jury as to which aspect of the evidence is the real truth of the occurrence. Where the only evidence adduced by the state to show that the accused committed the homicide consists of proof of a dying declaration by the deceased that he killed her, and proof of a statement made by him in which he stated that he killed her, but that it was an accident, the charge set out in the preceding headnote (except in regard to the point therein dealt with as to the charge in regard to the preponderance of evidence) cannot be held to be error requiring a new trial; but, on a new trial, the distinction between the different rules of law applicable where the proof of the homicide rests upon a statement of the accused proven by the state, which includes in itself exculpation, and where the homicide is proved by evidence which does not also include exculpation or mitigation, should be more clearly made. *Futch v. State*, 90 Ga. 472 (8), 490, 481, 16 S. E. 102; *Mann v. State*, 124 Ga. 760, 762, 53 S. E. 324, 4 L. R. A. (N. S.) 934.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1857; Dec. Dig. § 778;* *Homicide*, Cent. Dig. §§ 265-271, 563; Dec. Dig. §§ 146, 269, 340.*]

4. REVIEW ON APPEAL.

Except as pointed out in the preceding notes, no error requiring a new trial appears in any of the grounds of the motion for a new trial, or of the amendment thereto.

Error from Superior Court, Terrell County; W. C. Worrell, Judge.

Sell Boyd was convicted of murder, and brings error. Reversed.

The plaintiff in error (hereinafter called the defendant) was convicted of murder, and to the refusal of his motion for a new trial he excepted.

The evidence on behalf of the state was substantially as follows:

Frank Bowen testified that while sitting in his house, at about 7 o'clock at night, October 21, 1909, he heard a gun fire, and on going out found the deceased lying on the edge of the road just outside of his yard, with a wound about the size of a silver dollar in her stomach. The wound was inflicted by the firing of a shotgun, and was just "a bit to the right of the stomach." When the gun fired, he was 75 or 80 feet from where the deceased was found, and the noise of the gun appeared to come from this place. When he reached her body, no one else was there, and no weapon was near her. "She said something about Sell [the defendant] shooting her, some way or other; but I don't remember how she brought that in. . . . The deceased was his (defendant's) wife, or the woman he was living with as his wife. She lived 15 or 20 minutes after I found her. She lived about 150 or 200 yards from that place on a plantation road. I examined the place where her dress was struck by the load. It was powder-burned. I examined

enough to see whether there was any wound on the back side. I noticed that there was a knot pushed higher up on her back than the wound in front. I felt of it. It felt like shot. Her husband came in about 20 or 30 minutes, and stayed there until Mr. Lewis came and brought him to town. * * * This man and woman had been getting along fairly well, as well as negroes generally get along, before the time of the shooting. They had a few little disputes since I had been there. * * * Sell Boyd said at the coroner's inquest that they were tussling over a gun, and she got shot; and that is all that I remember having heard him say at the coroner's inquest. He said that she was drinking, and that she had started up towards your house with the gun; that he overtook her, and told her to give him that gun; that he caught hold of it, and she jerked back; and that the gun went off accidentally. Sell Boyd said at the coroner's inquest that the shooting was an accident; that he was simply trying to get the gun away from her when it fired; that she snatched the gun when he caught hold of it, and that it was all an accident; that she went out of the house and carried the gun, and was going up towards my house when he overtook her and tried to take the gun away from her; that, to the best of my recollection, he said at the coroner's inquest that she was drinking, and what I am now talking about, is what Sell Boyd said at the coroner's inquest. * * * He said that she was leaving the house, and that he followed her, and that in trying to take the gun away from her it went off. * * * I saw Sell Boyd that night after the shooting. He was very little drunk. He may have had a drink. I would not say that he was drunk. I could smell some whisky on him, and her, too. I smelt some whisky on him. I smelt whisky on Ella Boyd, too."

R. B. McLain testified that he was a member of the coroner's jury which held an inquest on the body of the deceased in the house in which she and the defendant lived. "There was a little single-barrel breech-loading shotgun exhibited to us, with which they told us the killing was done. Sell Boyd, I believe, said it was the gun. * * * I think that Sell brought the gun in there. * * * Sell Boyd, at the same time and place in which he told me that this was the gun that the shooting was done with, told me that his wife took the gun and started up the road, and he followed her up there, and attempted to take the gun away from her, and in the tussle it went off. * * * My recollection is that he stated that she went off up the road with the gun, and he followed her, and he followed her up and attempted to take the gun away from her, and the gun went off. He said that, in tussling over the gun, the gun went off. I think

that Sell Boyd said, in that same conversation, that he did not intend to kill her."

C. P. Buchanan, the coroner, testified that he failed to find any "powder stains or burns about the wound, if there were any. * * * I examined a dark skirt, and around that hole in the skirt was some sand and dirt. The clothing was not on her at the time I examined them. They had been taken off of her. The woman had been re-dressed at the time I examined her. The clothing that she had worn at the time that she had been shot was on the floor, by the window. They were bloody. The hole in the garments that I examined looked to be about the same size of the hole in the body. The dark skirt had some dirt on it, but I saw no signs of powder stains. The skirt I examined was a dark skirt, and I suppose it was an outer garment. * * * It had dirt, or sand, or something of that nature, on it. * * * I don't know that the clothes I examined were the clothes that she had on at the time she was shot. * * * I can't swear whether that was a skirt or a dress that I found the hole in. I cannot swear positively what part of the stomach that wound was in. I don't know exactly whether it was below the waist, along where the skirt hangs."

The defendant introduced no testimony, and made no statement upon the trial.

M. C. Edwards and M. J. Yeomans, for plaintiff in error. J. A. Laing, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

HOLDEN, J. Judgment reversed. All the Justices concur.

(186 Ga. 355)

LEWIS v. STATE.

(Supreme Court of Georgia. May 12, 1911.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 174*)—ISSUES AND PROOF—MURDER—DECREE.

In the crime of murder, the punishment of the principal in the first and second degree is the same, and no distinction need be made between them in the indictment; and the conviction of one of several indicted for murder as principals in the first degree is lawful, though the evidence shows him guilty only as principal in the second degree. *McLeod v. State*, 128 Ga. 17 (3), 57 S. E. 83; *Bradley v. State*, 128 Ga. 20, 57 S. E. 237.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 540; Dec. Dig. § 174.*]

2. CRIMINAL LAW (§ 429*)—ADMISSIBILITY OF EVIDENCE.

Will Bruner, Sol Lewis, and Jim Wilkerson were indicted for murder as principals in the first degree. Upon the trial of the plaintiff in error, Sol Lewis, the evidence was sufficient to authorize a finding that Will Bruner was guilty of murder as principal in the first degree, and that Sol Lewis was present, aiding and abetting him in the commission of the crime, and that he was therefore guilty of murder as principal in the second degree. *Held*, that up-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on the trial of Sol Lewis it was not error to allow the state to introduce in evidence the indictment and the verdict thereon of guilty as to Will Bruner. *Studstill v. State*, 7 Ga. 2; *Jackson v. State*, 54 Ga. 439; *Bruce v. State*, 99 Ga. 50, 25 S. E. 760.

(a) It was not error to refuse to allow the defendant to introduce in evidence the motion for a new trial made by Will Bruner.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 429.*]

3. INSTRUCTION HELD PROPER.

In view of the entire charge, the following charge of the court was not error requiring a new trial: "Should you believe from the evidence in this case, beyond a reasonable doubt, that the defendant Sol Lewis, either by himself or acting in concert with Will Bruner, in Terrell county, on or about the 24th day of April, 1910, killed Silas Sutton with malice aforethought, either expressed or implied, in the manner set forth in this indictment, you would be authorized to convict him; otherwise, not."

4. CRIMINAL LAW (§ 1122*)—APPEAL—RESERVATION OF GROUNDS OF REVIEW.

One ground of the amendment to the motion for a new trial is as follows: "Because the court erred in charging the jury on the subject of conspiracy as set forth and recited in the charge, which was duly reported, approved, and filed as a part of the record in said case, and which is hereby referred to as part hereof." Held that, the charge excepted to not being copied, or its substance set forth in the motion, or in an exhibit thereto properly identified, this ground presents no question for consideration by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940-2945; Dec. Dig. § 1122.*]

5. REVIEW ON APPEAL.

There is no merit in the ground that the charge of the court, "taken as a whole, put the case too strongly against the defendant Sol Lewis, and was more favorable to the state than to the defendant."

6. VERDICT SUPPORTED BY EVIDENCE.

The evidence warranted the verdict.

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Sol Lewis was convicted of murder, and he brings error. Affirmed.

Jas. G. Parks, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, and H. A. Hall, Atty. Gen., for the State.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 276)

TURNER v. WOODWARD.

(Supreme Court of Georgia. May 11, 1911.)

(Syllabus by the Court.)

1. WITNESSES (§ 150*)—COMPETENCY—TRANSACTION WITH DECEDENT — "ASSIGNEE OR TRANSFEREE OF THE TITLE."

An equitable action was brought by a man, alleging that by a deed absolute on its face he had conveyed land to his wife to secure an indebtedness, which he had paid off; that she had destroyed the security deed, supposing that this reinvested him with title, and had subsequently made to him a conveyance in the form of a deed of bargain and sale, but without an order of court approving it; that subsequently she had conveyed the land to her daughter by deed of gift, which the plaintiff sought to can-

cel as a cloud on his title. Held, that the grantee in the deed of gift was an "assignee or transferee of the title," within the meaning of Civ. Code 1910, § 5858, par. 1, and the plaintiff was incompetent as a witness to testify to transactions between himself and his deceased wife.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 653-657; Dec. Dig. § 150.*]

2. NONSUIT PROPERLY GRANTED.

The evidence failed to sustain the allegations of the petition, and there was no error in granting a nonsuit.

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Action by Geo. B. Turner against M. A. G. Woodward. Judgment for defendant, and plaintiff brings error. Affirmed.

T. L. Griner and Hines & Jordan, for plaintiff in error. A. F. Daley, H. P. Howard, and P. L. Wade, for defendant in error.

LUMPKIN, J. Turner brought an equitable action against Mrs. Woodward, seeking to have a deed which had been made by Mrs. Turner to Mrs. Woodward canceled and the title of the plaintiff decreed to be perfect. The case has been to this court on exception to the sustaining of a demurrer. *Turner v. Woodward*, 133 Ga. 467, 66 S. E. 160. The plaintiff alleged that he had borrowed money from his wife and had made a deed to her to secure the loan, though the deed was absolute in form; that he had paid the loan, and his wife had destroyed the deed, intending thereby to reinvest the title in him; that his wife thereafter made a conveyance to him by deed of bargain and sale, with warranty of title, but no bargain and sale was in fact made, and such conveyance was not allowed by order of the superior court; that subsequently she executed to her daughter, Mrs. Woodward, a deed of gift. An amendment was made, to the effect that the deed of Mrs. Turner to the plaintiff was a gift, inasmuch as he had paid all the money which she had loaned to him. This court construed such amendment as not substantially varying the allegations of the petition. Presiding Justice Evans said: "In the amendment it is alleged that the deed from the wife to the plaintiff was a gift; but in view of the other allegations we construe this averment to mean only that no consideration passed from the wife to the husband, other than the repayment of the wife's debt due to her by the husband." When the case came on again for trial, after the close of the plaintiff's evidence, the judge granted a nonsuit, and the plaintiff excepted.

[1] 1. The court refused to permit the plaintiff to testify that the deed from his wife to him was a deed of gift to him from his wife, as he had given her this property; that he had made a previous deed to her, because she had given her notes to creditors of his, and was to make the title back when he paid these notes; that he had paid off

such notes, and that she had then made this deed back to him. The objection raised was that the witness was incompetent to testify to such facts, because his wife was dead, and this suit was being defended by her assignee or transferee of the land in dispute. The court ruled correctly, under the decision in *Hendrick v. Daniel*, 119 Ga. 358, 46 S. E. 438, and *Hendricks v. Allen*, 128 Ga. 181, 57 S. E. 224.

It was contended that these decisions were in conflict with certain previous decisions, which were cited. To this contention we cannot agree. In *Heard v. Phillips*, 101 Ga. 691, 31 S. E. 216, 44 L. R. A. 369, a transferee of a bond for title had taken a deed from the obligor of the bond, and brought suit to recover possession of the premises, so conveyed to him by deed, from one who acquired possession under the original obligee, who was dead at the time of the trial. It was held that the defendant did not fall within any of the classes of persons excluded as witnesses by the terms of paragraph 1 of section 5269 of the Civil Code of 1895 (Civ. Code 1910, § 5858). In *Ray v. Camp*, 110 Ga. 818, 36 S. E. 242, it was held that, although one may have been a party defendant and interested in the result of a case instituted by the personal representative of a deceased person, such defendant was not incompetent to testify to what was said in a conversation had, not with him, but in his presence between the plaintiff's intestate and another; such conversation being neither a transaction nor a communication between the witness and the deceased. In *Florida Central, etc., R. Co. v. Usina*, 111 Ga. 697, 36 S. E. 928, it was held that when, in the trial of a suit against a corporation for a breach of contract, the terms of a contract between the defendant and a deceased individual not a party to the case were collaterally relevant, an agent of the defendant, who acted for it in making the contract with such individual was not, because of the death of the other contracting party, incompetent to testify with respect to the transaction. In *Austin v. Collier*, 112 Ga. 247, 37 S. E. 434, it was held that legatees under a will were not indorsees, assignees, or transferees, or personal representatives of the deceased, so as to render a plaintiff who sued to recover the land from them an incompetent witness. In *Boynton v. Reese*, 112 Ga. 354, 37 S. E. 437, a similar ruling was made as to an heir at law. In *Harris v. Whitney*, 112 Ga. 633, 37 S. E. 883, the suit as it came on for trial under a consent substitution of a party, was between a grantee of an intestate and his widow, claiming a year's support. It was held that the widow did not fall within the description of the statute, so as to render the grantee of the intestate an incompetent witness.

It will readily be seen that the facts of each of these cases differentiate it from the

one now before us, and that there is no conflict between the decisions then made and that now rendered. It should also be noticed that they were rendered in cases which arose prior to the act of December 18, 1900 (Acts 1900, p. 57). This act added to the excluding paragraph of the section of the Code, to which reference has been made, these words, "whether such transactions or communications were had by such insane or deceased person with the party testifying or with any other person."

[2] 2. The evidence did not sustain the allegations of the petition, with or without the amendment, and there was no error in granting a nonsuit.

Judgment affirmed. All the Justices concur.

(136 Ga. 378)

ABBOTT v. PADROSA.

(Supreme Court of Georgia. May 11, 1911.)

(Syllabus by the Court.)

1. JURY (§ 75*)—EXCUSING JURORS UNTIL FUTURE DAY DURING TERM.

A judge of the superior court may, in his discretion, excuse 24 jurors, regularly impaneled and in attendance upon the court, until a future day during the term, when they shall appear to try a given cause then set for trial. Such jurors would not be "without power or authority to serve as such" at the time designated for the trial of the case.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 384-390; Dec. Dig. § 75.*]

2. LANDLORD AND TENANT (§ 118*)—TENANCY AT WILL.

Upon the trial of a dispossessionary warrant proceeding to evict a tenant holding over, it appeared from the uncontradicted evidence that the contract of rental was in parol. The plaintiff testified that the term was for one year. The defendant testified that it was for the balance of the current year, "with the privilege of another, and as long as I paid my rent." It also appeared that the plaintiff gave the two months' notice required by Civil Code 1910, § 3709, to the defendant to quit as a tenant at will. Held, under plaintiff's evidence, the term of defendant was ended, as the contract of rental was only for a year, which had expired; also that, according to the provisions of Civil Code 1910, § 3693, the evidence of the defendant had the effect of constituting him a tenant at will. Accordingly, under either view of the disputed evidence, considered in connection with that which was uncontradicted, a verdict was demanded in favor of the plaintiff, and the court did not err in directing the jury to return such a verdict. In this connection, see *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794; *Nicholes v. Swift*, 118 Ga. 922, 45 S. E. 708.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 402-415; Dec. Dig. § 118.*]

3. REVIEW ON APPEAL.

The verdict being demanded under the defendant's testimony, it is unnecessary to pass upon rulings of the court upon which error was assigned in refusing to continue the case on his motion on account of an absent witness, who, if he had been present, would merely have corroborated defendant's testimony, and in excluding the testimony of a witness, which, if it had been admitted, would have had the same tendency.

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by Benito Padrosa against J. W. Abbott. Judgment for plaintiff, and defendant brings error. Affirmed.

Crovatt & Whitfield and Ernest Dart, for plaintiff in error. Bennet, Twitty & Reese, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(128 Ga. 201)

TATE et al. v. CITY OF ELBERTON et al.
(Supreme Court of Georgia. May 11, 1911.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 864*)—INDEBTEDNESS—LIMITATION—CONSTITUTIONAL PROVISION.

By article 7, § 7, par. 1, of the Constitution (Civil Code 1910, § 6563), it is declared that the debt of a municipal corporation shall not exceed 7 per centum of the assessed value of all the taxable property therein; and no municipality shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of 1 per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof at an election for that purpose, to be held as prescribed by law.

(a) The provision as to cities the debt of which did not exceed 7 per centum of the assessed value of the taxable property at the time of the adoption of the Constitution is not material in the present case.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 864.*]

2. MUNICIPAL CORPORATIONS (§ 864*)—INDEBTEDNESS—LIMITATION—CONSTITUTIONAL PROVISION.

A liability for a legitimate current expense may be incurred, provided there is at the time of incurring the liability a sufficient sum in the treasury of the municipality which may be lawfully used to pay the liability incurred, or if a sufficient sum to discharge the liability can be raised by taxation during the current year. *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 864.*]

3. MUNICIPAL CORPORATIONS (§ 864*)—INDEBTEDNESS—LIMITATION—CONSTITUTIONAL PROVISION.

This does not authorize municipal authorities to borrow money (not to supply casual deficiencies of revenue) for the purpose of using it during the year in defraying current expenses as occasion may arise, and to give notes therefor.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 864.*]

4. MUNICIPAL CORPORATIONS (§ 864*)—LIMITATION OF INDEBTEDNESS—CONSTITUTIONAL PROVISIONS.

Under the constitutional provision cited above, municipal officers have not the right to borrow money, except upon being authorized as therein provided, on the ground that the municipality has sources of revenue, such as charges for furnishing water and electric lights, and fines and forfeitures which may be imposed in a recorder's court, and the like, from which it

is contemplated that money will arise which can be used to discharge such indebtedness.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 864.*]

5. INJUNCTION IMPROPERLY RESTRICTED.

Under the evidence adduced on the interlocutory hearing, it appeared that the municipal authorities had borrowed money and given notes therefor, and that such indebtedness was not created in the manner authorized by the Constitution. If the money obtained from such loan was traceable into the payment of legitimate municipal liabilities, and if any rights arose from such facts, either by way of implied contract or subrogation, such fact was not made to appear by the evidence contained in the record. It was therefore error to restrict the injunction against the payment of such notes to be used for that purpose by the money arising from a sale of bonds issued for street improvements and taxes arising from the levy for the year 1910.

(a) This was a proceeding brought by citizens and taxpayers to enjoin the municipal authorities from paying generally and specially certain debts alleged to be unconstitutional. It was not a proceeding by the holders of the claims nor were they parties to the proceeding.

6. MUNICIPAL CORPORATIONS (§ 985*)—INDEBTEDNESS—PAYMENT.

There was testimony tending to show that the open accounts which the municipal authorities intended to pay were incurred for legitimate municipal expenses for the current year, and the presiding judge so treated them. If so, and they were within the constitutional limitation as stated in the previous headnotes, provision should have been made for their payment by taxation. If such provision were not so made, after applying the taxes levied for the year to the purposes specified in the levy, if there should be any residue, it could be applied to the payment of such claims and liabilities. Funds arising from other sources than taxation, if not required by law to be applied in some other particular direction, might also be used for the discharge of such liabilities.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 985.*]

7. MUNICIPAL CORPORATIONS (§ 994*)—PAYMENT OF DEBTS ALLEGED TO BE UNCONSTITUTIONAL—ACTION FOR INJUNCTION—JUDGMENT.

The judge erred in restricting the interlocutory injunction relative to the payment of notes, as ruled in the fifth headnote, and also erred as to the open accounts in merely declaring that their payment should be enjoined, by use of the funds derived from the sale of bonds for street improvements and from taxation for the current year, "unless * * * from funds derived from the levy of taxes there should be funds that can lawfully be so applied, but they are not enjoined from paying said accounts out of any other funds in the treasury available for that purpose and which can legally be applied to the payment of such accounts." It was the duty of the judge to determine, so far as necessary for the purpose of granting or refusing the interlocutory injunction, whether the open accounts represented legitimate expenses as herein defined, and whether certain funds could be lawfully applied to their payment, and, if he so held, to state clearly to what funds he had reference, and not leave that open for determination by the defendants themselves.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 994.*]

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Action by E. B. Tate and others against the City of Elberton and others. Judgment

for defendants, and plaintiffs bring error. Reversed.

P. P. Proffitt, for plaintiffs in error. Jos. N. Worley, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except HOLDEN, J., disqualified.

(136 Ga. 300)

BROWN v. DENNIS.

(Supreme Court of Georgia. May 11, 1911.)

(*Syllabus by the Court.*)

1. SUFFICIENCY OF PETITION.

This case was before this court on a former occasion. *Brown v. Dennis*, 133 Ga. 791, 66 S. E. 1080. The petition, which contained allegations in substance as disclosed in the former decision of the case, was not open to general demurrer; nor, under the ruling in the case of *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 458, were any of the separate paragraphs of the petition subject to demurrer upon the ground of irrelevancy, indefiniteness, insufficiency, or immateriality of the allegations made in them.

2. REVIEW ON APPEAL.

There was no merit in the assignments of error upon the charge of the court, criticising certain portions of it as erroneous statements of the law, and complaining that it restricted the issues and improperly stated the defendant's contentions; nor was there merit in those assignments of error which complained of a failure to charge with respect to certain matters, nor in the assignments of error that criticised the charge as containing expressions of opinion upon questions of fact, and not being adjusted to the evidence.

3. OBJECTIONS TO TESTIMONY NOT TENABLE.

Objections urged to the admissibility of testimony of the plaintiff, as complained of in the eleventh, twelfth, and thirteenth grounds of the amended motion for new trial, were properly overruled.

4. SECONDARY EVIDENCE — SUFFICIENCY OF FOUNDATION.

Evidence as to the authenticity and loss of a letter from the assured to the agent of the plaintiff, relating to a change of beneficiary in the policy, was sufficient to authorize the admission of parol evidence of its contents.

5. PRIOR DECISION CONTROLLING.

Upon its facts this case is controlled by the principles ruled in the case of *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 458, as applied to the facts of that case disclosed by the original record of file in this court.

6. VERDICT AUTHORIZED BY EVIDENCE.

The evidence authorized the verdict, and there was no abuse of discretion in refusing to grant a new trial.

Error from Superior Court, Bibb County, W. H. Felton, Judge.

Action between B. A. Brown and C. S. Dennis. From the judgment, Brown brings error. Affirmed.

R. Douglas Feagin, for plaintiff in error. Harris & Harris, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(136 Ga. 294)

ATLANTA ICE & COAL CO. v. REEVES.

(Supreme Court of Georgia. May 11, 1911.)

(*Syllabus by the Court.*)

1. MALICIOUS PROSECUTION (§ 10*)—ABUSE OF CIVIL PROCESS.

One is liable in an action for malicious abuse of civil process who fraudulently procures a judgment upon a spurious claim, causes a *fi. fa.* to issue thereon, and directs the seizure of the plaintiff's property by a levying officer, which is averted only by the payment of the fraudulent judgment by the plaintiff's wife during his absence.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 11, 12; Dec. Dig. § 10.*]

2. MALICIOUS PROSECUTION (§ 48*)—PLEADING.

Allegations respecting the manner in which a judgment was fraudulently obtained, and the manner in which the payment of the same was exacted, are not irrelevant in a suit of the character described in the preceding headnote.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Dec. Dig. § 48.*]

3. CORPORATIONS (§ 513*)—TORTS OF OFFICERS—ACTIONS—PLEADING—IDENTIFICATION OF AGENT.

Where a corporation is sought to be made liable in a tort action for the conduct of its agent, an allegation that such agent was "the agent in charge of" the office of the corporation sufficiently identifies the agent upon whose conduct the plaintiff in part bases his right to recover.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2017-2045; Dec. Dig. § 513.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by W. F. Reeves against the Atlanta Ice & Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The suit was by W. F. Reeves against the Atlanta Ice & Coal Company. The exception is to the overruling of the general and special demurrers. In substance the plaintiff alleged that in July, 1909, he was served with a copy of a summons issued by the notary public and ex officio justice of the peace of the 1,026th district, G. M., Fulton county, Ga., in a suit instituted by the defendant against the plaintiff on an account for one dollar. Upon service of the suit the plaintiff's wife, at his request, took the copy of the suit and went to the office of the defendant and exhibited it to the agent in charge of the office, and informed him that there was evidently a mistake, as the plaintiff was not indebted in any manner to the defendant, and had never had an account with it. The agent of the defendant inspected the copy of the suit and assured the plaintiff's wife that it was a mistake, that the plaintiff was not indebted in any manner to the defendant, and that he would stop the suit, and that the plaintiff need not appear at the court to make defense. The copy of the suit was retained by the agent. Relying upon these statements, the plaintiff made no defense. Notwithstanding the assurances of

the agent of the defendant that the judgment would not be taken against him, judgment was entered up and *fi. fa.* issued thereon. On December 10, 1909, the constable levied upon the household goods of the plaintiff, and was preparing to remove the goods. The plaintiff was away from home at the time, and his wife informed the constable of the foregoing facts, and requested him to wait and speak to the defendant's agent, or allow time for the plaintiff's wife to call him up over the telephone to speak to him about it. The constable refused all of these requests, and was proceeding to remove the household goods, when the plaintiff's wife, in order to prevent such removal, paid him the amount of the *fi. fa.* and the costs, to wit, \$5.45. The constable was acting under the direction and instruction of the defendant. It is alleged that the constable carried with him a dray when he went to execute the levy, and that the plaintiff's neighbors saw the constable go to his house with the dray, and knew that it was his purpose to levy and carry away the household goods of the plaintiff, which conduct of the constable caused him much humiliation, anxiety, and mental suffering, by being placed in a false light before his neighbors. He denied that he was indebted to the defendant in any sum, and further alleged that "the acts of defendant in instituting the suit against petitioner, and in misleading petitioner, and in leading petitioner to believe that said suit would be dismissed and discontinued, and in willfully and fraudulently carrying on said suit to judgment after having represented that said suit would be discontinued, and in causing execution to be issued on said suit, and in causing the constable to go to petitioner's house with a dray to levy on and carry away petitioner's household goods, were done maliciously and with the purpose of injuring and damaging petitioner, and that there were aggravating circumstances accompanying both the acts and intentions of said defendant in said matter." The prayer was to recover actual and punitive damages.

Payne, Little & Jones, for plaintiff in error. Moore & Branch, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1] The wrong of which the plaintiff complains is the malicious abuse of civil process. The substance of the complaint is that the defendant fraudulently procured a judgment upon a spurious claim against the plaintiff, which judgment was maliciously and oppressively enforced by directing the seizure of the plaintiff's property, which was averted only by the payment of the fraudulent judgment by the plaintiff's wife during his absence. If civil process is unlawfully made use of for a purpose not justified by the law, this is an abuse for which an action will lie. Hath-

away v. Smith, 117 Ga. 946, 43 S. E. 984; King v. Yarbray, 136 Ga. —, 71 S. E. 131; Barnett v. Reid, 51 Pa. 190, 88 Am. Dec. 574; Juchter v. Boehm, 67 Ga. 534. The general demurrer was properly overruled.

[2] There were many alleged grounds of special demurrer, most of which attacked certain allegations as immaterial. The narrative of facts upon which the plaintiff predicated his right to recover included the circumstances under which the fraudulent judgment was obtained, and its oppressive enforcement by the defendant. These allegations were neither irrelevant nor immaterial. The special demurrer, which called for the name of the agent of the defendant who is alleged to have given the assurance that the suit would be dismissed, was properly overruled.

[3] Where a corporation is sued for the tortious acts of its agents or servants, it is entitled to such notice as will serve to identify the person in connection with the transaction out of which the cause of action arises. This does not mean that the name of such agent must be given, or the particular designation of his official relation with the company, if the allegations sufficiently show the person intended. The defendant is a domestic corporation, sued in the county of its residence, and is informed that the agent alleged to have given assurance for the dismissal of the suit was that in charge of its office. This sufficiently identifies the person referred to. *Riley v. W. & T. R. Co.*, 133 Ga. 413, 65 S. E. 890, 24 L. R. A. (N. S.) 379. No ground of the special demurrer was meritorious.

Judgment affirmed. All the Justices concur.

(126 Ga. 303)

SOUTHERN RY. CO. v. GRANT.

(Supreme Court of Georgia. May 11, 1911.)

(Syllabus by the Court.)

1. ACCOUNT, ACTION ON (§ 6*)—PLEADING.

Where a suit against a corporation is brought on account, and an itemized statement thereof is attached to the petition, it is not necessary for the plaintiff to set forth in the petition the grounds upon which he contends that the defendant is liable to pay him the account.

[Ed. Note.—For other cases, see Account, Action on, Dec. Dig. § 6.*]

2. RAILROADS (§ 17*)—SPECIAL AGENT—AUTHORITY—NOTICE—MEDICAL AID.

One dealing with a special agent is bound to take notice of the extent of his authority.

(a) A physician, who, under a written contract between him and a railroad company, is thereby employed to give first medical attention to persons injured in the operation of the road of the company, when ordered by it to attend them, but by the terms of the contract of employment is prohibited from admitting any such persons "to hospital or private quarters on account of the company without specific authority from the head of the department to which such injury is accredited, or some other officer of the company," in the absence of such authority can-

not bind the company by contracting with a hotel keeper to furnish, on its account, board and lodging for such injured persons, or for those in attendance on them.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 36-38; Dec. Dig. § 17.*]

3. PRINCIPAL AND AGENT (§ 22*)—RAILROADS (§ 25*)—ADMISSIBILITY OF EVIDENCE—AUTHORITY OF AGENT.

Declarations of an agent are not admissible to prove his agency.

(a) The fact that the defendant, acting on the recommendation of the same physician, who, as claimed by the plaintiff, incurred the account with the plaintiff on which the present suit is brought, had on a previous occasion paid to the plaintiff the board of a person injured by the defendant, was an immaterial one, and proof thereof was inadmissible.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 40; Dec. Dig. § 22;* *Railroads*, Dec. Dig. § 25.*]

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by B. W. Grant against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Robt. McMillan and A. G. & Julian McCurry, for plaintiff in error. J. C. Edwards, for defendant in error.

HOLDEN, J. The defendant in error (hereinafter called the plaintiff) brought suit against the plaintiff in error (hereinafter called the defendant), alleging that the defendant was a corporation having an office and doing business in the county in which the suit was brought, and was "indebted to petitioner in the sum of \$123 on account, a copy of which is hereto attached and made a part of this paragraph and petition, and marked 'Exhibit A.'" The account attached to the petition was as follows: "Southern Railway Company, in Account with B. W. Grant, Prop'r Hotel Grant, Cornelia, Ga. To board for injured boys, Tom Brock and Gordon Logan, and for nurses, assistants, and doctors for the same, from March 16 to April 5, 1907. To one week's board for Gordon Logan \$10.00." Here followed other items, consisting of charges for board, for a specified time, for named persons, and the amounts respectively charged for the same, except that in two items the persons named were described as nurses, assistants, or physicians. A verdict was rendered in favor of the plaintiff, and to the order of the court refusing the defendant a new trial it excepted.

[1] 1. The defendant made a motion to dismiss the action, on the ground that the petition "contained no allegation showing any legal liability of the defendant for the payment of the account sued on; and that the pleadings did not set forth a prima facie case of liability of defendant for the payment of the account sued on." Exceptions pendente lite were filed to the ruling of the court overruling this motion, and error was

assigned thereon in the bill of exceptions. The court committed no error in overruling the motion to dismiss the petition. The plaintiff had the right to bring the suit upon an account, attaching to his petition a bill of particulars or statement of the account, and to recover upon proof of an express or implied promise to pay the same. If, as in this case, the account be against a corporation, and it was not in fact incurred by it, or was incurred by one of its agents not authorized to bind it in that regard, there can be no recovery. If the account was incurred by some agent authorized to bind the corporation, but not its agent to make payment, it would be the duty of the agent to notify the proper authorities of the corporation to discharge it; and if the agent failed to so notify them, they would nevertheless be charged with knowledge of its existence, knowledge of the acts of an agent within the scope of his authority being in law imputed to his principal. Under either view, the corporation cannot require more specific pleading in a suit against it of this character than would be required of a plaintiff bringing a like suit against an individual defendant. It was unnecessary to set forth in the petition the grounds upon which the plaintiff claimed the defendant was liable to him on the account upon which the suit was brought. *Talbotton Railroad Co. v. Gibson*, 106 Ga. 229, 234, 32 S. E. 151; *Jackson v. Bulce*, 132 Ga. 51, 63 S. E. 823; 1 Cyc. 778.

[2] 2. Upon the trial of the case, part of the evidence in favor of the plaintiff was substantially as follows: The plaintiff operates a hotel at Cornelia, Ga. On March 16, 1907, Gordon Logan and Tom Brock were injured on the railroad of the defendant, and were taken to the hotel of the plaintiff. Dr. Crawford, a physician residing in Cornelia, operated on one of them, and a short time thereafter they were removed by Dr. Crawford to the hotel of the plaintiff. Subsequently and during the same day Dr. Hathcock, the surgeon of the defendant, came to the hotel, and he and other physicians performed other operations on Brock and Logan. Dr. Hathcock contracted with the plaintiff to care for Brock and Logan, and to board and lodge the nurses and other persons attending them, and that the railroad would pay for the same. He boarded Brock, Logan, and others, under this agreement, and the account sued upon is for such board and lodging. "On the ——— day of ———, 19—," Hathcock notified the plaintiff that Brock had sued the railroad company, and that the latter would no longer be responsible for the board and lodging of Brock or any of the others. Hathcock testified, upon the trial of the case, that he went to Cornelia to attend Brock and Logan by virtue of a message from the officers of the railroad company to do so; that he

made no contract with the plaintiff on behalf of the company to board and lodge Brock and Logan, or any other person; that he had no authority to make such a contract; that under his contract with the railroad company his authority as surgeon or agent of the company was so limited that he had no authority to bind the company by virtue of any contract which the plaintiff contended was made; and that he made no such contract. The defendant introduced the contract between it and its surgeon, Hathcock.

The brief of evidence sets forth the following provisions of the contract as being the ones material to be considered: "Said contract, after being a contract entered into January 1, 1902, between the Southern Railway Company and Jiles Hathcock, as surgeon of said road, fixing the fees for service, and regulations governing said surgeons when employed by the Southern Railway Company, after fixing fees for services, provides as follows, to wit: In all cases of injury to employes, passengers, or others, when first or temporary attention is ordered, first attention should be construed as authorizing the surgeon to control hemorrhages and relieve pain and shock, together with temporary aseptic and surgical dressing. The patient should then be turned over to his friends, or, in the case of tramps, to the authorities or charitable institutions. When temporary attention is ordered, no further expense will be incurred or paid by the company; and surgeons are requested to strictly comply with this rule. A surgeon is an agent of the company only after he has been properly called, and then limited as to such to the immediate necessities of the injury. When attention is rendered to persons not in the employ of the company, or in its employ and the accident be due to the carelessness of the person, the surgeon, after having been notified by the company that it does not hold itself responsible for any claim for damages sustained by such injured person, may present his bill for a reasonable sum for such attendance to such person for payment; but the company shall not be liable for the payment of such bill. No case of injury must be admitted to hospital or private quarters on account of the company without specific authority from the head of the department to which such injury is accredited, or some other officer of the company." There was other evidence introduced; but, under the view we take of the case, we deem it unnecessary to set forth the same.

There was no testimony to show that Hathcock was a general agent of the railroad company. The evidence shows that, when he was sent by the company to attend Brock and Logan (injured on its railroad), the written contract between him and the company was in force. This contract shows that Hathcock was a special agent of the company when he rendered services for it to the injured parties. Under this contract, "without

specific authority" from one of those referred to in the contract, he had no authority to make a contract by which the company would be bound to pay for the board and lodging of the injured persons, or of any one nursing or otherwise rendering them services in a "hospital or private quarters." By the express terms of the contract such authority was denied him. The contract provides: "No case of injury must be admitted to hospital or private quarters on account of the company, without specific authority from the head of the department to which such injury is accredited, or some other officer of the company." No officer of the company, specially or otherwise, authorized any one to admit either of the injured parties "to private quarters on account of the company," nor did the head of any department do so. If Hathcock made the contract with Grant which the latter testified he made, he had no authority to do so; and the evidence does not show that such a contract, if made, was ratified by any agent or officer of the company. It is well settled that any one dealing with a special agent is bound to take notice of the extent of his authority. *Inman v. Crawford*, 116 Ga. 63, 42 S. E. 473; *Americus Oil Co. v. Gurr*, 114 Ga. 624, 40 S. E. 780. In this case Hathcock was a special agent of the company, without authority to bind the company by any agreement that the company would pay for the board and lodging of the injured parties, or any one serving them, and Grant was bound to take notice of the lack of such authority. If Hathcock made such an agreement, the company was not bound by it. In 2 Cyc. 1044, it is said: "A railroad physician or surgeon, employed by the corporation to render professional services to its servants or other persons injured in the operation of the road, cannot, in the absence of express authority, engage the services of others at the expense of the company to attend such injured persons or furnish them with the necessary supplies." See *Central of Ga. Ry. Co. v. Price*, 106 Ga. 176, 32 S. E. 77, 43 L. R. A. 402, 71 Am. St. Rep. 246; *Bond v. Hurd*, 31 Mont. 814, 78 Pac. 579; *Mayberry v. Chicago, R. I. & P. Ry. Co. (Mo.)* 11 Am. & Eng. R. R. Cases, 29, and cases cited in note on page 30; 1 *Elliott on Railroads*, §§ 222-225.

The ruling we make does not conflict with the decisions, referred to in 2 Cyc. 1044, and 1 *Elliott on Railroads*, § 222, to the effect that subordinate officers or agents of a railroad company are clothed with the powers of the corporation itself for the purposes of meeting an immediate emergency when a person is injured on the road, nor with the principle that an agent's authority will be construed to include all necessary and usual means for effectually executing it. The record does not show that the company held Hathcock out as its agent authorized to make the agreement which Grant says he made, or

that he was apparently acting within the scope of his authority in making such contract, if he made it. The evidence shows that Hathcock was a special agent, and, if he made such an agreement, in doing so he was acting without the scope of his authority and the company is not bound by it. The court erred in refusing the written request of counsel for the defendant to give certain instructions to the jury, which request was properly constructed and was in conformity to the principles above announced. The charge of the court of which complaint is made in one ground of the motion for a new trial was not in accord with the ruling herein made, and was error.

[3] 3. Complaint is made that the court erred in admitting the following testimony of a witness for the plaintiff: "I had a conversation with Dr. Hathcock about Tom being here at the Grant Hotel. He told me that he was an agent of the Southern Railway. I don't know as I can say in what capacity; he said he was a railroad agent or doctor for the railroad." It was error to admit this testimony, as the fact that one is agent for another cannot be proved by the declarations of the former.

Complaint is also made that the court erred in admitting the following testimony of the plaintiff: "The Southern Railway paid the expenses of Addison staying at my house at the time he was hurt." It appears from the testimony that, before Brock and Logan were injured, one Addison was injured, and was taken to the hotel of the plaintiff, who was paid for boarding him by the defendant on the recommendation of Hathcock after he left the hotel. This testimony was irrelevant, and should have been excluded. There was no effort to show, nor any contention, that it was the custom of the company to pay for boarding persons injured by it, and those attending them, or that it had ever done so, except in the instance above referred to, where Addison was injured by the company, and it paid his board upon the recommendation of Hathcock.

Judgment reversed. All the Justices concur.

(126 Ga. 270)

LOUISVILLE & N. R. CO. et al. v.
ROBERTS.

(Supreme Court of Georgia. May 10, 1911.)

(Syllabus by the Court.)

REMOVAL OF CAUSES (§§ 36, 49*)—SEPARABLE
CONTOVERSY—JOINDER OF PARTIES.

An action, brought in a state court by a resident plaintiff against a nonresident railroad corporation and certain of its servants, some of whom are residents, jointly, to recover damages in excess of \$2,000 on account of alleged personal injuries to the plaintiff, involves no separable controversy between the plaintiff and the

nonresident defendants, entitling the latter to remove the cause on that ground to the Circuit Court of the United States, where the declaration states a prima facie case of joint and concurrent liability against all of the defendants.

(a) Even though one of the defendants may have been alleged, in the petition for removal, to have been fraudulently joined for the purpose of defeating the right of removal, this will not destroy the right of the state court to retain a case in which there remains a proper party defendant who resides in its jurisdiction, and who is jointly liable with the other defendants sued for the injuries of the plaintiff.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 79, 95-99; Dec. Dig. §§ 36, 49.*]

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Action by J. B. Roberts against the Louisville & Nashville Railroad Company and others. From an order refusing to grant a removal to the federal court, defendants bring error. Affirmed.

Tye, Peeples & Jordan and D. W. Blair, for plaintiffs in error. R. R. Arnold, for defendant in error.

HOLDEN, J. The defendant in error brought suit in the state court against the plaintiffs in error, the Louisville & Nashville Railroad Company, Thomas Jarvis, and two other defendants, who were employees of the railroad company. The railroad company and Jarvis, alleging they were nonresidents, filed petition and bond to remove the case to the United States Circuit Court on the ground that a separable controversy was presented between them and the plaintiff. The court declined to grant an order of removal, and they excepted.

In the original petition the plaintiff alleged that he was injured in a wreck caused by the train on which he was a passenger running into a washout. He charged negligence on the part of one defendant (the engineer) in running at a dangerous rate of speed and in failing to keep a proper lookout, so as to discover the washout in time to prevent the wreck; negligence on the part of another defendant (the fireman) in failing to keep a proper lookout, and, though he discovered the washout, in failing to take any steps to stop the train; and negligence on the part of another defendant (the section boss) in failing to perform his duty of "keeping up the track," and in failing to inspect it and discover the alleged washout. The alleged acts of negligence on the part of these various defendants were detailed, and it was averred: "In each and all of the particulars herein mentioned the defendant railroad company was negligent, through its engineer, Dobbs, through its fireman, Jarvis, and through its section boss, Casteel, and their joint and combined negligence caused the said wreck and consequent injury to plain-

tiff." The allegations of the petition did not make a separable controversy between the plaintiff and the nonresident defendants, giving the latter the right to remove the case to the federal court. *Vanzant v. So. Ry. Co.* 135 Ga. 444, 69 S. E. 721, and authorities therein cited.

In the petition for removal it was averred that the allegations of negligence as to the section boss, one of the resident defendants, were falsely and fraudulently made, and that the only object in joining such defendant was to defeat the right of petitioners to have the case removed to the United States court. These allegations do not affect the right of removal, there being still another defendant (the engineer) alleged in the petition bringing the suit to be a resident, and with respect to whom no allegation of fraudulent joinder is made in the petition for removal, or that his residence is falsely stated in the original petition. In the petition bringing the suit it was alleged that the engineer "was negligently running at a speed, at this dangerous part of the track, of from 25 to 30 miles per hour, and, as representing said railroad company, he negligently failed to avail himself of a view which he had of said washout and defective place in the track for fully 200 to 300 yards ahead, within which time he could have stopped his train or reduced its speed to where there would have been no wreck and no injury to any person. * * * The defendant Jarvis, representing said railroad company as fireman on said engine, negligently failed to keep a proper lookout ahead, and, had he done so, would have discovered said washout, and in fact did discover it, but negligently failed to take any steps to bring the train to a stop, or to slow up the speed thereof." The engineer, a resident defendant, was jointly liable with the company and the fireman, alleged in their petition for removal to be nonresident defendants. *Vanzant v. So. Ry. Co.*, supra; *So. Ry. Co. v. Miller*, 1 Ga. App. 616, 57 S. E. 1090; *Id.*, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. Ed. 732; *Eining v. Ga. Ry. & Elec. Co.*, 123 Ga. 458, 66 S. E. 237. If the section boss was not liable, and this fact was known to the plaintiff, who falsely and fraudulently joined him as a defendant to prevent removal of the case to the federal court, or if the section boss had never been joined as a defendant, the petition for removal filed by the company and the fireman, who were alleged therein to be nonresidents, was not sustainable; no allegation of fraudulent joinder of the engineer as a defendant, or that he was not in fact, a resident, being made in the petition for removal, and the original petition alleging acts of negligence making jointly liable for the injuries received by the plaintiff the engineer, the company, and the fireman.

Judgment affirmed.

(136 Ga. 265)

AULD v. SOUTHERN RY. CO.

(Supreme Court of Georgia. May 10, 1911.)

(Syllabus by the Court.)

1. CARRIERS (§ 347*)—INJURIES TO PASSENGERS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

The act of crossing from one car platform to another on a moving train is not per se negligence, in the absence of a rule or notice warning the passengers from such act. A passenger who undertakes to go from one car to another while the train is in motion assumes only the risk incident to such undertaking in the ordinary operation of the train; and if such passenger is injured by being thrown from the platform by a sudden jerk, questions of negligence of the defendant in causing the injury and of the passenger's contributory negligence are for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1346-1397; Dec. Dig. § 347.*]

2. CARRIERS (§ 317*)—INJURIES TO PASSENGER—PASSING FROM ONE CAR TO ANOTHER.

In a suit against a carrier for an injury to a passenger from being precipitated from a moving train while crossing from one coach to another, testimony of a known usage or custom of passengers to cross is competent evidence, not to justify or excuse the passenger from attempting to cross when it would be an obviously hazardous act, but as illustrating the character and nature of the act as bearing on the passenger's alleged contributory negligence in crossing.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1296-1306; Dec. Dig. § 317.*]

3. EVIDENCE (§ 473*)—OPINION EVIDENCE.

If data supplied by a witness can be placed before the jury in such a way that they may draw the inference as well as the witness, it is superfluous to add by way of testimony the inference which the jury may well draw for themselves.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2220-2223; Dec. Dig. § 473.*]

Error from Superior Court, De Kalb County; E. J. Reagan, Judge.

Action by W. N. Auld, administrator of Eliza Auld, against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Burton Smith, for plaintiff in error. McDaniel, Alston & Black, for defendant in error.

EVANS, P. J. W. N. Auld, administrator of Mrs. Eliza Auld, brought suit, in the superior court of De Kalb county, against the Southern Railway Company, to recover damages for the alleged wrongful death of the plaintiff's intestate. The injury resulting in Mrs. Auld's death occurred in the state of South Carolina, and the action was in virtue of a South Carolina statute authorizing suit by an administrator. The plaintiff was consulted.

The substance of the evidence was that Mrs. Auld, a married woman, 44 years of age, the mother of seven children, on the day previous to her death had been discharged from a sanitarium, and was returning to her home in company with her husband and brother. She had been in failing health for

two or three years before being sent to the sanitarium. She was despondent, morose, and gloomy. At the time of her injury her mental and physical health was a great deal better than it had been. Her party boarded the cars of the defendant at Toccoa, Ga. The particular coach in which she entered was vestibuled. The coach in the rear was not vestibuled. The train was about two hours behind time. The country traversed by the defendant's road was mountainous. The train was running fast, trying to catch up the lost time. A passenger testified that the husband and brother were in the rear coach; that he observed her leave her seat, and go to the rear of the car, and pass through the door. * * * As she left the door there was a sudden plunge or jerk of the train, and we all had to hold our seats, just at the point she was thrown from the train." She was found lying near the track in an unconscious condition, and died from her injuries. One of the plaintiff's witnesses testified that "the train was about two hours late that night," and in the absence of any other testimony on the subject we infer that the injury occurred at night.

[1] 1. It is not negligence as matter of law for a passenger to pass from one coach to another while the train is in motion. Whether or not a passenger is negligent in so doing depends upon the facts and circumstances of the particular case. *Cotchett v. S. & T. Ry. Co.*, 84 Ga. 687, 11 S. E. 553; *A. S. Ry. Co. v. Snider*, 118 Ga. 146, 44 S. E. 1005. Some early cases may be found in other jurisdictions in which it is said that a passenger's attempt to cross the platforms between the coaches while the train was running was a negligent act. The later cases are harmonious that it is not per se negligence for a passenger to go from one coach to another while the train is in motion. The modern view results from the great improvement in constructing cars, and the tacit or implied invitation by railroad companies in the make-up of the trains, including a smoking car, a dining car, and other coaches, that the passenger may pass from one to the other for his comfort or convenience. A passenger who undertakes to pass from one coach to another while the train is running assumes the risk of injury caused by the ordinary movements of the train. If he is injured in his effort to go from one car to another, and the railway company is not guilty of negligence proximately causing the injury, the passenger cannot recover. *Hicks v. Ga. So. & Fla. Ry. Co.*, 108 Ga. 304, 32 S. E. 880. Or, if the railway company is negligent, and the plaintiff could have avoided the consequences thereof by the use of ordinary care and diligence, he cannot recover. *Blitch v. Central R. Co.*, 76 Ga. 333; *So. Ry. Co. v. Strickland*, 130 Ga. 779, 61 S. E. 826. The circumstances attending the injury to the plaintiff's intestate,

as developed on the trial, were sufficient to make a prima facie case against the carrier, and the burden was upon it to overcome the imputation of negligence or to show the passenger's contributory negligence. It appeared from the testimony that the train was behind time and running fast to catch up the lost time, and that it gave a sudden plunge and jerk as Mrs. Auld passed to the platform. These facts are not conclusive that Mrs. Auld was thrown or fell from the train by a jerk usual and incident to the ordinary operation of the train. Under the rule just stated, it was a question for the jury to determine whether the defendant was negligent in the operation of the train, and whether under all the circumstances the plaintiff's intestate was guilty of such negligence in undertaking to pass from one coach to another as would defeat a recovery. *Branan v. So. Ry. Co.*, 135 Ga. 24, 68 S. E. 793.

[2] 2. A witness was examined by interrogatories. He was asked: "If you say anything about her moving from one place to another, state how and where she moved. State whether or not there was any custom with reference to moving. If so, what was the custom? Answer fully." To which he replied: "I saw her get up and start back through the car, and as she passed the door I did not see her any more. It is the custom of passengers to go from one car to another whenever they want to, and go to the toilet whenever they want to go." The court excluded the following part of the answer: "It is the custom of passengers to go from one car to another whenever they want to, and to go to the toilet whenever they want to go." We do not think that the question was too indefinite to apprise the defendant of an effort to prove a custom or usage among the passengers to go from one car to another of a moving train. It is competent to show a known usage or custom of passengers to pass from one car to another while in motion, not so much as an act of license by the defendant, but as explanatory of the custom and usage of passengers on moving trains. If passengers commonly go from one car to another, the very commonness of the custom tends to show that it is known to the defendant. Of course, no custom to do an obviously dangerous act will excuse contributory negligence; but, as we have seen, this court cannot say as matter of law that it is negligence to go from one car to another.

[3] 3. The court refused to allow a witness to testify that, from certain facts which he enumerated, it was his opinion that the jerk of the car threw Mrs. Auld from the train. There was no error in this. The jury were as competent to draw the deduction from the facts as the witness. *Taylor v. State*, 135 Ga. 622, 70 S. E. 237.

Judgment reversed. All the Justices concur.

(136 Ga. 354)

BUTTS COUNTY v. JOHNSON.

(Supreme Court of Georgia. May 12, 1911.)

*(Syllabus by the Court.)***BRIDGES (§ 46*)—DEFECTIVE BRIDGES—PLEADING—PETITION.**

Under the ruling in *Seymore v. Elbert County*, 116 Ga. 371, 42 S. E. 727, the petition was defective in failing to allege that the bridge claimed to have been in disrepair was built subsequently to the act of December 29, 1888 (Acts 1888, p. 39), and should have been dismissed on demurrer.

[Ed. Note.—For other cases, see *Bridges*, Dec. Dig. § 46.*]

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Action by Young Johnson against Butts County. Judgment for plaintiff, and defendant brings error. Reversed.

W. E. Watkins, for plaintiff in error. W. A. Thompson, for defendant in error.

EVANS, P. J. Judgment reversed. All the Justices concur.

(136 Ga. 278)

DAVIS & BRANDON v. SEABOARD AIR LINE RY.

(Supreme Court of Georgia. May 11, 1911.)

*(Syllabus by the Court.)***1. CARRIERS (§ 181½, * New, vol. 12, Key No. Series)—CARRIAGE OF GOODS—ACTION—NATURE.**

Under a proper construction of the petition, the suit in this case was not brought to recover damages for a breach of contract of carriage, or for a breach of the common-law duty of a common carrier, but was based on sections 2771 and 2772 of the Code of 1910, which require common carriers, on application by a shipper, to trace freight which may have been lost, damaged, or destroyed, and to inform the applicant in writing, within 30 days, of the time, place, and manner of the loss, damage, or destruction, and the names of the parties, and their official position, if any, by whom such facts can be established, and which provide that, on failure to do so, the carrier shall be liable for the value of the freight lost, damaged, or destroyed, in the same manner and to the same extent as if said loss, damage, or destruction occurred on its own line.

2. CARRIERS (§ 185*)—CARRIAGE OF GOODS—FAILURE TO TRACE PLACE—ACTION—ADMISSIBILITY OF EVIDENCE.

In such an action, although the bill of lading stated that it was subject to the conditions on the face and back thereof, and was signed by the shipper, as well as the agent of the carrier, and although one of the conditions on the back thereof was that no carrier should be liable for loss or damage not occurring on its portion of the route, it would not defeat a recovery to show that the initial carrier delivered the property in good order to the next connecting carrier for transportation to its destination. Evidence to show such fact was inadmissible, over objection.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 185.*]

3. CARRIERS (§ 180*)—CARRIAGE OF GOODS—FAILURE TO TRACE—ACTION.

A bill of lading, which was signed both by the shipper and the agent of the carrier, contained on its face a statement that the property shipped was received subject to the conditions on the face and back of such bill. On the back of the bill, among the printed conditions, was the following: "Claims for loss or damage must be made in writing to the agent at the point of delivery promptly after the arrival of the property, and if delayed for more than 30 days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event." At the bottom of the conditions was printed the following: "N. B.—All claims for loss or damage to freight, or for overcharge under this bill of lading, will be promptly investigated upon application to O. B. Bidwell, Jr., freight claim agent, Portsmouth, Va., with original bill of lading and paid freight bill attached." An action was brought against the initial carrier, under Civ. Code 1910, §§ 2771, 2772. Held, that the fact that the demand for tracing was made more than 30 days after the arrival of the goods at their destination did not authorize a nonsuit.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 815-828; Dec. Dig. § 180.*]

4. APPEAL AND ERROR (§ 242*)—EXCEPTIONS, BILL OF (§ 8*)—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF BILLS OF EXCEPTION.

Where the plaintiff introduced evidence to show the market value of goods shipped at the point of shipment and also at the point of destination, and that they arrived in a damaged condition and were of less value than the market value at either place, but the presiding judge granted a nonsuit, on the ground that he was not entitled to recover at all, a mere general statement in the bill of exceptions that, during the introduction of evidence by the plaintiff, the court "held" that under a provision in the bill of lading the measure of damages would be fixed with reference to the market value at the point of shipment, rather than at the point of destination, without more, stated no such actual ruling or judgment as to invoke a decision of this court thereon.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1417-1425; Dec. Dig. § 242; * *Exceptions*, Bill of, Cent. Dig. § 10; Dec. Dig. § 8.*]

Error from Superior Court, Camden County; C. B. Conyers, Judge.

Action by Davis & Brandon against the Seaboard Air Line Railway. Judgment of nonsuit, and plaintiff brings error. Reversed.

R. D. Meader, for plaintiff in error. Crovatt & Whitfield, for defendant in error.

LUMPKIN, J. Davis & Brandon brought suit against the Seaboard Air Line Railway, alleging that they made a shipment of potatoes from a station on the line of the defendant to a point on the line of another connecting carrier; that demand was made upon the initial carrier to trace the freight and make a report to the shipper, as provided by the statute; that there was a failure to comply with this demand; and that suit was brought accordingly against the defendant for the difference between the market value of the potatoes at the time and place when they should have been delivered and their

value as delivered. After both sides had closed their evidence, the defendant moved for the direction of a verdict in its favor. The court declined to give such direction, but granted a nonsuit. The plaintiff excepted.

[1] This was not an action for damages arising out of a breach of the contract of carriage, or from a breach of the common-law duty resting upon the carrier. It was distinctly an action based upon the statutory provisions contained in Civil Code 1910, §§ 2771, 2772. In *McCall v. Central of Ga. Ry. Co.*, 120 Ga. 602, 605, 48 S. E. 157, it was said that the liability of a railroad company under these sections is not incidental to the transportation of the freight, springing out of the contract of affreightment, but is in the nature of a penalty, prescribing damages for noncompliance with a statutory duty; that the initial carrier may have performed its contract to carry and deliver the freight in good order to its connecting carrier; yet if the freight was delayed, damaged, or destroyed after leaving its possession, the refusal to trace and give the information required by the statute would give a cause of action against the initial carrier.

[2] Following this ruling, a provision in the bill of lading, although the contract was signed by the shipper, to the effect that each carrier should only be liable for loss or damage occurring on its portion of the route did not furnish a defense to such action; nor was evidence admissible to show that in fact the carrier who failed to trace the freight, as required by the statute, had delivered the potatoes in good order to the connecting line.

[3] Neither did the provision of the bill of lading that claims for loss or damage must be made in writing to the agent at the point of delivery promptly after arrival of the property, "and if delayed for more than 30 days after the delivery of the property or after due time for the delivery thereof, no carrier hereunder shall be liable in any event," limit the right of the shipper to make demand upon the initial carrier to trace the freight in accordance with the statute. Even if it were otherwise, considering together the two statements contained in the printed conditions on the back of the bill of lading which are quoted in the third headnote, it is not altogether certain as to what would be required of the shipper by one provision stating that a claim must be made for damages within 30 days upon the agent at the point of delivery, and a notice at the close of the printed conditions that all claims for loss or damage to freight would be promptly investigated upon application to the freight claim agent at Portsmouth, Va.

In view of what has been said, it will be seen that the presiding judge erred in granting a nonsuit. The granting of a nonsuit, after the close of the evidence introduced by both sides, and upon a motion for a direction of a verdict in favor of the defendant, was

not altogether regular; but if a nonsuit were proper, this method of procedure would seem to furnish no ground for complaint on behalf of the plaintiff, who would only be cut off from proceeding with his case when he might have had a verdict directed finally barring him from suing again.

[4] The plaintiff introduced evidence to show the market value of the potatoes at the place of shipment and also at the place of delivery. One of the printed conditions on the back of the bill of lading was that "the amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based," etc. It was recited in the bill of exceptions that "the court held, during the introduction of the evidence for the plaintiffs," that under the terms of the bill of lading the measure of damages would be based upon the value of the potatoes at the point of shipment, rather than at the point of delivery, and to this exception was taken. Such a statement raises no question for decision by this court. There must be a concrete ruling or decision of some point or matter in the case, not a mere anticipatory announcement of the view of the judge, in order to furnish a subject-matter for exception. It does not appear that the judge excluded any evidence bearing on this point, or admitted any over objection, and that to such exclusion or admission exception was taken. He did not reach the point of charging the jury in the case. His grant of a nonsuit was not based upon what would have been the extent of the plaintiffs' recovery, had there been one, but upon his opinion that they were not entitled to recover at all. It is thus evident that the so-called "ruling" was not in fact a decision of any question practically applying to the case, but must have been some general announcement of the views of the judge on that subject. Moot questions cannot be brought to this court, but only actual rulings or decisions. We think it would be a bad precedent to have the decision of this court invoked upon mere theoretical questions, instead of actual rulings affecting the trial as it took place. If this were permitted, bills of exceptions might be filled with statements of the general views and opinions of the presiding judge in the trial court, announced in an anticipatory way, which might never ripen into actual rulings. It is actual, not anticipated, error which forms a subject of correction by a court of review. We must therefore decline to pass upon the question on which it is thus sought to obtain a ruling of this court, and which evidently played no part in the grant of a nonsuit in the court below.

Judgment reversed. All the Justices concur.

(136 Ga. 297)

BROOM v. GRIZZARD.**GRIZZARD v. BROOM.**

(Supreme Court of Georgia. May 11, 1911.)

*(Syllabus by the Court.)***1. REVIEW ON APPEAL.**

Under the pleadings and evidence in this case, the court properly refused to render a final judgment upon the hearing of the petition for certiorari, and properly remanded the case with appropriate directions.

*(Additional Syllabus by Editorial Staff.)***2. EASEMENTS (§ 36*)—RIGHT OF WAY—EVIDENCE.**

Evidence held not to show the acquisition of a right of way by prescription.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 36.*]

3. EASEMENTS (§ 27*)—RIGHT OF WAY—MERGER IN FEE.

One cannot have an easement upon his own property, since the lesser estate, represented by the easement, would be merged into the fee, upon which it was subservient.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 75; Dec. Dig. § 27.*]

4. EASEMENTS (§ 61*)—RIGHT OF WAY—ACTION TO ENFORCE—PLEADING.

In an action for obstructing an alleged private way, where the petition contained allegations pertinent to an application for removal of obstructions from a way that had been used for one year, and also alleged a right of way by prescription, defendant was entitled, upon demurrer, to have plaintiff show distinctly, by proper averments, whether his petition was based on Civ. Code 1910, § 819, relating to rights of the user of a way for as much as one year, or under section 824, relating to a prescriptive right of way.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 61.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by S. S. Grizzard against W. P. Broom. Judgment for defendant, and plaintiff brings error; defendant filing cross-exceptions. Affirmed on both bills.

J. F. Golightly and Jno. B. Suttles, for plaintiff in error. A. C. Broom, for defendant in error.

BECK, J. S. S. Grizzard filed his petition to the ordinary of Fulton county against W. P. Broom, alleging that the petitioner was the owner of a house and lot in said county; that there was a private way leading from his house to a certain road, known as the "chert road" from Atlanta to College Park, and that the defendant had obstructed the alleged private way by erecting a wire fence across it, so that petitioner and those who had been in the habit of traveling over the way could not pass over it; that defendant had given no notice of his intention to close the road; that petitioner and those under whom he claims have used the road for about 30 years, "and the same is a private way, which cannot be obstructed without legal steps." Thereupon the ordinary issued a rule nisi in terms of the

statute. Broom demurred, on the ground that the petition set forth no cause of action, and specially on the ground that the petition did not locate the petitioner's house and lot with reference to the alleged private way, and did not show with sufficient particularity the location of the private way, the width of the same, when and at what times it had been repaired, who had been in the habit of traveling over it, who originally laid it out, and when it was laid out, and whether or not the present alleged private way was the same as had been originally laid out, and upon other grounds calling for greater particularity in the allegations of the petition. The plaintiff amended his petition, and alleged "that the said right of way has been worked by petitioner and kept in repair since he owned the place, to and for 14 months last past; that the persons under whom he claims, to wit, Mary A. Baugh and Edward Baugh and the East Point Land Company, all kept it in repair, and when it needed work they worked the same."

Upon the trial, there being evidence to show that the defendant had obstructed the way referred to in the petition, the ordinary rendered a judgment requiring the defendant to remove the obstructions. Upon the hearing of a petition for certiorari and answer, the judge of the superior court ordered that the certiorari be sustained, and the case be remanded for a new trial or hearing, holding that the demurrer ought to be sustained, with leave to amend; that under the pleadings the two remedies sought were set forth in such contradictory and confused manner as not to put the defendant on proper notice of what he had to defend. The plaintiff excepted, and the defendant took a cross-bill of exceptions.

[1] In the direct bill of exceptions error is assigned upon the order of the judge sustaining the certiorari, on the ground that the court erred in adjudging that the certiorari be sustained, and that upon the new hearing in the court of ordinary the demurrer be sustained, with leave to amend, and upon the further ground that the court erred in holding that the remedies sought under the petition to the ordinary are set forth in a contradictory and confused manner. In the cross-bill error is assigned upon the ground that the court should have sustained the certiorari and entered up a final judgment in favor of the defendant, without remanding the case for another hearing or direction that the plaintiff be allowed to amend his petition before the ordinary. We are of the opinion that the court below, upon the hearing of the petition for certiorari, passed the proper order.

[2] Under the evidence in the case before the ordinary, the complaining party failed entirely to show that he had acquired a right of way by prescription over the lands

of the party complained against. While there was evidence to authorize the finding by the ordinary that the road referred to had been continuously used for more than seven years, it clearly appears from the evidence that the use had been by those who were the owners of the land over which it passed. The house and lot of the complainant, Grizzard, and the lands of the defendant, had been the property of the East Point Land Company until the year 1904, when the defendant purchased the land from that company. The complainant purchased his house and lot in the year 1907. The land company, the immediate predecessor in title, had purchased the tract of land embracing both the lots of the complainant and defendant from Mary and Edward Baugh, who appeared to have been the owners of the entire property at the time when the way in controversy was first used.

[3] Certainly prior to the date of Broom's purchase from the land company, when the two tracts of land belonging, respectively, to Grizzard and to Broom, became the property of different owners, no prescriptive right of way could have been acquired over the tract of land now owned by Broom. Neither Baugh nor the land company, who owned the land over which the way passed, could acquire a way by prescription over their own land. "It is axiomatic that one cannot have an easement upon his own property, for the lesser estate, represented by the easement, will be merged into the fee, upon which it is subservient. 10 Am. & Eng. Enc. L. (2d Ed.) 433." *Railway Co. v. Fleming*, 118 Ga. 699, 45 S. E. 664. From the time when the use of the way by one who was not the owner of the land over which the way passed commenced, sufficient time had not elapsed for the establishment of a prescriptive right of way; and so far as relates to the contention of the complainant that he had a prescriptive right of way as against the defendant over the latter's land, there was an entire failure to support by evidence the allegation in the petition embodying this contention.

[4] But it is alleged in the petition that the road had been used for over one year, and that it had been closed up without giving the notice required by law. While it has been held that "proof that a private way which has been in use for more than one year has been obstructed without giving the 30 days' notice required by Civil Code 1895, § 673 (section 819, Civil Code 1910), will not authorize the ordinary to direct the removal of such obstructions upon an application for such removal, based solely on a prescriptive right to the use of such private way" (*Kraley v. Nabors*, 131 Ga. 457, 62 S. E. 527) the petition in the present case, as we have seen, contains allegations pertinent to an application for the removal of

obstructions from a way that has been used for one year. The defendant in the case before the ordinary was entitled, upon demurrer, to have the complaining party show distinctly by proper averments whether his application was based on the provisions of section 819 of the Code of 1910, relating to the rights of the user of a way for as much as one year, or upon section 824, which relates to a prescriptive right of way. And this result could be accomplished under the order and judgment passed by the judge of the superior court upon the hearing of the petition for certiorari, upon which error is assigned in both the direct bill of exceptions and the cross-bill. Under that order the complaining party is compelled to state distinctly which cause of action he relies upon, and to eliminate the allegations which tend to confuse it with some other cause of action. Such is the meaning of the order passed by the judge of the superior court, and as such it should be given effect.

Judgment affirmed, on both bills. All the Justices concur.

(126 Ga. 309)

HAMBY et al. v. COLLIER.

SAME v. YOUNG.

(Supreme Court of Georgia. May 11, 1911.)

(Syllabus by the Court.)

WORK AND LABOR (§§ 4, 20*)—VENUE (§ 22*)—LIMITATION OF ACTIONS (§ 21*)—EVIDENCE (§ 83*)—PRESUMPTIONS—ACTS OF PUBLIC OFFICERS—SERVICES RENDERED UNDER COMPELSION—JOINDER OF PARTIES DEFENDANT—PARTIES.

The defendants in error brought separate suits against the same defendants, in Cobb superior court, making in their respective petitions substantially the following allegations: Two of the defendants resided in Cobb county and the other defendant in Fulton county. The defendants, and each of them, through agents, guards, and bosses named, and others "whose names petitioner cannot remember," took charge of and chained the plaintiff and caused him to do work in grading for a railroad for a specified time in 1906 and 1907. The defendants were jointly interested in the services rendered by the plaintiff, "and are jointly responsible to plaintiff for the value of said services so rendered and here sued for; the said defendants having jointly received the benefits of said services and having converted the same into cash. His labor was worth a stated sum, and he waives the tort and sues for the value of the services rendered. A verdict was rendered in each of the cases in favor of the plaintiff against all of the defendants, who complain that the court erred in overruling their demurrers and in refusing them a new trial. The two cases, being practically identical, are considered and decided together. It is held:

(1) If A. wrongfully compels B. to render him valuable services, B. can maintain against A. an action of assumpsit to recover their value; a promise to pay on the part of A. being implied in law. 1 Addison on Contracts, § 30 et seq.; 3 Addison on Contracts, § 1399; 2 Street on Foundation of Legal Liability, §§ 208, 209, 215, 217; 3 Street on Foundation of Legal Liability, 199; Patterson v. Crawford, 12 Ind. 241; Peter v. Steel, 3 Yeates (Pa.) 250; Greer v. Oritz, 53 Ark. 247, 13 S. W. 764; Hickam v. Hickam, 46

Mo. App. 496; Patterson v. Prior, 18 Ind. 440, 81 Am. Dec. 367; Wood's Law of Master & Servant (2d Ed.) § 63, p. 96, § 68, pp. 107-109; 2 Paige on Contracts, § 848.

(a) In the action B. can join as defendants all who jointly compel the service and receive the benefits thereof. Elliott v. Bell, 37 W. Va. 834, 17 S. E. 399.

(2) The superior court of the county of either of the persons sued has jurisdiction of the suit against all, though one of them may not reside in that county.

(3) The petition alleging that the services were rendered within four years prior to the time the suit was instituted, it was not subject to demurrer on the ground that the right of action was barred by the statute of limitations.

(4) The petition was not subject to any of the grounds of special demurrer.

(5) It was not error to charge: "I give you this law: Ordinarily when one renders services or transfers property valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof."

(6) It was error for the court to refuse, upon the trial of the first case stated above, a written request of counsel for the defendant to charge the jury as follows: "The presumption of law is that all public officers or authorities do their duty as prescribed by law; and in the absence of satisfactory proof that any officer or county authority has violated his duty or done an illegal act, that it will not be held that the officer has done any illegal act."

(7) There was no error in the failure of the court to charge, or in the charges given, of which complaint is made, other than as above pointed out.

(8) The evidence in each case shows that the plaintiff therein, while performing the services for the value of which the suit is brought, was at work in a chain gang under a sentence for a misdemeanor imposed by Cobb superior court. The presumption is that the officers did their duty, and that the plaintiffs were being worked in accordance with law. The evidence was insufficient to overcome this presumption.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 6, 38; Dec. Dig. §§ 4, 20; Venue, Cent. Dig. §§ 35-37; Dec. Dig. § 22; Limitation of Actions, Dec. Dig. § 21; Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Actions by Thomas Collier and by Charlie Young against W. B. Hamby and others. Judgments for plaintiffs, and defendants bring error. Reversed.

D. W. Blair and Candler, Thomson & Hirsch, for plaintiffs in error. Mozley & Moss, for defendants in error.

HOLDEN, J. Judgment in each case reversed. All the Justices concur.

(9 Ga. App. 308)

BERKSTEIN v. CITY OF ATLANTA.
(No. 3,288.)

(Court of Appeals of Georgia. April 24, 1911.
Rehearing Denied June 7, 1911.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 641*)—VIOLATION OF ORDINANCES—TRIAL—CONDUCT OF TRIAL—MISCONDUCT OF JUDGE.

On a trial before the recorder of a police court, the recorder, after a lengthy cross-examination of a witness, remarked to the attorney for the accused, in effect, that it seemed to him that he had "pumped the witness dry," and that, as he had a heavy docket, he wished the attorney would expedite the examination, and that the attorney took up more time in the trial of cases in his court than any other attorney. Held, that this language of the recorder does not indicate that the accused did not have a fair and impartial trial, especially in view of the fact that the recorder told the attorney, in the same connection, that he would stay on the bench until midnight, if necessary, to conclude the case.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 641.*]

2. MUNICIPAL CORPORATIONS (§ 642*)—VIOLATION OF ORDINANCES—WRIT OF ERROR—ABANDONMENT—FAILURE TO REFER TO QUESTION IN ARGUMENT OR BRIEF.

The constitutional question raised in the petition for certiorari, not being referred to in the argument or brief, will be treated as abandoned.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.*]

3. MUNICIPAL CORPORATIONS (§ 642*)—PROSECUTIONS—WRIT OF ERROR—REVIEW—CREDIBILITY OF WITNESSES.

The credibility of the witnesses was a matter for the recorder, and the evidence was sufficient to show that the accused had violated the city ordinance as alleged.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 642.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

L. W. Berkstein was convicted of violating an ordinance of the City of Atlanta, and brings error. Affirmed.

Morris Macks, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

HILL, C. J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

(155 N. C. 338)

FOREHAND et al. v. TAYLOR.

(Supreme Court of North Carolina. May 31, 1911.)

1. EMINENT DOMAIN (§ 31*)—DRAINS—STATUTES—CONSTITUTIONALITY.

Revisal 1905, § 3995, provides that whenever there shall be a canal or ditch, in the keeping up of which two or more persons shall be interested and receive actual benefit therefrom, and the duties and proportion of labor which each shall perform is not fixed by agreement or by a mode previously prescribed, any of the parties may have the same assessed by applying to a justice of the peace, who, on notice, shall summon two disinterested freeholders, and they, with the justice, shall assess the damages sustained by the applicant, and the justice shall give judgment in favor of the applicant for damages, or for work done on the ditch or lands, etc. *Held*, that such section was constitutional.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 77; Dec. Dig. § 31.*]

2. JUDGMENT (§ 570*)—ESTOPPEL—ACTION PREMATURELY BROUGHT.

Where a former action for the same cause was dismissed, because it was prematurely brought, the judgment was not available as an estoppel against the subsequent suit.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1028-1045; Dec. Dig. § 570.*]

Appeal from Superior Court, Wayne County; Whedbee, Judge.

Action by J. H. Forehand and another against Alex Taylor. From the judgment, defendant appeals. Affirmed.

John M. Robinson, for appellant. Wentworth W. Pierce, for appellee.

CLARK, C. J. This is an action which was begun before a justice of the peace under Revisal 1905, § 3995, which is in chapter 88, providing for the establishment of drainage districts, and in subchapter 2 thereof. Said section 3995 provides:

"How Amount of Contribution for Repair Ascertained.—Whenever there shall be a dam, canal, or ditch, in the repairing or keeping up of which two or more persons shall be interested and receive actual benefit therefrom, and the duties and proportion of labor which each one ought to do and perform therefor shall not be fixed by agreement, or by the mode already in this chapter provided for assessing and apportioning such labor, any of the parties may have the same assessed and apportioned by applying to a justice of the peace, who shall give all parties at least three days' notice, and shall summon two disinterested freeholders who, together with the justice, shall meet on the premises, and assess the damages sustained by the applicant, whereupon the justice shall enter judgment in favor of the applicant for damages or for work done on such ditch or lands. The cost of this proceeding shall be in the discretion of the justice."

In the summer of 1910 the plaintiffs did certain work repairing and cleaning out a

canal which runs by certain land of the defendant, who owns on one side of the canal only, and also runs through the lands of others in the vicinity. The jury finds that the defendant, together with others, was interested in repairing the canal in question and received actual benefit therefrom. The adjoining landowners paid their proportional part for repairing and cleaning out the canal. The defendant refused to pay the amount claimed of him, upon the ground that he had not been benefited that much. Thereupon, in September, 1910, the plaintiffs warranted the defendant before a justice of the peace for the nonpayment of \$82 for his share of the cost of cleaning out and repairing the canal, alleging defendant's liability both upon contract and on a quantum meruit. The magistrate dismissed the action, doubtless on the ground that there had been no agreement shown, and that plaintiffs could not recover on quantum meruit because of plaintiffs' failure to comply with the prerequisite required by Revisal 1905, § 3995; the cost not having been assessed by a justice of the peace and two freeholders. Subsequently, in November, 1910, the plaintiffs complied with the requirements of said section 3995 by applying to a justice of the peace, who, after summoning two disinterested freeholders, and the defendant being present, viewed the canal and decided that the plaintiff was entitled to \$82 for damages which they assessed. The defendant appealed to the superior court. In that court the jury found that the defendant was interested in the repair of the canal, and was indebted to the plaintiffs for \$82 for his proportional part of the cost. The defendant appealed to this court, and makes two assignments of error.

[1] 1. For the refusal of the court to nonsuit, on the ground that Revisal 1905, § 3995, is unconstitutional. He cites no authorities to support his position. The drainage act has been held constitutional in several cases. *Staton v. Staton*, 148 N. C. 490, 62 S. E. 596; *Adams v. Joyner*, 147 N. C. 77, 60 S. E. 725; *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787; *Sanderlin v. Luken*, 152 N. C. 738, 68 S. E. 225; *White v. Lane*, 153 N. C. 14, 68 S. E. 695.

[2] 2. The second exception is that the plaintiff was estopped by the judgment in the former action. But it appears from the facts stated that at the time of the former action the plaintiff had not taken the steps required by Revisal 1905, § 3995, to entitle him to recover under the drainage act. It was only thereafter in November that he applied to the justice and had two disinterested freeholders appointed, who, after giving him notice, met on the premises and with the justice assessed the damages. When the former action before the justice was brought,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the plaintiff was therefore not entitled to recover. His action was premature, and the justice properly dismissed it. There is, therefore, no estoppel. *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108, and cases citing the same in the Annotated Edition.

It is not distinctly stated, as it should be, that this canal had been laid out and dug under the drainage act; but both briefs treat it as such, and the whole proceeding is taken under Revisal 1905, § 3995, concerning the apportionment of repairs of a canal of that kind.

No error.

(155 N. C. 255)

JOYNER & LONG v. SCOTTISH FIRE INS. CO.

(Supreme Court of North Carolina. May 17, 1911.)

1. INSURANCE (§ 229*)—POLICY—CANCELLATION—NOTICE.

Plaintiffs, having noticed a mistake in a fire policy written by the V. Company, notified its agent to make the correction. The agent wrote plaintiffs that he had been directed to cancel the policy by the V. Company, and inclosed a policy of the same tenor and amount in defendant company. The letter with policy inclosed was mailed on Saturday, and was received by plaintiffs on Monday morning following; but late Saturday night the property was destroyed by fire. The policy in the V. Company provided that it could not be canceled without five days notice to insured. *Held*, that defendant's policy had not taken effect at the time of the fire, and that plaintiff could not recover thereon.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 229.*]

2. JUDGMENT (§ 570*)—CONCLUSIVENESS—DISMISSAL—EFFECT.

In a suit on a fire policy, the granting of a nonsuit did not prevent defendant's joinder, as party defendant in a subsequent action, with another insurer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1045; Dec. Dig. § 570.*]

Appeal from Superior Court, Mecklenburg County; Biggs, Judge.

Action by Joyner & Long against the Scottish Fire Insurance Company. From a judgment of nonsuit, plaintiffs appeal. *Affirmed*.

The plaintiff, Joyner, held a policy of insurance on his store and goods in the Atlantic Fire Insurance Company. W. A. Stone, agent for the Virginia State Insurance Company, asked him to take, instead, a policy in that company, which he agreed to do, telling said agent to make out the policy exactly like the other, merely changing the name to Long & Joyner, as he had sold a half interest in the business to Long. By mistake Stone sent the policy made out, as before, in the name of Joyner alone. This policy took effect September 22, 1908. On discovery of said mistake, Joyner notified Stone to make the correction. On October 24th Stone, who was also agent for the Scottish Fire

Insurance Company, mailed a letter to Joyner, telling him that he was directed by the Virginia State Insurance Company to cancel the policy, as they did not wish to carry insurance upon country property, and inclosing a policy of the same tenor and amount in the Scottish Fire Insurance Company. This letter, with policy inclosed, was put in the mail, addressed to Joyner, on Saturday, October 24, 1908, and was received by him on Monday morning following. In the interval, late Saturday night, the property was destroyed by fire. The policy of the Virginia State Company contained a provision that it could not be canceled without giving a notice of five days to the insured.

L. T. Hartsell and J. F. Newell, for appellants. O. W. Tillett, Jr., and J. F. Flowers, for appellee.

PER CURIAM. [1] The judgment of nonsuit is affirmed. An examination of the record indicates that the Virginia State Insurance Company is liable to the plaintiffs; but we refrain from expressing an opinion in regard thereto until it has the opportunity of being heard.

It is clear that the plaintiffs cannot recover on both policies, but equally clear, upon the evidence before us, that one of the insurance companies should be required to pay.

[2] The judgment of nonsuit will not prevent the joinder of the defendant in this action with the Virginia State Insurance Company in a new action, as was done in *Lee v. Insurance Co.*, 70 S. E. 819, at this term. *Affirmed*.

(155 N. C. 330)

GAZZAM v. GERMAN UNION FIRE INS. CO.

(Supreme Court of North Carolina. May 26, 1911.)

1. INSURANCE (§ 90*)—FIRE INSURANCE CONTRACTS—CONSTRUCTION.

A standard fire policy, containing the provision, approved by statute, that in the matter relating to the insurance no person, unless duly authorized in writing, shall be deemed the agent of insurer, does not impose on insured the duty of showing that the agent issuing the policy had written authority to do so.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 90.*]

2. INSURANCE (§ 372*)—FIRE INSURANCE—STIPULATIONS—WAIVER.

Stipulations in a fire policy as to the conditions on which it shall have its inception and become operative as a contract may be waived.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 941; Dec. Dig. § 372.*]

3. INSURANCE (§ 146*)—FIRE INSURANCE—CONTRACTS—CONSTRUCTION.

The rule that doubtful terms in a fire policy must be construed favorably to insured applies to the construction of a standard fire policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292-298; Dec. Dig. § 146.*]

4. INSURANCE (§ 90*)—FIRE INSURANCE—CONTRACTS—CONSTRUCTION.

A stipulation in a fire policy that, "in matters relating to this policy no person unless duly authorized in writing shall be deemed the agent of" insurer, relates to matters connected with the insurance after the policy has become a valid contract.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 90.*]

5. INSURANCE (§ 137*)—FIRE INSURANCE—CONTRACTS—CONSIDERATION.

A fire insurance company became insolvent, and its general agent contracted with another insurance company, whereby the latter company agreed to insure the outstanding risks of the insolvent company. A holder of a policy issued by the insolvent company surrendered the policy and his right to the return premium thereon in consideration of receiving a policy of the latter company, which under the contract gained new business by reinsuring risks of the insolvent company. *Held*, that the new policy was supported by a valid consideration.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 231-245; Dec. Dig. § 137.*]

6. INSURANCE (§ 137*)—FIRE INSURANCE—PAYMENT OF PREMIUMS.

An insured cannot pay the premium on a fire policy by satisfying a private debt due him by the agent of insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 231-245; Dec. Dig. § 137.*]

7. INSURANCE (§ 137*)—FIRE INSURANCE—PAYMENT OF PREMIUMS.

A fire insurance company became insolvent, and its general agent contracted with another insurance company through its agent, whereby the latter company agreed to reinsure the outstanding risks of the insolvent company. A holder of a policy issued by the insolvent company surrendered the policy and his right to the return premium thereon in consideration of receiving a new policy issued by the latter company. Without knowledge of the policy holder, it was agreed between the agents that the return premium should be applied to an indebtedness existing between them. Neither of the agents was the agent of insured. *Held*, that an action on the new policy could not be defeated on the ground that the premium therefor had not been received by the latter company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 231-245; Dec. Dig. § 137.*]

8. EVIDENCE (§ 244*)—DECLARATIONS OF AGENTS—ADMISSIBILITY.

A declaration of an agent of a corporation, consisting of a narrative of a past occurrence, is incompetent against the corporation; but a declaration made within the scope of his agency and while engaged in the very business about which the declaration is made is competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

9. EVIDENCE (§ 244*)—DECLARATIONS OF AGENTS—ADMISSIBILITY.

A letter, signed in the name of an insurance company and its president and secretary, addressed to an agent issuing policies for the company, which recites that F. & Co. had resigned as general agents of the company, and directs the agent to report directly to the company, sent while the agent was regularly reporting to F. & Co. in due course of business, and a prior letter by F. & Co., received by the agent while reporting to them, to the effect that an individual had been appointed general agent for a state, and directing the agent to report to him, etc., are admissible against the company as declarations made by agents within the scope of

their agency while engaged in the business about which the declarations are made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

Appeal from Superior Court, Buncombe County; Allen, Judge.

Action by Joseph M. Gazzam against the German Union Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover \$2,500 on a policy of fire insurance.

The defendant denied that it issued the policy, or that it was issued by its authority. Prior to November 22, 1908, the plaintiff held a fire insurance policy, issued by the Ohio German Fire Company, for \$2,500 on the property described in the policy in controversy in this action, and on said day said company became insolvent, and a receiver was appointed to take charge of its assets and business. M. W. Nash was the general agent, and the firm of Alston, Rawls & Co., the local agent of said company.

The plaintiff contends that the firm of W. E. Fowler & Co. was the general agent of the defendant company; that, after the failure of the Ohio German Company, the said Nash, as its general agent, entered into an agreement with the defendant, through Fowler & Co., by which he (said Nash) was appointed the general agent of the defendant in this state; that it was a part of this agreement that the defendant would reinsure the outstanding risks of the Ohio German Company; that thereafter the defendant, through said Nash, issued the policy declared on.

The defendant denies that Fowler & Co. or Nash had authority to issue the policy, and contends that under the provision in the policy that, "in the matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company," authority to represent the defendant cannot be shown by parol, and, as no written authority has been produced, that the policy is void; that the evidence of the plaintiff fails to show any consideration to sustain the policy; that evidence admitted to prove agency was incompetent; and that on the whole evidence judgment of nonsuit should have been entered.

The policy of the defendant was delivered by Nash to Alston, Rawls & Co., who sent it to the plaintiff, and he surrendered his policy in the Ohio German Company and his right to the return premium thereon, the amount of which is not stated.

Nash was indebted to Alston, Rawls & Co., and it was agreed between them, without the knowledge of the plaintiff that the return premium should be applied to this indebtedness. The following agreement was made by the parties on the trial: "First. It is admitted by the plaintiff that the defendant, the German Union Fire Insurance Company, did

"While many of the unfair features of the earlier policies have been eliminated from the modern standard policy, the courts still apply to this instrument the same rule of construction as the considerations just mentioned led them to apply to the old forms. Any doubtful terms are always construed in favor of the insured. It has been contended that inasmuch as the law compels the use of the standard policy, and will not allow any variance from it, excepting in certain limited particulars, the insurer cannot be regarded as selecting the terms of the contract, and subjected to an unfavorable rule of construction on that account. This contention, however, has been held to be without merit, for the terms of these statutory policies were chosen with reference to the construction given by the precedent cases to similar terms in other policies, and therefore ought to be regarded as being used in the sense of their previous construction. It is also apparent from an examination of the instruments themselves, as well as the history of their adoption, that their terms were really chosen by the underwriters with particular reference to their own interests."

Again he says, on page 493, with reference to the clause on which the defendant relies: "It may be stated here, however, that the condition in the standard policy stipulating that 'no person shall be the agent of the insurer unless authorized in writing,' has no contractual significance whatever. It does amount to notice to the insured, and, as such, is binding on him, if true; otherwise not."

The decisions of our court, in so far as the questions have been considered, are in accord with these views.

In *Floars v. Insurance Co.*, 144 N. C. 235, 56 S. E. 916, it was held: "That the enactment of a statute which establishes a standard form for a policy, the statute being only affirmative in its terms, will not invalidate an oral contract." And in *Black v. Insurance Co.*, 148 N. C. 170, 61 S. E. 672, 21 L. R. A. (N. S.) 578, the provisions considered did not affect the validity of the contract in its inception.

[4] If, however, it should be held that the stipulation is contractual, the language used will reasonably lead to the conclusion that it relates to matters connected with the insurance after the policy has become a valid contract.

It does not say, "in matters relating to this policy, no person, unless duly authorized in writing, shall be deemed the agent of this company," but does say that "in matters relating to this insurance."

There is no "insurance" until a valid contract in one form or another has been entered into. We therefore conclude that the part of the policy quoted is not contractual, and that it does not relate to the acts of the agent in issuing the policy. [5] Nor do we agree with the contention of the defendant

that there is no consideration to support the contract.

The surrender of the policy in the Ohio German Insurance Company, and the relinquishment of the right to the return premium thereon by the plaintiff, furnished a consideration, and in addition, while the defendant may not have received the full premium on this policy, it gained new business by its contract of reinsurance of the risks of the old company.

The defendant, while admitting the force of this view, says it has no application to the facts appearing on the record. It says that the plaintiff admits that the defendant never received any consideration for the premium; that the firm of Alston, Rawls & Co. was the agent of the plaintiff; and that the evidence of the plaintiff shows that the policy was issued by virtue of an agreement between Nash and the agent of the plaintiff that the return premium should be used to liquidate an indebtedness existing between Nash and the agent, and it relies on *Folt v. Insurance Co.*, 133 N. C. 180, 45 S. E. 547.

[6] The authority is decisive of the proposition that the insured cannot pay the premium on the policy by satisfying a private debt due him by the agent of the company, and might be controlling if it appeared that the firm of Alston, Rawls & Co. was the agent of the plaintiff; but this is not our interpretation of the evidence, and there is nothing in the record to show that the plaintiff knew anything of the transaction.

[7] It is true that a witness of the plaintiff spoke of the firm as the insurance agents of the plaintiff; but, when this statement is considered in connection with the other evidence, it means that the firm of Alston, Rawls & Co. was a local insurance agency, with whom the plaintiff insured. It is not unusual to hear the inquiry, "Who is your insurance agent?" meaning "With whom do you insure?"

The record discloses that Nash was the general agent of the Ohio German Insurance Company and the firm of Alston, Rawls & Co., its local agent; that, after the failure of this company, Nash attempted to make a contract with the defendant, through Fowler & Co., to reinsure its risks; that Nash assured said firm he would take care of the policies of the old company, and gave him the policy in suit to be sent to the plaintiff, which was done, and the plaintiff then returned the policy he had held in the Ohio German Company, and released his right to the return premium thereon.

The exceptions to evidence and to the refusal to give the special instructions requested, and to parts of the charge, were entered principally to preserve the exception as to the competency of parol evidence to prove the authority of the agent, and this question has already been considered; but the defendant also insists that the two letters were incompetent because they were

declarations of an agent, and that the evidence as to the location of the office of Fowler & Co. was immaterial and prejudicial.

[8] The competency of the declarations of an agent of a corporation rests upon the same principle as the declarations of an agent of an individual. If they are narrative of a past occurrence, as in *Smith v. Railroad*, 68 N. C. 107, and in *Rumbough v. Improvement Co.*, 112 N. C. 752, 17 S. E. 536, 34 Am. St. Rep. 528, they are incompetent; but, if made within the scope of the agency and while engaged in the very business about which the declaration is made, they are competent. *McComb v. Railroad*, 70 N. C. 180; *Southerland v. Railroad*, 106 N. C. 105, 11 S. E. 189; *Darlington v. Tel. Co.*, 127 N. C. 450, 37 S. E. 479.

[9] The letters come within the last class. The evidence as to the location of the office was a slight circumstance on the question of agency, and standing alone would be entitled to little consideration; but we think it was not error to admit it.

There was evidence fit to be considered by the jury, on the issues submitted to them, and the motion for nonsuit was properly refused. We have considered all the exceptions appearing on the record and find no error.

No error.

(156 N. C. 352)

FORD v. PIGEON RIVER LUMBER CO.

(Supreme Court of North Carolina. May 31, 1911.)

REMOVAL OF CAUSES (§ 17*)—CONSENT—EXCEPTIONS TO ORDERS.

Where a defendant takes no exceptions to an order extending the time within which to file the complaint and answer, it becomes a consent order, and a voluntary submission by defendant to the jurisdiction of the court, and a waiver of a right to remove the cause to the United States court.

[Ed. Note.—For other cases, see *Removal of Causes*, Cent. Dig. § 10; Dec. Dig. § 17.*]

Appeal from Superior Court, Haywood County; Cline, Judge.

Action by Arthur Ford, administrator, against the Pigeon River Lumber Company. From an order denying a petition for removal from the superior court to the Circuit Court of the United States, defendant appeals. Affirmed.

Moore & Rollins, for appellant. S. Brown Shepherd and G. W. Ferguson, for appellee.

BROWN, J. The summons was returnable to September term, 1910, at which term an order was made in this cause as follows: "Plaintiff allowed 40 days to file complaint. Defendant has 40 days to file answer." The defendant did not except to this order, and did not move to dismiss the action for failure to file complaint, as it had a right to do.

It may be, as contended by defendant, that a petition for removal need not be presented until the complaint is filed and the record then discloses a removable controversy as to the sum demanded, but under our decisions the defendant has waived his right to remove and submitted itself to the jurisdiction of the court by not excepting to the order we have quoted. By failing to except to it, the defendant is taken to have consented to it. *Lewis v. Steamboat Co.*, 131 N. C. 653, 42 S. E. 969; *Bryson v. Railroad*, 141 N. C. 594, 54 S. E. 434; *Garrett v. Bear*, 144 N. C. 26, 56 S. E. 479.

Where an order of reference is made in a cause, and it is not excepted to and the exception noted on the record, it is taken to be a reference by consent, upon the principle that "silence speaks consent," and a jury trial is thereby waived. *Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427. Upon same principle, when the defendant takes no exception to the order extending the time within which to file complaint and answer, the order is a consent order, and a voluntary submission by defendant to the jurisdiction of the court, and a waiver of a right to remove.

Affirmed.

(155 N. C. 372)

HENRY et al. v. HILLIARD et al.

(Supreme Court of North Carolina. May 31, 1911.)

1. FRAUDS, STATUTE OF (§ 152*)—PLEADING STATUTE AS DEFENSE—NECESSITY.

A vendee under a parol contract in regard to land, after payment of the purchase price, can compel the execution of a deed to him, where the statute of frauds is not pleaded, or the contract denied, and there is no objection to the evidence.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 363-366; Dec. Dig. § 152.*]

2. FRAUDS, STATUTE OF (§ 152*)—PLEADING STATUTE OF DEFENSE—NECESSITY.

In an action to compel a conveyance of land under a parol contract, after payment of the purchase price, the party to be charged may simply deny the contract, or deny it and set up a different contract, and avail himself of the statute of frauds without pleading it by objecting to the evidence, or he may admit the contract and plead the statute; and in either case the contract cannot be enforced.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 363-366; Dec. Dig. § 152.*]

Appeal from Superior Court, Haywood County; Cline, Judge.

Action by W. L. Henry and others against W. L. Hilliard and others. From a judgment overruling exceptions to the report of a referee, and holding that the defendant Stringfield was not entitled to a conveyance of land, defendant Stringfield appeals. Reversed.

This is an action instituted a number of years ago by certain of the heirs of James R. Love, deceased, against W. L. Hilliard, the then sole surviving executor of the last

will and testament of said Love, by which will certain lands of the said Love, of which the land in question is a part, were devised to his executors to be sold and the proceeds divided among his heirs at law. Some time after the institution of the action, Hilliard died, whereupon all the heirs at law of the said Love were made parties, and R. D. Gilmer was appointed by the court trustee, with all the power and authority of an executor under the will. During his executorship, W. L. Hilliard employed the appellant W. W. Stringfield as a surveyor for the purpose of locating and surveying the lands belonging to the estate, and agreed with the said Stringfield that he, the said Hilliard, would sell and convey to him the two tracts of land mentioned in the petition of Stringfield at the price of \$11.25 per acre, the purchase price to be paid by Stringfield by services as surveyor. The land referred to in this agreement was immediately surveyed, and Stringfield entered into possession, and has been in possession thereof for 20 years. After the death of Hilliard, Gilmer, trustee, recognized the claim of Stringfield, and continued to employ him as surveyor. At Fall term, 1907, of the superior court for Haywood county, Mrs. M. E. Hilliard, one of the heirs at law of James R. Love, deceased, moved in the cause to require R. D. Gilmer, trustee, to account; and at the same time appellant W. W. Stringfield filed his petition, set out in the record, alleging his contract with Hilliard for the land in question, and that the purchase money had been paid in full, and praying that the court direct the trustee to execute to him a deed for the land. To this petition no answer was filed by any of the parties, and the whole matter, including the Stringfield claim, was referred by consent. It was admitted that the said Hilliard had authority to make said contract with said Stringfield, and that the whole of the purchase price for the land had been paid. The original and supplemental report of the referee and the exceptions thereto are as follows: "The report of the undersigned referee would respectfully show that pursuant to the order of reference made at Fall term, 1907, of this court, a copy of which is hereto attached, I designated the 23d day of May, 1908, at 1 o'clock p. m., as the time when the hearing the matters referred to me would begin at the courthouse at Waynesville, N. C., and gave notice by mail to the parties as I was advised and as shown by the first page of the evidence. The various hearings were had and the adjournments taken as therein noted."

Claim of W. W. Stringfield: "The referee finds as a fact: (1) That W. W. Stringfield began to act as agent for Dr. Hilliard, former trustee, in 1893 or 1894, and continued after the appointment of R. D. Gilmer as trustee in 1891. That he also acted as surveyor whenever needed, and performed various services in and about the Love lands in

both of said capacities. (2) That during the lifetime of W. L. Hilliard, former trustee, the said Stringfield made a verbal contract for the purchase of the two lots of land known as exceptions Nos. 70 and 71, in the deed from R. D. Gilmer, trustee, to S. A. Jones, of the boundaries therein given, and that the contract of purchase was never reduced to writing. That the heirs at law and the trustee have recognized the said Stringfield's claim to the said parcels of land, and that he has been in possession of the same for at least 20 years, and that the same were excepted from the deed to S. A. Jones by reason of and because of the said Stringfield's claim thereto. That on the 26th day of August, 1908, counsel for Mrs. M. E. Hilliard sent to the referee a paper writing, which is marked 'Exhibit No. 203,' in which it was stated as follows: 'Mrs. Hilliard will not oppose a report to the effect that Stringfield is the owner of the land excepted in the Jones deed as sold to Stringfield—rather she will consent to such a decree.' And on the same day R. G. A. Love and Maggie L. Marshall, by her attorney in fact, handed to the referee a paper writing in the following words and figures: 'We hereby give our consent for Maj. W. W. Stringfield to be allowed his amount in full as filed with you and find as a fact W. W. Stringfield is entitled to the deed for 70 and 71 exceptions in the deed from R. D. Gilmer, trustee, to S. A. Jones for lands in Jackson county.' This is also marked 'Exhibit No. 203.' And I concluded as a matter of law that W. W. Stringfield is not entitled to a deed for the exceptions Nos. 70 and 71 in the Jones deed, the contract of purchase thereof not having been in writing and the former trustee with whom said contract is claimed to have been made being dead; but in good conscience and equity the said Stringfield is entitled to a judgment for \$1,150.93, to be paid out of the funds now on hand. Your referee herewith sends all the evidence taken by and before him and the papers filed with him, and respectfully reports to the court that his actual expenses have been paid except the sum of \$7 for the past two trips he made to Waynesville, and that \$100 has been paid to him as a part of his allowance. Signed in triplicate. Filed Oct. 4th, 1910."

Supplemental Report: "The referee desires to submit the following supplemental report as to claim of W. W. Stringfield to that heretofore filed by him in the case, deeming it advisable to do so, because additional facts may be necessary, and that in his conclusions of law he finds that an error has been made as follows: Add to findings of fact No. 2 the words, 'and fully paid for the same at the dates shown in Exhibit No. 2, in the amounts herein given.' I desire to strike out the conclusions of law submitted and substitute in lieu thereof the following: I conclude as a matter of law that said W. W. Stringfield is not entitled to a deed for the

exceptions Nos. 70 and 71, the contract of purchase therefor not being in writing, and the former trustee, with whom said contract is alleged to have been made, being dead, but that in good conscience and equity he must be paid the sums shown to have been paid by him for said exceptions, with interest from the date on which they were paid, unless by agreement the heirs convey said exceptions to him. That said W. W. Stringfield is entitled to a judgment for \$1,150.93, balance of account. This the 4th day of October, 1910. Filed Oct. 4, 1910."

Exceptions of W. W. Stringfield to the report and the supplemental report of referee: "That whereas the said referee found as a fact that there was a verbal contract made between W. L. Hilliard, one of the executors and trustees of the said Love estate, who had power to make said contract with W. W. Stringfield, whereby W. L. Hilliard, former trustee, sold to said W. W. Stringfield the said known as exceptions Nos. 70 and 71 in the deed from R. D. Gilmer, trustee, to S. A. Jones, and whereas the said referee found as a fact that the said land was fully paid for by the said W. W. Stringfield, who has been in possession for more than twenty years, and whereas the said referee in his said reports found as a fact that the heirs at law and those who are interested therein recognized the right and claim of the said Stringfield to have a deed to said land, and filed no plea of objection to his said claim and petition for title deed to said land in the hearing of this cause or at any other time, all which facts the said petitioner, W. W. Stringfield, admits to be true. That the said referee in his said reports erred in his conclusions of law upon the above found facts, whereby he concluded as a matter of law that the said Stringfield was not entitled to a deed for said land because it was a verbal contract made with W. L. Hilliard, former trustee, who is dead. The said referee should have found as a conclusion of law that the said W. W. Stringfield was entitled to a deed to the said exceptions Nos. 70 and 71 in the deed from R. D. Gilmer, trustee, to said S. A. Jones. Wherefore, the said W. W. Stringfield prays the court to correct and modify said report and to issue a decree appointing a commissioner to execute a deed to the said Stringfield for the said land. W. J. Hannah, Attorney for said W. W. Stringfield."

A judgment was rendered overruling the exceptions to the report, and holding that the said Stringfield was not entitled to a conveyance of the land, but that he could recover the purchase money paid by him, from which judgment this appeal is taken.

No pleading was filed relying on the statute of frauds, or denying the contract, and no objection to evidence was entered except by Mrs. Hilliard, and this has been withdrawn.

Adams & Adams, for appellant. W. T. Crawford, for appellees.

ALLEN, J. (after stating the facts as above). [1] A single question is presented by this appeal, and that is, Can the vendee, under a parol contract, in regard to land, after the payment of the purchase price, compel the execution of a deed to him, when the statute of frauds is not pleaded, the contract is not denied, and there is no objection to the evidence? The authorities seem to be uniform that the vendee is entitled to a conveyance under such circumstances. In 20 Cyc. p. 312, note 4, the decisions of the highest courts of 16 states are cited in support of the text that "if he [the vendor] admits the making of the contract, and fails to claim the benefit of the statute or to demur, he will be taken to have waived it." Browne on Stat. Frauds, § 135, says: "As the statute of frauds affects only the remedy upon the contract, giving the party sought to be charged upon it a defense to an action for that purpose, if the requirements of the statute be not fulfilled, it is obvious that he may waive such protection, or rather that, except as he undertakes to avail himself of such protection, the contract is perfectly good against him." Also Story, Eq. Pl. § 763: "It seems now understood that this plea extends to the discovery of the parol agreement, as well as to the performance of it, although it has been said that the defendant is compellable by answer, or by plea, to admit or to deny the parol agreement stated in the bill. But this seems utterly nugatory, for it is now well settled that if the defendant should by his answer admit the parol agreement, and should insist upon the benefit of the statute, he will be fully entitled to it, notwithstanding such admission. But if he admits the parol agreement, without insisting on the statute, the court will decree a specific performance, upon the ground that the defendant has thereby renounced the benefit of the statute." The decisions of this court announce the same doctrine.

In Loughran v. Giles, 110 N. C. 426, 14 S. E. 966, the court says: "The statute of frauds (said Justice Ruffin in McCracken v. McCracken, 88 N. C. 276) was intended to 'close the door upon temptations to commit perjury and the assertion of feigned titles to property.' The evil intended to be guarded against in the enactment of the statute was the attempt to enforce pretended verbal agreements by resorting to perjury, and though it became necessary in attaining this end to put it in the power of a party to avoid, at his election, his own verbal promise to convey land, the statute was not construed as a declaration that all such contracts not in writing and signed by the party to be charged were to be treated ipso facto as null and void. Wilkie v. Womble, 90 N. C. 254; Green v. Railroad, 77 N. C. 95; Davis v. Inscoe, 84 N. C. 396. 'A verbal contract for the sale of land, tenements, or hereditaments, or any interest in or concerning them (said the court in Thigpen v. Staton, 104 N. C. 40, 10 S. E. 89), is good

between the parties to it, and will be enforced if they agree upon its terms, and the party to be charged does not plead the statute." The cases of *Syme v. Smith*, 92 N. C. 338, *Thigpen v. Staton*, 104 N. C. 40, 10 S. E. 89, and *Hall v. Lewis*, 118 N. C. 510, 24 S. E. 209, are to the same effect. The rule does not, however, apply except when there is no denial of the contract, and the statute is not pleaded.

[2] The party to be charged may simply deny the contract alleged or deny it and set up a different contract, and avail himself of the statute, without pleading it, by objecting to the evidence, or he may admit the contract and plead the statute, and in either case the contract cannot be enforced. *Browning v. Berry*, 107 N. C. 235, 12 S. E. 195, 10 L. R. A. 726; *Jordan v. Furnace Co.*, 126 N. C. 147, 35 S. E. 247, 78 Am. St. Rep. 644; *Winders v. Hill*, 144 N. C. 617, 57 S. E. 456.

We are of the opinion there was error in the ruling of the court on the record as it is presented to us, and that the appellant is entitled to a conveyance as prayed for.

Reversed.

(155 N. C. 384)

STACEY CHEESE CO. v. PIPKIN.

(Supreme Court of North Carolina. May 31, 1911.)

1. JUSTICES OF THE PEACE (§ 141*)—APPEAL—JURISDICTION—DETERMINATION.

The jurisdiction of the superior court on appeals from a justice of the peace is entirely derivative, so that, if the justice had no jurisdiction in an action as it was before him, the superior court can derive none by amendment.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 472; Dec. Dig. § 141.*]

2. JUSTICES OF THE PEACE (§ 45*)—JURISDICTION—COUNTERCLAIM—AMOUNT.

Where one sued before a justice of the peace has a valid counterclaim against plaintiff's demand, it may be pleaded, and, if established to an amount equal to or more than plaintiff's claim, may avail to defeat plaintiff's action, though the counterclaim is in excess of the justice's jurisdiction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 174; Dec. Dig. § 45.*]

3. JUSTICES OF THE PEACE (§ 44*)—PLEADING—CONSTRUCTION—JURISDICTION.

Neither a particular form of statement nor a special prayer for relief is determinative or controlling of the jurisdiction of a justice of the peace, which is determined by the facts alleged and proved.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 157-172; Dec. Dig. § 44.*]

4. JUSTICES OF THE PEACE (§ 45*)—JURISDICTION—COUNTERCLAIM.

Though a defendant sued before a justice of the peace pleads as a counterclaim a cause of action against plaintiff for an amount greater than the justice's jurisdiction, he may not recover an affirmative judgment for the excess.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 173-175; Dec. Dig. § 45.*]

Appeal from Superior Court, Wayne County; O. H. Allen, Judge.

Action by the Stacey Cheese Company against R. E. Pipkin. From a judgment dismissing defendant's counterclaim for lack of jurisdiction, on appeal from a justice of the peace, defendant appeals. Reversed.

The action was instituted by plaintiff to recover \$199 due by contract. Defendant denied the indebtedness, and set up a counterclaim for breach of contract of warranty on other sales of cheese. On the hearing before the justice, there was judgment in defendant's favor for an excess of \$38.38. Plaintiff having appealed on trial in superior court, four issues were submitted as follows: "First. In what amount, if any, is the defendant indebted to the plaintiff? Second. In what amount, if any, is the plaintiff Stacey Cheese Company indebted to the defendant? Third. What amount, if any, is the plaintiff entitled to recover? Fourth. What amount, if any, is the defendant entitled to recover?" And it was agreed by parties that the court should answer the third and fourth issues according to the findings of the jury in the first and second. The jury rendered verdict as to defendant's indebtedness to plaintiff. Answer first issue \$199 and second issue as to plaintiff's indebtedness to defendant \$210. On the verdict defendant moved for judgment that plaintiff take nothing by his suit, and defendant recover his costs. The court being of opinion that as the counterclaim of defendant was in excess of the justice's jurisdiction, and that defendant had at no time remitted the excess or offered to do so until after verdict, the court in accordance with the agreement answered the third issue \$199, and fourth issue nothing, and entered judgment in favor of plaintiff for said amount of \$199 and costs and dismissed defendant's counterclaim for lack of jurisdiction, etc. Defendant excepted and appealed, assigning for error that the court refused to sign the judgment as tendered by him; second, to the judgment as entered.

Aycock & Winston and W. T. Dortch, for appellant. M. T. Dickinson, for appellee.

HOKE, J. (after stating the facts as above). There is apparent conflict of authority with us on the question presented, and at least two or more decisions of this court would seem to be in direct support of his honor's ruling. *Raisin v. Thomas*, 88 N. C. 148; *Meneely v. Craven*, 86 N. C. 364. [1] The cause having originated in the court of a justice of the peace, questions of jurisdiction must be considered and determined in reference to that fact, and numerous and repeated cases with us are to the effect "that the jurisdiction of the superior court on appeals from a justice of the peace is entirely derivative, and, if the justice had no jurisdiction in an action as it was be-

fore him, the superior court can derive none by amendment (*I*James v. McClamroch, 92 N. C. 362)—a principle fully approved by the present Chief Justice delivering the opinion of the court in *Robeson v. Hodges*, 105 N. C. 49, 11 S. E. 263, and reaffirmed and applied at the present term in *Wilson v. Insurance Co.*, 71 S. E. 79.

[2] Considering the present case in that aspect, however, we are of opinion that it is a fair and correct deduction from the better considered decisions of our court, and is in accord with the better reason and the enlightened policy and expressed purposes of our present Code, that, whenever one is sued in a court of justice of the peace and has a valid counterclaim against plaintiff's demand, though the same may be in excess of the justice's jurisdiction, it may be pleaded, and, if established to an amount equal to or greater than plaintiff's claim, it may avail to defeat the action. On a counterclaim resting in contract no recovery for an excess can be had in favor of defendant except on demands for \$200 or less, or unless the excess over \$200 has been remitted in the justice's court and in apt time (*I*James v. McClamroch, *supra*); but whether set up strictly as a counterclaim or not, where it exists and has been pleaded and established, it should avail as a defense and defeat recovery by plaintiff, where the amount is sufficient for the purpose. This position is not in violation of our Constitution, limiting the jurisdiction of justices of the peace in actions *ex contractu* to cases involving \$200 or less. Though a larger counterclaim may be presented, the question determined is limited to \$200 or less, to wit, the amount required to defeat the plaintiff's claim, and is no more forbidden by the Constitution than in cases where the excess of a larger counterclaim is remitted to \$200, or an equitable defense has been entertained in bar of plaintiff's demand. Under our former system and in actions at law, this principle of balancing one claim against another was much more restricted than at present and was included in the general term, "set-off," confined usually to actions of debt or *indebitatus assumpsit* for a moneyed demand and of a liquidated nature. It was so held with us (*Lindsay v. King*, 23 N. C. 401), but under the present system, by which actions at law and suits in equity are instituted and determined in one and the same court, and as far as permissible in one and the same action, the doctrine has been included and very much extended under the general term "counterclaim." In *Smith v. French*, 141 N. C. 6, 53 S. E. 437, the court said: "Our statute on counterclaim is very broad in its scope and terms, is designed to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action, and should be liberally construed by the court in furtherance of this most desirable and beneficial

purpose." And, after quoting our statutory provisions on the subject, said further: "Subject to the limitations expressed in this statute, a counterclaim includes well-nigh every kind of cross-demand existing in favor of defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured to him on the same state of facts." Several of the earlier New York decisions showed a disposition to establish some of the common-law restrictions on the relief available under their statutory counterclaim, and confine this user of one claim against another to the old technical doctrine of set-off, and Mr. Green, in his work on Code Pleading and Practice, comments on the doctrine of these cases as follows: "Now if the term 'counterclaim' includes set-off and recoupment, and, in fact, nearly all counterclaims are either set-offs or recoupments, how is it, and why is it, that a set-off may be interposed as a defense, and that a counterclaim cannot? Or why should the same state of facts be a good defense when called a 'set-off' and liable to demurrer when called a 'counterclaim'? There seems to be literally no sense at all in the distinction here made between a 'counterclaim' and a 'set-off'; and such hair splitting is even worse than that under the old system in regard to the distinctions between the actions of trespass and case." And further the author says: "Indeed, it makes no difference what name a party may give to his pleading under the code system, if the facts constitute a good cause of action or ground of defense." In the line of these comments and in direct support of the disposition we make of the present appeal are the well-considered decisions in our own court of *Hurst, Miller & Co. v. Everett & Everett*, 91 N. C. 399, and *McClenahan v. Cotten*, 83 N. C. 333. In *Hurst v. Everett* plaintiff sued before a justice of the peace in five separate actions on five separate promissory notes, aggregating \$800. These actions were consolidated in the superior court, but this in no way affects the bearing of the decision on the point presented. Defendant claimed damages for breach of warranty in failing to supply goods of the quality contracted for to the amount of \$400; the sale and warranty attaching to one entire transaction, to wit, a single sale. It was objected that, as this was for breach of warranty in an indivisible transaction, the claim was not available as a set-off to plaintiff's actions in the court of a justice of the peace. The lower court sustained plaintiff's objection, and on appeal this court, in reversing the judgment, after referring to the effect of our statute extending the doctrine of set-

off to all matters embraced within our statutory counterclaim, said further on the question chiefly involved: "This view of the case, founded upon the statutes, the authorities, and the 'reason of the thing,' leads us to the conclusion that when the defendants were sued, no matter whether for goods sold and delivered or upon one of the notes given in payment therefor, they had the right to recoup the damages they had sustained to the amount of the sum claimed in the plaintiff's complaint, and so on in each action, 'tillies quoties,' until the amount of their damages should be exhausted. And this defense, having attached to the action while in the justice's court, followed the cases on appeal; and, when the several actions were consolidated in the superior court, the defendants had the right to recoup the whole amount of such damages, as they might be able to prove they had sustained, from the plaintiff's recovery." In *McClenahan v. Cotten*, the court spoke of the rights available to a defendant under a counterclaim as follows: "The question now arises, How may a party use and rely on his cross-demand? The answer is, he may plead it or not at his will, but, if he elect to plead it, he may do so, and then, if it be equal to or greater than the opposing demand, he may plead it in bar as formerly, or plead it as a defense, so called, under the Code, the plea or defense having the operation merely to defeat the action, and not to admit of any judgment for an excess, or he may, if he will, instead of pleading it as a bar merely, set up his demand under the name and with the proper prayer of a counterclaim as introduced by the Code, and then the defendant will have judgment for the excess. This construction is within the words of the Code, and is just in itself, for no reason can be given why A. having a debt of \$200 against B., who has a debt of \$1,000 against him, should have judgment for his debt without the right in B. to defeat the action by a plea of his larger debt as a set-off in bar. Such a distinction between set-off set up as a bar and as a technical counterclaim is laid down as proper to be taken by an intelligent writer (*Bliss on Code Pleading*, § 368), and is recognized and admitted under the Code in *New York*. *Tillinghast Shearn, Prac.* 158; *Burrall v. De Groot*, 5 *Duer* (N. Y.) 379; *Prentiss v. Graves*, 33 *Barb.* (N. Y.) 621. In our opinion, therefore, the judgment, if not otherwise liable to objection, was properly pleadable as a defense, formerly a plea in bar, without any remittitur whatever, and that there was no error in the ruling on this point except in requiring the excess above plaintiff's demand to be remitted, which was an error against the defendant of which the plaintiff cannot complain." And in that case the decision of the court expressly holds: "A defendant, sued on contract in a justice's court, may plead as a defense an independent cross-

demand arising *ex contractu*, the principle of which is beyond the jurisdiction of a justice of the peace." The same principle is applied in many well-considered decisions of this court holding that an equitable defense may be interposed to defeat a recovery in a justice's court, though affirmative equitable relief in such court is not allowed as in *Garrett v. Love*, 89 N. C. 205; *Lutz v. Thompson*, 87 N. C. 334. In all the cases examined, except the two heretofore mentioned, which are seen to uphold a contrary view, as in *Electric Co. v. Williams*, 123 N. C. 51, 31 S. E. 288, *Derr v. Stubbs*, 83 N. C. 539, etc., the claimant continued to insist on his right to recover on his counterclaim an amount in excess of the justice's jurisdiction, and such claim was very properly denied. Even the two cases referred to—that is, *Ralsin v. Thomas*, *supra*, and *Meneely v. Craven*—perhaps permit of that interpretation but to the extent that these cases hold that a valid demand by way of counterclaim cannot be had as a defense to an action in justice's court because the entire amount of same is in excess of such jurisdiction. We are of opinion that these cases are not well decided. In the cases themselves and in others which refer to them, with apparent approval, the decisions seem to lay much stress upon the form of the statement that it was set forth as a counterclaim, but substantial rights should not to that extent be made a matter of form.

[3] In numerous and repeated decisions of this court, we have held that neither a particular form of statement nor a special prayer for relief should be allowed as determinative or controlling, but that rights are declared and justice administered on the facts which are alleged and properly established. *Peanut Co. v. Railroad*, 71 S. E. 71, present term; *Williams v. Railroad*, 144 N. C. 498-505, 57 S. E. 218, 12 L. R. A. (N. S.) 191; *Vorhees v. Porter*, 184 N. C. 591, 47 S. E. 31, 85 L. R. A. 736; *Bowers v. Railroad*, 107 N. C. 721, 12 S. E. 452. Defendant having pleaded and the verdict having established a counterclaim in his favor of \$210, and plaintiff's claim being for a lesser sum, said defendant is entitled to have judgment entered that he go without day and recover costs. *Unitype Co. v. Ashcraft*, 71 S. E. 61 (at the present term).

[4] He is not entitled to a judgment for the excess, for that would be to uphold the justice's jurisdiction in excess of the constitutional provision, but to the amount required to defeat plaintiff's demand, to wit, \$199, such court has jurisdiction, and may award relief by rendering judgment that defendant go without day.

For the reasons stated, we are of opinion that the judgment of the superior court must be reversed, and it is so ordered.

Reversed.

CLARK, C. J., concurs that *Ralsin v. Thomas*, 88 N. C., and *Meneely v. Craven*.

86 N. C., should be overruled, but finds no authority in the Constitution for the doctrine of derivative jurisdiction. It has been created solely by judicial construction. The jurisdiction of the superior court is fixed by the Constitution, and contains no limitation because the case may have been previously tried in another court. When the case gets into the superior court, its jurisdiction is general and unlimited, and it can make no difference whether the case was brought into the superior court by summons or by appeal. In either event, the case is in that court which has full jurisdiction to give an adequate remedy. I am therefore of an opinion that judgment should be rendered against the plaintiff and in favor of the defendant for the excess of the counterclaim pleaded and proven over and above the amount of the claim proven to be due the plaintiff by the defendant.

If on appeal from the justice of the peace to the superior court the inquiry were confined to the question whether error had been committed in the court below, there would be a logical basis for the doctrine of "derivative jurisdiction." But on such appeal the trial is *de novo*, and it is proceeded with precisely as if it had been begun in the superior court, without any consideration as to whether the action of the justice was erroneous or not. There is therefore no reason to restrict the remedy to the limits of the jurisdiction of the justice of the peace. The case is tried exactly like any other case in the superior court, and the remedy should not be restricted to that which might have been granted by a justice of the peace.

(155 N. C. 339)

SMITH et ux. v. ELLINGTON-GUY TIMBER CO.

(Supreme Court of North Carolina. May 31, 1911.)

1. WILLS (§ 439*)—CONSTRUCTION—INTENTION OF TESTATOR.

In construing a will, the intention of the testator must govern, as ascertained from the whole will in the light of the circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955-961; Dec. Dig. § 439.*]

2. WILLS (§ 450*)—CONSTRUCTION—MEANING OF WORDS.

The court in construing a will must give effect, if possible, to every part thereof before one clause can be held repugnant to another.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 966; Dec. Dig. § 450.*]

3. WILLS (§ 602*)—CONSTRUCTION—ESTATES ACQUIRED—"LAWFUL HEIRS."

A devise of land to testator's children, subject to the provision that the share of any child dying without issue of his body shall descend to the survivors of the children, or the lawful heirs surviving any of the children, gives to the children an estate in fee, defeasible as to each on his dying without leaving lawful issue, and on the death of a child, without issue surviving, his interest passes to the surviving children or grandchildren surviving any of the chil-

dren; the words "lawful heirs" meaning surviving children and grandchildren of the devisees, who take and hold as purchasers directly from testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351-1359; Dec. Dig. § 602.*]

For other definitions, see Words and Phrases, vol. 5, p. 4029; vol. 8, p. 7702.]

4. PARTITION (§ 95*)—JUDGMENT—CONCLUSIVENESS.

Where devisees of a tract of land holding an estate in fee, defeasible on each dying without issue of his body surviving, with gift over to the surviving devisees, or to the lawful heirs surviving any of the devisees, instituted partition to determine their respective interests, a judgment awarding a share to a devisee did not give her complete title, because, on her death without issue living, her estate would pass to the surviving devisees or surviving children of deceased devisees, who would take as purchasers under the will, and hence would not be bound by the judgment.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 95.*]

Appeal from Superior Court, Duplin County; Peebles, Judge.

Action by Lonnie Smith and wife against the Ellington-Guy Timber Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Civil action heard on case agreed May, 1911. On the hearing it was properly made to appear that plaintiffs had contracted in writing to sell defendant an interest in a certain tract of land in said county, stipulating that a good title should be made, and, having tendered a deed for the property in correct form, defendant resisted payment, claiming that the title offered was defective. On the question of title it appeared that Bryant Smith, now deceased, was the owner of this and other lands, and had in the third item of his will devised his real estate, including this tract, to six of his children, to wit, Penelope, Lemuel, Hepsey, Nancy (the plaintiff), Cella, and Bryant. The devise containing and affected by a limitation explained as follows: "And it is further my will and desire that if any of my said children mentioned in this item of my said will should die without leaving lawful issue of his or her body surviving, or to be born within the period of gestation after his death, then it is my will and desire that the part therein given and devised to said child shall descend to and upon the survivors of my said children mentioned in this item of this my will, or upon the lawful heirs who may be surviving any of my said children mentioned in this item." By a subsequent clause of this will, another child, Saprionia, having married contrary to her father's wishes, was given \$1 as her full share of the estate. After the death of Bryant Smith, the six children mentioned in item 3 of the will instituted proceedings, and partition of the land was duly made between these devisees; that portion of the land, the subject of this contract, being duly assigned

to fame plaintiff. The case further states that one child had been born to plaintiff which lived a short time, and is now dead. Upon these facts, the court, being of opinion that plaintiffs could convey a good title, entered judgment enforcing the contract, and defendant excepted and appealed.

G. V. Cowper, for appellant. H. D. Williams, for appellees.

HOKE, J. Under several recent decisions of the court, the children under the third item of this will took an estate in fee simple defeasible as to each on an uncertain event, in this case "a dying without leaving lawful issue of his or her body surviving or to be born within the period of gestation after death." *Perrett v. Byrd*, 152 N. C. 220, 67 S. E. 507; *Dawson v. Emmett*, 151 N. C. 543, 66 S. E. 566; *Harrell v. Hagan*, 147 N. C. 111, 60 S. E. 909, 125 Am. St. Rep. 539; *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687; *Whitfield v. Garriss*, 134 N. C. 24, 45 S. E. 904; *Smith v. Brissan*, 90 N. C. 284. And we have held, also, in these and other cases, that when a devise is limited over on a contingency of this kind, unless a contrary intent clearly appears in the will, the event by which each interest is to be determined must be referred, not to the death of the deviser, but to that of the several holders, respectively. Speaking to this question in *Harrell v. Hagan*, supra, the court said: "Under several of the more recent decisions of the court, the event by which the interest of each is to be determined must be referred, not to the death of the deviser, but to that of the several takers of the estate in remainder, respectively, without leaving a lawful heir. *Kornegay v. Morris*, 122 N. C. 199 [29 S. E. 875]; *Williams v. Lewis*, 100 N. C. 142 [5 S. E. 435, 6 Am. St. Rep. 574]; *Buchanan v. Buchanan*, 99 N. C. 308 [5 S. E. 430]. And by reason of the terms in which the contingency is expressed, 'that if each or all of the girls die without leaving a lawful heir, then the land,' etc., and other indications which could be referred to, the estate does not become absolute in the other daughters on the death of one of them without leaving such heir, but the determinable quality of each interest continues to affect such interest until the event occurs by which it is to be determined or the estate becomes absolute. *Galloway v. Carter*, 100 N. C. 112 [5 S. E. 4]; *Hilliard v. Kearney*, 45 N. C. 221."

[1-3] Construing this will in reference to these authorities, and bearing in mind the well-recognized positions that as to wills "the intent of the testator, as ascertained from the consideration of the whole will in the light of the surrounding circumstances, must govern (*Holt v. Holt*, 114 N. C. 241 [18 S. E. 967])," and that as to both wills and deeds the intent as embodied in the entire instrument must prevail, and each and every part must be given effect, if it can be done

by fair and reasonable intendment, before one clause may be construed as repugnant to or irreconcilable with another (*Davis v. Frazer*, 150 N. C. 447, 64 S. E. 200), we are of opinion that the will conveys to the children mentioned in the third item an estate in fee defeasible on dying without leaving lawful issue of his or her body surviving and in that event as to either, and, when it occurs, the interest passes to the surviving children or to the "lawful heirs who may be surviving any of my children," and that by these words the testator did not intend "heirs" in the ordinary or general meaning of the term, but surviving issue, and in the sense of children and grandchildren, etc., of the devisees named, and that, in case this interest should arise to them, they would take and hold as purchasers directly from the deviser. To hold, as plaintiffs contend, that the words "lawful heirs who may be surviving any of my children" were intended to and did include the heirs general of the devisees named or issue in the sense of "heirs of the body" which last under our statute are established as equivalent to heirs general, would be to declare such devisees the absolute owners, and in direct contravention of the words just used by the testator, and by which their interest and ownership was made contingent on either dying without issue of the body living at the time of his or her death, and would also frustrate the purpose expressed in the item just succeeding, by which the daughter Saprionia was disinherited, for she would come within the description and definition of "lawful heirs who may be surviving any of my children" as contended for by plaintiff. There are numerous decisions, here and elsewhere, by which the words "heir or heirs or issue" in wills are construed to mean children and grandchildren when such construction would effectuate the manifest purpose of the testator. *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172; *Sain v. Baker*, 128 N. C. 256, 38 S. E. 858; *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684; *Campbell v. Cronly*, 150 N. C. 458, 64 S. E. 213. In this last case on matter relevant to the present inquiry it was held: "An estate to one, with a declaration of the use to grantor's wife and two named children in fee, 'and to the survivors of them,' the conveyance further providing that, if the said daughters 'shall die leaving issue, then to the use of such surviving issue, who shall take the same per stirpes, and not per capita,' does not vest the fee in the daughters upon the death of the wife; the grantor's intent appearing, both from the usual and legal significance of the language employed, to create in the daughters a determinable fee, and, upon the death of either, the use would shift and vest in the 'surviving issue.'" An estate in trust to the use of grantor's two daughters, providing in the deed that if said daughters "shall die leaving living issue then

to the use of such surviving issue, who shall take the same per stirpes, and not per capita," creates a succession of survivorships in the living children and grandchildren of the daughters, who may take as purchasers upon the happening of the event, and the daughters named cannot convey to a purchaser a good and indefeasible title. And the decision is an apt authority on the interpretation placed on the present devise.

[4] Having held the estate in the devisees to be a fee simple, defeasible on certain contingencies, by which the interest of one or more of them might pass to the children or grandchildren of the others as purchasers, it follows that the judgment in the partition proceedings to which the original devisees were all parties does not operate to perfect this title. True, we have held in *Carter v. White*, 134 N. C. 466, 46 S. E. 983, 101 Am. St. Rep. 853, that "a judgment in a partition proceeding determining the respective interests of the parties thereto is binding on said parties as against an after-acquired title." But this position obtains only as between the parties and their privies in estate, and does not prevail as against third persons. *Gillam v. Edmonson*, 154 N. C. 127, 69 S. E. 924. Suppose this present feme plaintiff should die without issue living at her death, under the terms of the will her estate would pass to her surviving sisters and her brothers mentioned in the third item of the will. Suppose, further, that one of her surviving sisters should then die, leaving sons and daughters. These last would take and hold, not under their mother who was a party to the proceedings, but as purchasers under the will of their grandfather. They would claim, not under the partition proceedings, but above it and so would not be bound by it.

For the reasons stated, we are of opinion that the plaintiffs are not now in a position to offer the defendant company a good title to the property, and that the decree enforcing performance of the contract must be reversed.

(155 N. C. 477)

STATE v. MAYHEW et al.

(Supreme Court of North Carolina. May 31, 1911.)

**DISTRICT AND PROSECUTING ATTORNEYS (§ 5*)
—FEES—CRIMINAL "PROSECUTION."**

Revisal 1905, § 2768, allows the solicitor, for "every conviction on an indictment which he shall prosecute for a capital crime," \$20 to be taxed against defendant, but where he is insolvent the solicitor's fee shall be one-half to be paid by the county, "except that for convictions in capital felonies," forgery, perjury and conspiracy, he shall receive full fees. On trial of an indictment for murder in the first degree the solicitor stated that he would only ask for a conviction of murder in the second degree, which was not a capital crime, and the conviction was for that degree. *Held*, that the prosecution

was for a capital crime, "prosecution being the whole or any part of the procedure which the law provides for bringing offenders to justice," but as there was no conviction of a capital crime the solicitor's fee could be only \$10 (quoting 6 Words and Phrases, p. 5737).

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.*]

Clark, C. J., and Walker, J., dissenting.

Appeal from Superior Court, Union County; O. H. Allen, Judge.

Action by the State against George Mayhew and others. Appeal by the county commissioners from an order retaxing costs for fees due the solicitor. Error.

This is an appeal by the commissioners of Union county from an order retaxing the costs or fees due the solicitor in above case.

The following are the findings and judgment: "(1) That at January criminal term of Union county the solicitor sent a bill of indictment before the grand jury, charging George Mayhew and two others with murder in the first degree, and that said indictment was returned into open court on Monday, January 28th, indorsed, 'A true bill.' (2) That on the 31st day of January at said term the solicitor announced that he would not ask for murder in the first degree, but for murder in the second degree or for manslaughter, as the jury might find the facts to be. (3) That said defendants were put on trial and convicted of murder in the second degree at said term, and were sentenced to terms of years in the penitentiary. (4) That said defendants are insolvent, and are unable to pay the costs in the case. (5) That in making out the bill of costs in the case to be presented to the county commissioners the clerk taxed a fee of \$10 for each defendant, and the bill was ordered paid by the commissioners of Union county. (6) That upon due notice to the commissioners of Union county the solicitor moved to retax the bill of costs, claiming that he is entitled to fee of \$20 for each defendant; and, by consent, the motion was heard before the court at the February term of the superior court."

Upon the foregoing facts the court is of the opinion that the solicitor is entitled to a fee of \$20 for each defendant convicted upon said indictment, and the clerk is hereby directed to retax the bill of costs in accordance with this order.

Adams, Armfield & Adams, for appellants.
J. J. Parker, for appellee.

BROWN, J. [1] The fees of the solicitor in this case are fixed by the following paragraphs, section 2768 of the Revisal 1905:

"The solicitor shall, in addition to the general compensation allowed them by the state, receive the following fees, and no other, namely:

"For every conviction upon an indictment

which they may prosecute for a capital crime twenty dollars.

"The fees in all the above cases are to be taxed in the costs against the party convicted; but where the party convicted is insolvent, the solicitor's fees shall be one-half, to be paid by the county in which the indictment was found, except that for convictions in capital felonies, forgery, perjury, and conspiracy, when they shall receive full fees."

The record in this case raises only one point, viz., is the solicitor entitled to full fee of \$20 for each defendant or to only \$10—half fees? It is admitted by the counsel for the appellants, the commissioners, that the solicitor is entitled to \$10—half fees—for each defendant convicted in this case. The prosecution, as commenced by bill of indictment, was undoubtedly for a capital crime, but the conviction was for murder in the second degree, which is not a capital crime. It would therefore seem plain that under the express language of the act, the defendants being insolvent and the county taxed with the costs, the solicitor is entitled to only half fees, admitted by appellants to be \$10 in each case. There was no conviction for a capital felony, and therefore the case is not brought within the exception contained in the statute.

Since the division of the crime of murder into two degrees, the solicitor's fees have remained unchanged. It requires about as much labor to convict of murder in the second degree as of the capital crime, and a conviction for the former should be put on the same basis as forgery, perjury, and conspiracy, but that can be done only by the Legislature.

It is suggested that the solicitor never prosecuted an indictment for a capital crime and that he is entitled to only \$4. We are of opinion that he commenced a prosecution upon an indictment for a capital crime, and that had he convicted the defendants of the capital felony he would have been entitled to \$20 for each defendant, but as he did not so convict he is entitled to only half that sum. The prosecution commenced when the solicitor drew the indictment for murder, a capital felony, and sent it to the grand jury. The prosecution for a capital felony continued when the bill was returned a true bill and the solicitor caused the prisoners to be arraigned, as the record shows, for a capital felony. "Prosecution is the whole or any part of the procedure which the law provides for bringing offenders to justice." Words & Phrases, vol. 6, p. 5737, citing *Ex parte Fagg*, 38 Tex. Cr. R. 573, 44 S. W. 294, 40 L. R. A. 212.

No degrees of murder were recognized in this state prior to 1893, and all murder was punishable with death. The act of 1893 created no new crime. It merely classified the different kinds of murder, leaving it to the petit jury to say of what degree of murder the accused is guilty. Pub. Laws 1893,

c. 85; *State v. Ewing*, 127 N. C. 555, 37 S. E. 332; *State v. Banks*, 143 N. C. 656, 57 S. E. 174. As pointed out above, this court has held that the solicitor must send a bill charging murder in the first degree, and the grand jury must so find it, before the solicitor can prosecute the accused for murder in the second degree. *State v. Ewing*, supra. Therefore, when the solicitor after arraignment decided to ask for a verdict of murder in the second degree only upon the evidence, so far as his fees are concerned he occupied the same position as if he had asked for a conviction for the capital felony and secured one for the second degree only. We cannot suppose for a moment that when the Legislature divided the crime of murder into two degrees it intended as a consequence to reduce the solicitor's fees to \$4 in case of a conviction for murder in second degree. This would reduce the fee in such cases to a much smaller figure than is allowed in perjury, forgery, counterfeiting and seven other offenses of much less gravity than homicide, where the fee is fixed at \$10. Revisal, § 2768.

We think our opinion that the indictment and arraignment constituted a prosecution for a capital felony, although there was a conviction for murder in second degree, is strongly supported by the opinion in *Coward v. Commissioners*, 137 N. C. 300, 49 S. E. 207, where Clark, C. J., says: "The question presented is the liability (300) of the county of Jackson for costs of state's witnesses in *State v. Long*, who was indicted in that county for murder, but whose cause was removed to the superior court of Macon. After the removal to the latter a *nolle prosequi* was entered as to murder in the first degree, and the witnesses were subpoenaed to the next term, at which the prisoner was tried for murder in the second degree and convicted of manslaughter. The witnesses for the state were entitled to their mileage and fees in full so long as attending court as witnesses upon the capital charge, including the term at which the *nol. pros.* was entered." In that case there was a trial for murder in second degree only and yet the witnesses were allowed full fees so long as attending court upon the capital charge.

We take the true intent and meaning of the law is that the solicitor shall receive \$20 for a conviction in a capital felony, and where he indicts and arraigns the prisoner for the capital felony and the jury returns a verdict of murder in second degree or manslaughter the solicitor is entitled to \$10 only. Error.

CLARK, C. J. (dissenting). Revisal 1905, § 2768, provides that the solicitors shall "receive the following fees and no other." In the list is the following: "For every conviction upon an indictment which they may prosecute for a capital crime, \$20." Revisal, § 3245, provides the form of indictment for

murder and Revisal, § 3271, provides that the same form shall be used whether it is murder in the first degree or murder in the second degree. In *State v. Ewing*, 127 N. C. 555, 37 S. E. 332, it was held that the grand jury could not make the distinction by indorsement upon the bill, and in *State v. Hunt*, 128 N. C. 587, 38 S. E. 474, it was said that when the case is reached for trial the solicitor determined that the trial or prosecution was for murder in the second degree by then so stating. The court held that "such action was equivalent to a nol. pros. as to murder in the first degree," and that consequently the prisoner was not entitled to a special venire or 23 challenges. This has been approved in *State v. Caldwell*, 129 N. C. 688, 40 S. E. 85; *Coward v. Com'rs*, 137 N. C. 300, 49 S. E. 207. In *Coward v. Com'rs*, supra, the court held, approving the above cases, that when a nol. pros. is entered as to murder in the first degree the state's witnesses subsequently attending are entitled to only half fees. The solicitor having entered a nol. pros. the prisoner, it was held, was not prosecuted for murder in the first degree and was deprived of all his challenges but 4 and of the right to a special venire. After such nol. pros. the witnesses also were not entitled to be considered witnesses in a capital felony, and were deprived of the pay which they would have otherwise received as such.

How then can it happen that the solicitor, notwithstanding the nol. pros. entered by him shall be entitled to pay for prosecuting a capital felony? As to the prisoner, it is held that he was not prosecuted for a capital felony. As to the witnesses, it is held that they are not attending a prosecution for a capital felony. How then could the solicitor be prosecuting for a capital felony so as to earn an allowance which is given for the extra labor involved in prosecuting an offense in which a special venire is ordered, and 23 challenges are allowed, and with the responsibilities incident to a trial in which a verdict is sought for a capital offense?

The grand jury certainly could not prosecute. The bill is a very ample one of a few lines and is simply a bill for "murder." It is not a bill specifying either degree of murder, and whether it is to be "prosecuted for a capital felony" or not cannot be determined till the prosecution or trial begins, at which time the solicitor in this case stated that the trial or prosecution would be for "murder in the second degree"—which is not a "prosecution for a capital felony." The solicitor prosecuted for murder in the second degree and entered of record that he would not prosecute—i. e., would not try the prisoner—for the capital felony. He cannot be entitled to an allowance for "prosecuting for a capital felony" when he has done nothing of the kind. The "prosecution" by the solicitor means "the trial," and begins only when the trial begins. This is plainly stated

by Chief Justice Marshall in *Cohen v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257, who said: "To prosecute a suit is, according to the common acceptation of language, to continue a demand which has been made by the institution of process in a court of justice."

It may be that the Legislature has not been as liberal to the solicitors in this respect as they ought to be, and that there ought to be a larger allowance than \$4, for prosecuting for murder in the second degree, which is the actual service that the solicitor in this case rendered. But it is for the Legislature to fix the fees of the solicitor and if they are too low, it is for that body, and not for the courts, to amend the allowance.

WALKER, J. (concurring in the dissent). I agree that there is error in the judgment, but not for the reason stated by the majority. The definition in the opinion of the court of the word "prosecution," as being the whole or any part of the procedure which the law provides for bringing offenders to justice, is statutory and was taken from a Texas enactment. It does not conform to the accepted definition of the word, but was evidently intended, for some reason, to modify it. The courts have generally adopted Chief Justice Marshall's definition, as given in the opinion of the Chief Justice. The court, in *Buecker v. Carr*, 60 N. J. Eq. 300, 47 Atl. 34, says there is a clear distinction between the prosecution of a proceeding or suit, and the bringing or initiation of it. The same court held in *State v. McDonald*, 2 N. J. Law, 355-360, that "a prosecution is not an action, it is not a suit, for none of our books confound it with those two words. It is the following up or carrying on of an action or suit already commenced, until the remedy be attained." In *Schulte v. Keokuk County*, 74 Iowa, 292, 37 N. W. 376, a case involving the amount of fee due a solicitor, the court adopted the definitions of the word given by Bouvier and Burrill, substantially the same, as follows: "A prosecution is the means adopted to bring a supposed offender to justice and punishment by due course of law" (Bouvier's Law Dict.); or "the institution and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information" (Burrill's Law Dict.). "To prosecute an action or suit is to follow up or to carry on such action or suit." *Inh. of Knowlton Township v. Read*, 11 N. J. Law, 321. "The requirement to 'prosecute' means that the suit or proceeding shall be followed up to the conclusion and is not complied with by a return of the suit to the court, for that is but one of the series of acts which go to make up the prosecution of the suit." *Marryott v. Young*, 33 N. J. Law, 337; 6 Words & Phrases, p. 5734. Having regard to its Latin derivation, the word means not to go backward or aban-

don, but to pursue or to go forward. It clearly involves the idea of continuance and not suspension. Blackstone and Webster agree that "to prosecute" means "to institute and carry on a legal proceeding." All this is according to the high authority of Chief Justice Marshall. But our statute plainly contemplates that the indictment shall first be returned by the grand jury and then prosecuted. It so says: "For any conviction upon an indictment which they may prosecute for a capital crime, twenty dollars." As you cannot carry on what is not commenced, the indictment may, in that sense, be a part of the criminal prosecution, but not by any means all of it, and the prosecution intended by the statute is that which follows the finding of the bill. We do not even require the aid of a definition to guide us in ascertaining the meaning of this provision. It sufficiently explains itself.

My strong inclination would be to decide in favor of the full allowance of \$20, believing, as I do, that it would be but inadequate compensation for the services rendered in such cases, but the language of the statute is clear and the meaning too plain even for construction. The defendant must be prosecuted for the capital felony to entitle the solicitor to the fee of \$20. It seems to me that the expression used, "for convictions in capital felonies," when providing for half fees, and the other, "for conviction upon an indictment which they may prosecute for a capital crime," should have the same meaning, and if the construction of the majority is correct, namely, that the prosecution intended by the statute is the commencement of the proceeding by the finding of the bill, the solicitor should have the full fee of \$20, and the judgment should, therefore, be affirmed; but for the reasons above stated, my opinion is that the solicitor is not entitled to even the half of the fee of \$20, as he did not prosecute for the capital crime. *Coward v. Commissioners*, 137 N. C. 300, 49 S. E. 207, sustains our view. As long as there was a prosecution for the capital crime, the fees were allowed to the witnesses, as claimed by them, but not so after the solicitor had abandoned the prosecution for the capital felony and had agreed to prosecute only for murder in the second degree. This shows clearly that there must be a continuance of the prosecution for the capital felony in order to entitle the solicitor to the fee of \$20.

(155 N. C. 485)

STATE v. HOLLY.

(Supreme Court of North Carolina. May 31, 1911.)

1. CRIMINAL LAW (§ 485*)—EXPERT TESTIMONY—HYPOTHETICAL QUESTION—BASIS.

In a murder trial, it was error to permit an expert witness to be asked a hypothetical question as to the cause of decedent's death based on a supposition that a chemical examination

disclosed strychnine in the stomach, liver, and lungs, where the only examination in evidence was that of the stomach.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.*]

2. CRIMINAL LAW (§ 485*)—EVIDENCE—HYPOTHETICAL QUESTIONS—BASIS.

A hypothetical question need not be based upon all the facts in evidence; opinions being properly asked upon different combinations of facts in evidence, but a question based on facts not in evidence is error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.*]

3. HOMICIDE (§ 163*)—EVIDENCE—ACCUSED'S CHARACTER.

In a murder trial, it was improper to allow the state to ask a witness to accused's good character if he had not heard that accused had been charged with killing his wife.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 163.*]

4. HOMICIDE (§ 163*)—EVIDENCE—ACCUSED'S GOOD CHARACTER.

One accused of murder can show his good character as a circumstance tending to show improbability of his guilt.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 163.*]

5. HOMICIDE (§ 163*)—EVIDENCE—ACCUSED'S CHARACTER—SCOPE OF INQUIRY.

When one accused of murder does not testify, evidence of his general character should be confined to the time preceding the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 310; Dec. Dig. § 163.*]

6. WITNESSES (§ 330*)—CRIMINAL LAW (§ 673*)—CROSS-EXAMINATION—CHARACTER WITNESSES.

A character witness may be tested by inquiry as to his sources of information, and may be asked if there was not a general reputation before the controversy as to particular matters tending to discredit, but, when this is done, the jury should be instructed that such evidence can be considered only as bearing on the testimony of the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330; Criminal Law, Cent. Dig. § 1875; Dec. Dig. § 673.*]

Appeal from Superior Court, New Hanover County; Peebles, Judge.

J. G. Holly was convicted of murder, and he appeals. Reversed for new trial.

The defendant was convicted of murder in the first degree. He was sentenced to be electrocuted, and appeals to this court.

The defendant offered no evidence.

That introduced on the part of the state tends to show: That the defendant, J. C. Holly, was the proprietor of a hotel in the city of Wilmington, known as the Rock Spring Hotel. That the deceased, Edward Cromwell, was a boy about 18 years of age, who lived with the defendant, and the defendant spoke of adopting him. It does not appear what relation, if any, the deceased bore to the defendant. That about March 27, 1910, the Life Insurance Company of Virginia received an application for a \$1,000 policy on the life of Edward Cromwell, but

declined to issue same for lack of information as to the parentage of the young man. The agent of the Virginia Company told Holly and Cromwell that they might get a policy with the Greensboro Life, and also told the agent of the Greensboro Life that he might get an application from these people. That about June 20, 1910, application was made to the Greensboro Life Insurance Company for a \$5,000 policy on the life of Edward Cromwell. The company issued a \$2,500 policy, the beneficiary named being the estate of Edward Cromwell, and the policy was delivered to Holly and Cromwell jointly, Holly paying the premium. That about a week after the policy was delivered Holly and Cromwell requested the agent of the Greensboro Life to make out the papers for the transfer of the policy to Holly and the transfer was duly made, and probated on the evening of August 8th. That Holly said he intended to adopt the young man and educate him and will him all his property, and that he expected the boy to take care of him in his old age. That the agent said to Holly that the transfer would have to be sent to the home office and be approved before the assignment would be valid, and that Holly, so far as the agent of the Greensboro Life knew, had never been notified that the policy had been transferred to him by the home office. That Holly had insured his furniture for \$1,250, stating to the insurance agent at the time the policy was issued that the furniture was worth \$1,700. That the agent of the company made an examination after the fire, and valued the furniture at \$450. That something was said to Holly about there not being much furniture in the house, and Holly said he had shipped a part of it away. That in June, 1910, the defendant, Holly, bought one dram of strychnine from a drug store in Wilmington, saying that he wanted it for the purpose of killing rats, and on August 3, 1910, he bought another dram for the same alleged purpose. That on the night of August 9, 1910, the boy, Cromwell, came into the hotel about 10 o'clock eating an ice cream cone. That some time after 10 o'clock, one Matthews, the occupant of the room No. 8 in the hotel, heard some one who seemed to be in great agony. Room No. 4, where deceased was found, was about six feet from room No. 8, occupied by Mr. Matthews. That Matthews heard a low voice like some one crying to another, and then heard a little whiffing sound which he recognized as a peculiar noise made by Holly with his nose. That after the fire witness asked Holly what all the trouble meant in the house that night, and Holly said he was having one of his spells and his boy was fanning him. That on the same night—that is, about 2:30 a. m. on the morning of August 10th—an alarm of fire was turned in, and Holly's hotel was found to be on fire.

W. P. Monroe, assistant chief of the fire

department, testifies as follows: "I am assistant chief of the fire department of the city of Wilmington. On the morning of August 10, 1910, we had an alarm of fire from box 25, and upon responding to that alarm we found the fire in the old Rock Spring Hotel, occupied by the prisoner, at No. 8 Chestnut street. I heard people hollering, and ordered the men to rescue the people from the windows, which they did. I went in the building from the front, and, when I came out, the prisoner asked me if I had seen his boy, the one that worked in the kitchen, and I asked him where he was, and he said he usually occupied room No. 4, on the right side of the passage. I went back in the building, and found the boy lying in the room No. 4 dead. His head was to the south, his feet to the north, and he was lying on an old comfort, which was burned up, except the part which was underneath him. I went back to the street and told Holly that the man was dead in No. 4, and that, if he had told me in time, I could have gotten him out. When I told him the boy was dead, he cried. I examined the room, and found that there was a bed, bedstead, mattress, and a grip in the room. The head of the bed was towards the north and the body was lying between the bed and the door, with his feet towards the north. The body was near the foot of the bed. There was nothing on the bed except the sheet and pillow, and the bed did not look like it had been occupied. Mr. Farrow, Mr. Frost, and myself took the body out. It was then stiff and cold. I discovered the body somewhere between 30 and 40 minutes after I got to the fire. The fire was then out. The body was stiff, with hands drawn upon the breast clenched. He had the thumb placed between the two fingers (turned under the forefinger). He appeared to be about 18 years old, and would weigh about 110 pounds, and was about 4 feet and 6 inches tall. The main fire was in the adjoining room, and the partition between this room and room No. 4, where the boy was, had burned out. The mattress which I found in this room was saturated with kerosene on it, and it had burned up to where the boy's body was on it. I detected odors something like kerosene. The fire was burning very badly in the adjoining room. It seemed to have originated there. After I took the body out, I placed it in the front room until the coroner was notified. I did not see the coroner. The body was taken to King's undertaking shop. I asked the prisoner about his furniture, and he said he had shipped some that belonged to Mr. Flowers in Pikeville; didn't say when he shipped it. There didn't seem to be very much furniture in the house. When I opened room No. 4, it was full of smoke and steam. Chief Schibben was there at that time. The windows were shut down, and we broke the glass out. The body was dressed in socks

and underwear. I saw two kerosene oil cans in the room where the fire originated and an empty vinegar barrel."

An autopsy was held, and a part of the liver, a part of the lungs, and the stomach were sent to W. A. Withers, professor of chemistry in the College of Agriculture and Mechanic Arts, who analyzed parts of the stomach and found two-fifths of a grain of strychnine in the stomach. Five tests were made, and all of these disclosed the presence of strychnine in the stomach. Prof. Withers and the doctors testified that one-half of a grain of strychnine is the minimum dose that will produce death, but that the strychnine which kills is the portion assimilated and distributed through the blood, and not the portion that remains in the stomach, and that he made no tests of the liver and lungs. The court put the following hypothetical question to Dr. Russell Bellamy: Dr. Russell Bellamy, a witness for the state, testified as follows: "I am a physician. Witness is admitted by the defendant to be an expert. I have heard the evidence in this case, and am acquainted with the effect of poison on the human system. Q. By the Court: If the jury should find that the deceased was a young man about 18 years old, weight from 110 to 140 pounds, was found dead between 2 and 3 o'clock in the morning, stiff and rigid, with his hands clenched and his thumbs between his forefingers, and upon a chemical examination of the contents of his stomach and a part of his liver and a part of his lungs the jury should find that such chemical examination showed that those parts had about two-fifths of a grain of strychnine in them, what in your opinion would be the cause of the death of the deceased? A. Strychnine or the salt of strychnine." Dr. Bell, a witness for the state, testified upon a cross-examination that the general character of the defendant was good. Upon the redirect examination the witness was asked by the state if he had not heard that the prisoner had been accused of killing his wife. The witness answered: "Not until after the present charge was brought." To this question and answer the defendant objected and excepted. Two expert witnesses on the part of the state expressed the opinion that the cause of the death of the deceased was suffocation by smoke. The evidence was entirely circumstantial.

C. D. Weeks and Wm. J. Bellamy, for appellant. Attorney General Bickett and G. L. Jones, for the State.

ALLEN, J. (after stating the facts as above). [1] We have examined the record with the care the importance of the case demands, and conclude that there is error which entitles the prisoner to a new trial. The hypothetical question propounded by the court to the medical expert, Dr. Russell Bellamy, included an important circumstance,

as to which there was no evidence, to wit, that there had been a chemical examination of a part of the liver and a part of the lungs of the deceased, and that strychnine was found in each. Prof. Withers, who made the chemical examination, stated expressly that he made no tests of the liver and lungs, and that his test was confined to the stomach. The clear inference from the evidence is that, but for the incorporation of this circumstance into the question, the answer of the expert would have been different, and the prisoner would have had the benefit of an opinion favorable to him, instead of the disadvantage of one that was injurious. The evidence indicates that strychnine may be in the stomach and death ensue from other causes, and that the quantity found in the stomach does not contribute to death, as it has not been assimilated. It is the strychnine taken up by the system which is dangerous, and this is traced in the liver, lungs, and other organs. The materiality of the answer to the question and its effect on the jury is apparent when it is remembered that the cause of the death of the deceased was in dispute; the state contending it was caused by strychnine administered by the prisoner, and the prisoner contending it was from suffocation by smoke, and that two expert witnesses for the state testified the latter was the cause of death. The injurious effect of this evidence is intensified by the fact that the question was propounded by the court, and not by counsel. It not only elicited an opinion upon facts not in evidence, but the jury might well infer that the court thought there was evidence that strychnine had been found in the liver and lungs.

[2] It is not necessary in the statement of a hypothetical question that all the facts should be stated. Opinions may be asked for upon different combinations of facts on the examination in chief and on the cross-examination, but "to allow on the direct examination an hypothetical question to be put, which assumes a state of facts not warranted by the testimony, is error, and counsel will never be permitted on the direct examination to embrace in an hypothetical question anything which the testimony does not either prove or tend to prove." Rogers, Ex. Ev. § 27; People v. Hall, 48 Mich. 489, 12 N. W. 665, 42 Am. Rep. 477; Reber v. Herring, 115 Pa. 609, 8 Atl. 830.

[3] We also think there was error in allowing the state to ask Dr. Bell, who testified to the good character of the prisoner, if he had not heard that the prisoner had been accused of killing his wife, and his reply: "Not until after the present charge was brought."

[4] The defendant did not testify in his own behalf, but he was entitled to introduce evidence of his good character as a circumstance tending to show the improbability of his having committed the crime alleged against him. State v. Laxton, 76 N. C. 216;

State v. Hice, 117 N. C. 783, 23 S. E. 357. When he availed himself of this right, the state could introduce evidence of bad character, but could not by cross-examination or otherwise offer evidence as to particular acts of misconduct. The rule is just, and based upon sound reason. A party charged with crime may be prepared to defend an attack upon his general character, which is a single fact, but he could not have at the trial witnesses to explain the conduct of a lifetime. Again, questions of this character, if permitted, would tend to multiply issues, would needlessly prolong trials, and would be calculated to distract the minds of jurors from the real issue. If a witness may state that he has heard that the defendant had been charged with killing his wife, the defendant ought to be allowed in reply to show that the charge is false, and to do so might involve the examination of many witnesses. If one collateral question of this character can be raised and tried, the same rule would permit a hundred others. The authorities in this state are numerous and uniform that it is error to allow such questions on the cross-examination of a witness as to character.

In *Barton v. Morpheus*, 13 N. C. 520, it was held inadmissible to ask "if he had not heard Morton accused of stealing a penknife"; in *Luther v. Skeen*, 53 N. C. 357, that "there was a current report in the neighborhood that plaintiff had sworn to lies while living in Randolph"; in *State v. Bullard*, 100 N. C. 487, 6 S. E. 192, "Do you not know that it was extensively talked about and said that the defendant practiced a fraud upon the firm of Worth & Worth?"; in *Marcom v. Adams*, 122 N. C. 222, 29 S. E. 338, "Have you not heard that defendant had committed forgery?" "Do you not know the defendant had been indicted for forgery?"; and in *Coxe v. Singleton*, 139 N. C. 362, 51 S. E. 1019, "Have you not heard that the defendant committed rape on a negro girl?" "Have you not heard he padded his pay roll at the mill?"

The first of these cases, *Barton v. Morpheus*, supra, which has been frequently approved, is of special importance, in that Chief Justice Henderson considers the ground frequently urged as a reason for admitting questions like the one under consideration as a means of testing the character witness. He says: "The ground on which the counsel for the defendant placed the question cannot render the evidence admissible, namely, that, although not evidence in chief, it is admissible to impeach the character of the supporting witness; that witness having given the first a good character, when he knew such reports had been circulated. This would be doing that indirectly which the law forbids to be done directly, viz., impeaching the character of the witness in chief by specific charges, and that, too, not

by common reputation, but by a mere report, which is very different; for the law supposes the latter to be true, and therefore admits it as evidence. But it makes no such supposition in favor of a mere report, which we know to be most commonly false. Reports may ripen into common reputation and common belief. When they arrive at that stage, it is supposed that they are true. They have then the best test of their truth, common opinion, and belief, and cease to be mere reports."

[5] There is another objection to the answer of the witness, as applied to the facts of this case, and that is that the evidence related to a fact affecting the character of the defendant, subsequent to the time of the commission of the offense alleged against him. When the defendant is not a witness, evidence of his general character should be confined to the time preceding the crime charged. *State v. Johnson*, 60 N. C. 151. The rule is otherwise if he testifies in his own behalf, as his credibility is then involved. *State v. Spurling*, 118 N. C. 1250, 24 S. E. 533. That the evidence was prejudicial cannot be doubted. The prisoner was charged with murdering by poison a member of his household, and the evidence was circumstantial. It was calculated to excite feeling against him in the minds of the most intelligent and upright jurors to know that he had been charged with killing his wife.

[6] It is permissible to test the character witness by inquiring as to his sources of information (*State v. Perkins*, 66 N. C. 126), and he may be asked if there was not a general reputation prior to the controversy as to particular matters tending to discredit, but, when this is done, the jury should be instructed that such evidence can only be considered as bearing on the evidence of the witness who testifies as to character. The evidence was not withdrawn from the jury, and the error in admitting it was not cured in the charge.

The competency of the record of the druggist as the evidence is now presented is doubtful, but it is not necessary to pass upon it, as the state can produce the witness who made the entries at the next trial.

There must be a new trial.

(155 N. C. 402)

CABE v. SOUTHERN RY. CO. et al.

(Supreme Court of North Carolina. May 31, 1911.)

1. MASTER AND SERVANT (§ 137*)—INJURY TO BRAKEMAN—DUTY OF ENGINEER.

It is not the duty of the engineer of a train, which is backing, to look along it or along the ends of the ties to discover immediately that a brakeman has fallen between the cars.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 277; Dec. Dig. § 137.*]

2. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Evidence in an action for the running over of a brakeman, who fell between the cars of a train that was backing, *held* insufficient to show that the engineer could have stopped the train in time, had he seen him immediately after he fell.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

Clark, C. J., and Allen, J., dissenting.

Appeal from Superior Court, Buncombe County; Council, Judge.

Action by S. L. Cabe, administrator of W. H. Sigmon, against the Southern Railway Company and another. There was a judgment of nonsuit, and plaintiff appeals. Affirmed.

Craig, Martin & Thomason, for appellant. Moore & Rollins and W. B. Rodman, for appellees.

BROWN, J. The plaintiff brings this action against the defendant Lon Roberts to recover damages for the death of his intestate, W. H. Sigmon, attributing his death to the negligent conduct of Roberts, an engineer of defendant railway company's freight train. Sigmon was a brakeman on the train, and on the 6th of May, 1908, was killed by falling between two cars. The facts are that the engineer was backing his train of three cars from the main track on to a siding at Balsam, the engine and tender pushing the cars. The three cars were coal cars loaded with wood. As the train was partly on main track and turning on to the siding Sigmon undertook to step from the second car to the one next to the tender, and fell between them. As he fell one foot was caught in the air hose coupler between the two cars, and Sigmon was thrown on his stomach across the rail. He grasped the ends of the cross-ties with his hands and endeavored to move his body along so as to keep out of the way of the wheel, but one wheel caught his leg and severed it, from which he died. It is admitted that if Roberts was guilty of such negligence as caused Sigmon's death, the railway company is liable, along with Roberts, for the resultant damage. The learned judge of the court below ruled that there was not sufficient evidence that Sigmon's death was occasioned by Roberts' negligence to require the matter to be submitted to the jury, and in that we agree with him.

We infer from the eloquent remarks of the learned counsel for plaintiff in defense of the right of trial by jury that he feels that his client was deprived of a fundamental right by the action of the judge. The record shows that the jury were duly impaneled and heard the case. At its conclusion his honor ruled that the plaintiff had failed to make out a case by proof as he was required to do. If his honor was correct, then there

was nothing for the jury to try. Speaking for the court, in *State v. Walker*, 149 N. C. 530, 83 S. E. 77, Mr. Justice Hoke well says: "The controlling principle on a question of this character is very well stated by Merri-mon, J., in *State v. White*, 89 N. C. 464-465, as follows: 'It is well-settled law that the court must decide what is evidence, and whether there is any evidence to be submitted to the jury, pertinent to an issue submitted to them. It is as well settled, that if there is evidence to be submitted, the jury must determine its weight and effect. This, however, does not imply that the court must submit a scintilla—very slight evidence; on the contrary, it must be such as, in the judgment of the court, would reasonably warrant the jury finding a verdict upon the issue submitted, affirmatively or negatively, accordingly as they might view it in one light or another and give it more or less weight, or none at all.' " This is a settled rule of law which obtains in all courts where the practice and principles of the common law obtains, and is quoted and affirmed by Mr. Justice Allen in *State v. Hawkins*, 71 S. E. 326, at this term. This practice is conducive to the dispatch of business and the orderly determination of litigated rights, and has been crystallized into a statute, Revisal 1905, § 539, which bears the name of an eminent lawyer of this state.

[1] There are four grounds of negligence set out in the complaint, but plaintiff rests his case upon one only, viz., that the defendant Roberts failed to stop his train, when he knew or should have known of Sigmon's imminent danger, and that he could have stopped in time to have saved his life. It was stated upon the argument that there was a man stationed on the end of the train to keep a lookout as the train was being backed, but it was admitted that he could have rendered no assistance and could not possibly have prevented the injury. As to whether the engineer under such conditions must also look out of his cab window when he is backing his train or can well do so and manage his train it is unnecessary to determine. This engineer admits he was looking out of the cab window and towards the end of the train and in the direction in which his train was moving. The learned counsel for plaintiff admits with characteristic candor and humanity that if the defendant Roberts had seen the predicament of Sigmon he would have done all in his power to avert the catastrophe. But it is contended that by the exercise of due diligence the said defendant could have seen him, and that if he had seen him he could have stopped the train in time to have saved his life. All the evidence shows that when Sigmon fell Roberts could not have possibly seen the fall. He was in his cab and the tender and a car loaded high with wood was between

him and Sigmon. When Sigmon fell, one foot was hung in the air hose coupler and his stomach was on the rail, and his head and hands about at end of cross-ties. He grasped the ends of the ties with his hands and endeavored by moving his body to keep the car wheel from catching him. He commenced to halloo as soon as he fell, and according to the witnesses it was about two seconds from the time he fell and commenced to halloo before one wheel ran over him, and the train stopped before the next wheel reached him. The plaintiff Cabe was examined as a witness in respect to the letters of administration, but he was not present on the occasion and knew none of the circumstances.

Plaintiff introduced three witnesses who were present and saw the occurrence. Witness Bryson states that he saw Sigmon twisting the brakes when train was backing on side track; "heard him commence hollering and the train was then slowing up—stopping." "Train did not run over ten feet after I heard Sigmon holler." On cross-examination Bryson stated that he did not really know how far the train moved after Sigmon commenced to holler—but repeats his statement that train was then slowing up and very shortly stopped. The witness was asked these questions: "Q. The train at the time of the accident was backing in on the sidetrack at Balsam? A. Yes. Q. And was preparing to stop at that time? A. Yes. Q. I will ask you if it was not only two or three seconds after the hollering until the train stopped? A. I don't know. Q. Wasn't it an instant? A. It was all done in a short time. Q. Almost a thought or an instant? A. Yes; something like that."

C. H. Perry saw Sigmon fall. On direct examination he states that after Sigmon fell the "train went a little piece, could not say exactly how far." Being pressed to estimate the distance witness said "probably a car length." Upon cross-examination the witness materially qualified his estimate of the distance the train moved after Sigmon fell, as following shows: "Counsel: Q. There was a car between where Sigmon stood and the engine, loaded with wood? A. Yes. Q. At that time you say you saw him fall down on the track, did he say anything at first or did it knock the breath out of him? A. He hollered pretty soon after he fell. Q. Did he holler the same instant he fell or a second or two afterwards? A. Yes, a second or two afterwards; about the same time. Q. I ask you if about the time he hollered twice if the train did not stop, wasn't it all over in a second or two? A. It was not but a short time until the train stopped. Q. It was only a thought or a second or two? A. Yes; he hollered a few times before the train stopped. Q. Would you swear positively that the train moved over 8 or 10 feet or 15 feet at the outside? A. No, sir; I did not measure it."

Mrs. C. H. Perry saw Sigmon just as he fell. His foot caught in something between cars. He fell between cars and had his hands hold of ends of cross-ties. The following excerpt from the evidence gives Mrs. Perry's estimate of the distance train moved after Sigmon fell: "Q. How far do you think the car ran while he was trying to keep out from under the wheels? A. Not very far. Q. What is your best judgment, a car length? You give us your best judgment? The Court: Q. Can you give any idea about the length from any object? A. It was only a few feet between the wheels. Mr. Craig: Q. What was he doing when the wheels caught him? A. He was trying to get out from under. Q. Did he seem to be hanging to anything? A. He was just lying there trying to get out. I don't know whether he was hanging to anything or not. Q. What was he doing, was he moving along? A. He had his hands outside abohd of the ends of the cross-ties. Q. How far did the train run after he fell before the train ran over him? A. Just a few feet; it just pushed him along a few feet and caught him. Q. How far? A. About as far as from here to the end of the table. Court: (Witness indicating about four or five feet.)"

Upon cross-examination Mrs. Perry testifies as follows: "Q. I ask you if he did not look like he was stepping from one car to the other, and either slipped or fell between them? A. Yes; that was the way it looked to me. Q. How far were the closest wheels to him when he fell on the track, was it over two or three feet? A. No, sir; I think not. Q. And you said that when he was standing he was in the middle of the car? A. Yes. Q. And when he fell he fell on the track? A. Yes. Q. And the car ran immediately on his body as the train moved on? A. Yes; it was just a second or two. Q. And it pushed his body along before he fell not exceeding 10 or 15 feet? A. Yes. Q. Don't you know it was not over 8 feet? A. I don't know. Q. You know it was done in a short distance? A. Yes. Q. I ask you if his falling and his hollering and the stopping of the train was not all in a few seconds? A. Yes. Q. Almost in a thought, wasn't it? A. Yes."

This is all the evidence introduced by the plaintiff of those who witnessed the occurrence. The plaintiff's case is not aided by anything cropping out in the evidence introduced by the defendant as an examination of the evidence plainly discloses.

J. R. Warren, witness for defendant, saw Sigmon as he fell; was 10 feet from him; he fell on his stomach across rail; his hands caught hold ends of cross-ties; sliding along in front of wheels; one foot hung in air hose. "Q. Which rail did he fall across? A. The left-hand rail going west. Q. That is the south rail? A. Yes. Q. When he fell in that position, what did you hear and what did you see, and what was done? A. He hollered once or twice, he did not have time to

holler much, it was done in a very short time. Q. It was all done in how long? A. In one or two seconds. Q. One or two seconds from the time he fell until the train stopped? A. Yes. Q. How far did the train move, how many feet before it stopped? A. It could not have moved but a short distance. Q. Can you give an idea of how many feet or yards, how many feet? A. I never did measure it. Q. Give us your best impression? A. It was something between 6 or 10 feet, I guess that train moved. Q. That the train moved? A. Yes, before the train stopped. Q. Was there a car between Sigmon at the time he fell, and the engineer? A. Yes, one car. Q. What was that car loaded with? A. Wood. Q. How many seconds was it from the time he fell until the train stopped? A. About two seconds. Q. How fast was that train going? A. Three or four miles an hour, just was barely moving, it was stopping when he fell." This witness further testifies that when Sigmon fell across the rail his head was about even with the end of the cross-ties.

D. C. Ensley saw Sigmon fall and gives substantially same account as other witnesses. He helped to pull Sigmon out after train stopped and was asked this question: "Q. Did you make any measurements of how far it was from where he fell to where you pulled him out? A. No, sir; only we saw the print where it looked like he had been in the cinders. It was about four ties. Q. How far would that be? A. Something like two feet from the center to center. Q. And you say there were four? A. Yes; we counted four. Q. From where he fell to where you pulled him out? A. Yes."

F. L. Potts saw the occurrence and stated: "Q. I wish you would state to his honor and the jury just what you saw in regard to this matter? A. I heard him holler and I ran out a few steps and looked, I was facing the railroad and could have seen him if I had looked. And the train was just barely stopping when I saw him flounce on his stomach and his heels came over and I started towards him. Q. From the time you heard him holler until the train stopped how far did the train run? A. Not over six feet. Q. How many times did you hear him holler? A. Three times—I am not certain. Q. From the time he first hollered until the time the train stopped, how much time elapsed? A. Not over two or three seconds."

The defendant Roberts testifies that he was backing from main track to switch at from four to six miles an hour, that he could not see Sigmon from the engine as there was a curve from the side track and he could not see Sigmon for that; that he was looking back from cab window in direction in which he was going; that he did not know Sigmon had fallen until train stopped; that he examined the distance and it was six feet from where Sigmon fell to where train stopped;

that he could not have stopped his train of three loaded cars under 8 or 10 feet.

Before the plaintiff can recover, or "go to the jury" in this case he must offer evidence of sufficient probative force to justify the establishment of these propositions: First. That Roberts saw or had actual knowledge of Sigmon's peril. As this is not contended by counsel it may be dismissed without discussion. Second. That, although Roberts had no actual knowledge of Sigmon's peril, it was his legal duty to have discovered it, and hence the law fixes him with such knowledge. Third. That after Sigmon fell between the wheels of the cars Roberts could have stopped the train in time to have avoided the injury.

Upon the second proposition we have been cited to no authority and have been able to find none, which fastens upon an engineer the duty to watch his brakemen, as they move over the train in the discharge of their duties, or to discover immediately that one has fallen between the cars. It is manifestly impossible and inconsistent with the management of an engine. Neither have we any authority for the contention that it is an engineer's duty, while moving his train backward to look under it or along the cross-ties and in the vicinity of the rails for persons who may have fallen between the cars. The engineer is not required to anticipate such accidents, and unless he actually discovers them, neither reason, authority, nor ordinary justice requires that he be held culpable if he fails to see them. In looking back from his cab window at the end of his train in the direction in which it is going, the engineer may well fail to see a person struggling under the wheels of the cars, for he is not required to look there, or anticipate such accidents as befell Sigmon. And as said by this court: "Where the law does not impose the duty of watchfulness it follows that the failure to watch is not an omission of duty intervening between the negligence of plaintiff in exposing himself, and the accident unless he actually be seen in time to avert it." *Pickett v. Railroad*, 117 N. C. 636, 23 S. E. 267 (30 L. R. A. 257, 53 Am. St. Rep. 611). In this case there was no legal duty on the part of the engineer, Roberts, to watch under the cars, the place where Sigmon fell, and therefore the failure to discover him cannot be imputed to his negligence. When moving his train forward it is the engineer's duty to keep a vigilant lookout in front of him along the tracks. For that reason he is chargeable with knowledge, not only of what he actually sees on the track, but of what by reasonable diligence he might have discovered. This is the principle settled by *Bullock's Case*, 105 N. C. 180, 10 S. E. 988, *Deans' Case*, 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902, *Pickett's Case*, supra, and many other cases. But when a train is backing, the engineer from his cab cannot

see the track ahead of his cars. Therefore the company must place a watchman on the end of the last car so he can watch the track and guard against injuring persons in front of him. When the engineer is backing and looking in the direction in which he is moving his vision is of course directed at end of his train. He is looking from an elevated position far above the track rails. His purpose in looking is to note signals, and, as far as possible, guard against any obstruction ahead of his train, and not what may be under its wheels or the ends of the cross-ties. The duties of an engineer are many and weighty, and he is held to a degree of vigilance and responsibility that is placed upon no other servant of the public. But if, in addition, he is to be charged with knowledge of everything that happens on his train and under it he would require the 100 eyes of the fabled Argus. But if perchance Roberts had been looking from his cab directly at the place where Sigmon fell there is no reasonable proof that he could have seen him. The train was being switched from the main track to a siding at the time Sigmon fell, and this formed a curve, throwing the car further out of the line of vision. All the evidence shows that Sigmon's head and hands were at the end of the cross-ties, and that the cars themselves extend 14 inches beyond the rail. The plaintiff's witnesses who were on the ground heard Sigmon halloo but did not see him until they looked for him. Roberts testifies that not only did he not see or hear Sigmon, but that he could not then have seen him from his position in the cab window. *Edge's Case*, 153 N. C. 212, 69 S. E. 74, is no authority for the positions advanced by the plaintiff. In that case the train was at a standstill in the switching yards. A messenger of the company approached it with the evident purpose of going between the cars. The plaintiff testified that "he (the engineer) was looking straight at me." When plaintiff was between cars the engineer, who should have known of his perilous position, started his train and injured plaintiff. The court thought the evidence of negligence sufficiently strong to be submitted to the jury. The great difference between that case and this is too obvious to justify discussion.

[2] As to the third proposition it is not contended that Roberts could have seen Sigmon as he fell between the cars, and, if he had afterwards actually discovered him struggling on the rail and between the wheels the plaintiff's evidence falls short of showing that Roberts could have stopped his train in time to have avoided the injury. Plaintiff's witnesses all say the train was slowing up when Sigmon fell, that it did move over 8 or 10 feet after that. One witness said about a car length but afterwards materially qualified that statement as the evidence we have quoted will show. Upon cross-examination all plaintiff's witnesses

say it was "only a thought," "two or three seconds," from time Sigmon commenced to "holler" until train stopped, and that he commenced to "holler" as soon as he fell. All the evidence shows that this train could not have been stopped at the rate of speed it was moving under 8 or 10 feet. We understood it to be contended on the argument that Roberts, the engineer, testified that he could have stopped his train in 10 or 12 inches. That is erroneous. He stated he could stop *one car* in 10 or 12 inches provided the slack was all out. There is some two feet slack between the cars and as the train was backing the "slack was all in." This train consisted of three heavy coal cars loaded with wood, and the engineer stated repeatedly it could not have been stopped under 8 or 10 feet.

We have reviewed this case at some length because of its importance, and are unable to find any sufficient evidence to warrant the contention that the defendant Roberts was responsible for the injury Sigmon received, or that it can be fairly attributed to Roberts' negligence. From the evidence it appears to us to have been an accident pure and simple, and, however lamentable, no omission of duty by the defendant Roberts was the proximate cause of it.

The judgment is affirmed.

HOKE, J. (concurring). I concur in the result. All of the testimony tends to show that the deceased fell beneath the train from a position where his fall could not possibly have been noted by the engineer, and that he was run over in about two or three seconds from the time that he fell. All of the witnesses except one testified that the distance the train moved was from 6 to 10 feet, and that he was standing some distance off, and that the train moved about a car length, and the witness afterwards qualified this testimony by saying that he could not positively say that the train moved over 10 or 15 feet. All of the testimony tends to show further that the tender and a car loaded with wood was between the engineer and the intestate at the time that he fell; that the deceased only gave a cry or two, and that if any part of his person was exposed to view at all it was only his hands about the end of the cross-ties and close to the ground, affording slight if any opportunity to either see or hear him, under any circumstances. I assume that the duty was on the engineer, in so far as consistent with proper attention to his engine, to keep an outlook over his train in the direction in which it was moving, and to be properly regardful of the safety of employes upon it, but on the facts of this case, considering the point from which the deceased fell, that it could not have been observed by the engineer, the shortness of the time—not more than two seconds—the necessary attention of the engineer to the proper operation of his engine

and the noise attendant upon its movement, I am of opinion that this was an excusable accident, and there is no testimony, within the definition of legal evidence, that there was a breach of duty on the part of the engineer, or that an actionable wrong has been committed by the defendants.

ALLEN, J. (dissenting). I do not concur in the views expressed by the court, but the opinion has been filed so late in the term that I cannot do more than suggest my reasons for dissenting. The opinion of the court is based on two propositions: (1) That it was not the duty of the engineer to keep a lookout in the direction the train was backing, except for the purpose of seeing if there was any obstruction on the track in front of the rear of the train, and consequently the defendants owed no duty to the plaintiff's intestate, a brakeman, who was between the first and second cars. (2) That if such a duty should be imposed there is no evidence that, by the exercise of ordinary care, the dangerous position of the intestate could have been discovered and his death averted. If either position can be sustained, the judgment of nonsuit should be affirmed. It is noticeable that in the first part of the opinion it is stated that it is not necessary to decide the first proposition, but after a review of a part of the evidence, it was thought best to do so.

1. The authorities agree that it is the duty of an engineer, while running his train, to keep a lookout, and that he and the company he represents are chargeable with what he sees, and with all that can be discovered by the exercise of ordinary care. By the term "keeping a lookout," I understand looking in front when the train is moving forward, and to the rear when it is moving backward. If there is any difference in the degree of care to be observed in the performance of this duty, dependent on the movement of the train, I would say that greater care should be required when moving backward, as the operation is more dangerous. I do not think that the purpose of requiring the engineer to look to the rear when it is backing, is to enable him to see obstructions in front of the train, as stated in the opinion of the court, but that it is that he may overlook the train and note the signals of the trainmen, and to do this he must observe their positions. In this case, the train consisted of an engine, tender, and three cars, and it was backing into a siding for the purpose of leaving the cars. J. R. Warren, a witness for the defendant, explains this: "Q. State to his honor and the jury exactly how it occurred and all about it. A. The train comes there, it has a mountain to come up, and they were to put those cars on the side track, and Mr. Sigmon was riding the car when he passed the switch, and he put on the first brake on the rear car and he jumped

off by the side of me, and he jumped up between the cars and got out of my sight then, and they went down about 30 or 40 feet, and I saw him down under the car, and he rolled out in front of the wheels." The plaintiff's intestate was setting the brakes in order that the cars might remain on the siding, and in the position desired. Suppose the brakes had not held, was it not the duty of the brakeman to notify the engineer and, if so, his duty to see. I do not wish to see a harsh or unreasonable rule imposed on engineers, who are usually prudent, intelligent, and brave, but the position of the brakeman is a very dangerous one, and he should not be left without protection. If this is a correct view of the relation of the parties, it was the duty of the engineer to look towards the rear of the train, that he might note its condition and might receive signals, and if he failed to look, or if he looked and failed to see what could have been seen by the exercise of ordinary care, he was negligent.

(1) Did he look? I do not know, and it is not for me to say. My duty is at an end when I consider the question whether there was any evidence that he did not look. The engineer testified that he was looking west towards the rear of the train. C. H. Perry, a witness for the plaintiff, described the fall of the deceased, his crying out, etc., and was then asked the following questions: "Q. Which way was the engineer looking when this was going on, what was standing on the other side of this train? A. There was a train pulling out just as they headed in there; pulling out towards Asheville, a freight train. Q. What was Mr. Roberts looking at? A. He had his face turned towards the east, towards Asheville when I noticed him. Q. Away from this train? A. Yes. Q. And Mr. Sigmon was which way from him? A. He was west." It is true he stated on cross-examination that he was not looking at the engineer the instant the deceased fell, but this witness was not a partisan of the plaintiff. It is in evidence that the defendant furnished him a pass to attend the trial, and that he notified witnesses for the defendant to attend. Again, Mrs. C. H. Perry says: "Q. Do you know which way the engineer was looking when he fell? A. He was looking east before the accident, but I don't know which way he was looking when he was under the car." It seems to me this is some evidence that the engineer was not keeping a lookout.

2. But suppose he looked, did he fail to observe what a man exercising ordinary care would have discovered? There was one car and a tender between the deceased and the engineer, a distance of perhaps 60 feet. The deceased began crying out about the time he fell, and this continued until the train stopped. C. H. Perry says: "Q. At that time you say you saw him fall down on the track, did he say anything at first

or did it knock the breath out of him? A. He hollered pretty soon after he fell. Q. Did he holler the same instant he fell, or a second or two afterwards? A. Yes, a second or two afterwards about the same time. Q. I ask you if it was not a second or two after he fell that he hollered, and if his hollering and the stopping of the train was not almost at the same time? A. No, sir; the train did not stop when he fell. Q. I mean did not the train stop almost as he hollered? A. As I recollect the train stopped while he was hollering. (This witness was 65 or 70 yards from the train.) Q. How far were you away? A. About 65 or 70 yards." Mrs. C. H. Perry testified that she heard the crying out and she was asked, "How far away were you? About 65 yards. Did you hear him holler? Yes." F. L. Potts, a witness for defendant, said he was 60 yards from the railroad and heard him. Dock Bryson said he was 125 feet from the railroad and heard him. If two witnesses, who were 65 yards, and another 125 feet, distant, heard him, is it unreasonable to say that there is evidence that the engineer, who was within 60 feet, could have heard if he had exercised ordinary care?

Next, was there evidence that he could have seen the dangerous position of the deceased? The deceased fell between the first and second car. One of his feet became entangled at the coupling, and he fell across the rail, out between the cars. He was a grown man, and the wheels ran across his thigh. This admits of the argument that from the thigh to the head was beyond the rail—approximately three feet. Mrs. C. H. Perry says: "Q. What was he doing, was he moving along? A. He had his hands outside ahold of the ends of the cross-ties." J. R. Warren says: "Q. What position was he in when he fell between the cars? A. He fell right down on his stomach, and his hands were catching on to the ends of the cross-ties as he was sliding down in front of the wheels. Q. Where was his feet? A. One was down next to the ties, and one was hanging somewhere, and he told me it was hung on the air hose; that his foot was hung on the air hose. Q. What is the air hose? A. It is to connect the air between the cars, it is the rubber hose. Q. When he fell, did he fall right across the track? A. Yes, his head was out about even with the end of the ties, about two feet, I guess; that is, to the end of the ties." A. L. Roberts, the engineer, testified: "Q. How far do those cars project over the rail? A. I don't know, something like 12 or 14 inches. Q. So, if a man's body projected out two feet over the rail, there would not be anything in the world to prevent you from seeing him? A. It don't look like that would be."

S. L. Cabe testified that he had worked on the railroad seven or eight years, and was acquainted with the situation at Balsam, and was asked the following questions: "Q.

I wish you would state to his honor and the jury how much of a curve there is there on this side track? A. The main line comes up straight until you get there to the switch. The Court: Q. That switch was where they were putting the cars in? A. Yes; and then the main line curves south around this way. The Court: Q. That is coming towards Asheville? A. Yes; and when the engine went up in here (indicating with motion), you could see down in there plain enough on this curve, and when you get down to the switch, there is a curve there; that is, the switch curves off from the main line like any other switch. By counsel: Q. How much does the switch curve? A. Very little. Q. State whether or not, at any point along there, he could have seen a man two feet over the track at the rear end of the car next to the engine? A. He could have seen him at any point. And the track comes on the south, on the engineer's side, and he could have seen better from his cab than he could from the side track." I submit that a fair consideration of this evidence leads to the conclusion that, if true, the engineer could have seen and heard.

3. If so, the remaining inquiry is, could he have seen and heard in time to stop the train and avoid killing the deceased, or, rather, is there evidence of this fact? This involves an investigation of the evidence as to the distance the train moved after the deceased fell, the speed of the train, and the distance within which it could be stopped.

(1) How far did the train move after the deceased fell? C. H. Perry testified: "Q. After he fell, how far did your train go? A. It seemed to me that it went but a little piece; could not say exactly how far. Q. Give your best judgment, as to how far it went? A. It went, it seemed to me, probably a car length. Q. That is your best judgment of it? A. Yes, at the time. Q. When he fell, what did you see him doing on the track? A. It looked like he was just scrambling along. I don't know whether his feet were fastened or whether he was just trying to keep out of the front of the car. Q. And it looked like he was trying to keep out of the way of the wheels? A. Yes. Q. Well, just state how he was? A. The best I could see it just looked like he was trying to keep out of the way of the wheel. Q. How far did the car go under those circumstances, you say it went a car length? A. I could not say, it might have been more than that. Q. That is your judgment that it went about a car length while he was in that situation? A. Yes, something like that." It is conceded that a car length is about 30 feet.

(2) What was the speed of the train? Dock Bryson and C. H. Perry say it was going about "as fast as a man could walk;" J. R. Warren, "three or four miles an hour;" D. C. Ensley, "three miles an hour." A. L.

Roberts says when he started in the siding, he was running from "four to six miles an hour," and he was then asked: "Q. You mean to tell the jury that when you started to back in there, it was going four to six miles an hour? A. Yes, but when he fell off it might not have been going two miles an hour."

(3) Within what distance could the train have been stopped? S. L. Cabe testified "within four feet." A. L. Roberts testified on cross-examination: "Q. You say if the train had been going from four to six miles an hour, you could have stopped in 8 or 10 feet, so that you could stop the train going at two miles an hour in what distance? A. In the slack of the car. Q. How much slack is there in a car? A. There was two feet slack in the cars that were coupled together. Q. How much slack was there in this car? A. Six or eight, maybe ten inches. Q. And you could stop that one car in six inches? A. In ten or twelve inches. Q. And the others might have rolled on a little further? A. (No answer.)" And on re-direct examination: "Q. You say you could stop a train going two miles an hour in ten inches, do you mean with or without slack? A. Without the slack of the cars. With the slack of the cars, it would have taken longer. Q. If that train was going back in there at two miles an hour with the slack in, in how far could you stop it? A. In about eight feet."

There is therefore evidence that the train ran 30 feet after the deceased fell; that he fell within 60 feet of the engine and in the direction the engineer was required to look; that he began crying out as he fell; that he was heard 65 yards distant; that his head was two feet beyond the rail, and he was grabbing at the end of the cross-ties; that the car between him and the engine projected over the rail 14 inches; that the train was running at from two to four miles an hour, and therefore making little noise; that the train could have been stopped in four feet at least, and one witness who was not present, but was familiar with the location and trains, swore the engineer could have seen the deceased. If the car ran 30 feet and he had seen or heard the deceased as he fell, and had stopped his car in 28 feet, when, according to the evidence it could have been stopped in 4, a life would have been saved. I agree with the principle laid down by the court that it is the duty of the superior court judge to decide whether there is evidence, and of this court upon appeal to review this decision, but we cannot go further. We cannot weigh the evidence and pass on its sufficiency, and if we undertake to do so, we usurp the powers of the jury. The duty imposed is well stated by Justice Hoke in *Fitzgerald v. Railroad*, 141 N. C. 534, 54 S. E. 893 (6 L. R. A. [N. S.] 837). He says: "It is very generally held that

direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances, and it is well established that if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. Thus, in *Shearman and Redfield on Negligence*, § 58, it is said: "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this he is entitled to recover unless the defendant produces evidence to rebut the presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default, but this is going too far. If the facts proved render it probable that the defendant violated its duty, it is for the jury to decide whether it did so or not. To hold otherwise would be to deny the value of circumstantial evidence."

I was interested in the eloquent plea of counsel for the plaintiff in behalf of trial by jury, in the course of which he said it was reported that King Alfred, in the olden days, had caused 44 of the judges to be executed, because of their denial of this right to the subject. I would suggest to him that the incident is violative of the principle he advocates as there is no suggestion that the king gave the judges a trial by jury.

I repeat that I do not know how the fact is, nor do I know what I would do as a juror, but in my opinion there is evidence fit to be submitted to a jury.

CLARK, C. J. (concurring in dissenting opinion of ALLEN, J.). When the train was moving rear foremost into the siding—that is, backing into it—it was the duty of the engineer to look out of the cab window in the direction in which the train was moving. If he did not do so, and thereby failed to hear the outcries or see the struggles of the deceased brakeman in trying to save himself, it was clearly negligence. The engineer was in charge of the train, and it was his duty to keep supervision over it. It is true that the engineer testifies, in his own behalf, that he did keep a lookout by leaning out of the window and looking in the direction in which the train was moving. But he may have been mistaken as to this. The nonsuit takes for granted that his statement was true, but if the statement had been submitted to the jury there was evidence from which they might have found the contrary. The fact that people standing some distance off heard the agonized scream of the victim while the engineer little more than a car length away says that he did not would indicate that he was not leaning out the cab window. Besides how far the head and

hands of a man in the position of the deceased should have been seen by one leaning out of the cab window, which would put the engineer considerably beyond the edge of the ties, was a matter for the jury. These and other potent circumstances mentioned in the dissenting opinion of Mr. Justice ALLEN, which need not be repeated here, would seem to make it clear that this case should have been submitted to the jury.

The old landmark was that if there is "any evidence beyond a *scintilla*" a party was entitled to have the case submitted to jury, as guaranteed by the Constitution. The departure was made in *Wittkowsky v. Watson*, 71 N. C. 451, in which Judge Bynum filed his admirable dissenting opinion which is a classic. From that day to this the power of the judges to take cases from the jury has been steadily extended till now it can almost be said that trial judges are tempted to think that it is not incumbent upon them to give the plaintiff, especially in negligence cases, the right to a trial by jury unless the judge is of an opinion that the evidence will "reasonably" justify a verdict for the plaintiff. That is, the judge puts himself in the place of the jury. The distinguished counsel of the plaintiff in this case recalled to our attention that Alfred the Great is said by some writers to have hung 44 judges for denying this right to trial by jury. The incident is doubtless mythical, for trial by jury was not known till many centuries later, if we take the best authorities. But if the tendency to cut short trials by depriving parties of the right to have controversies settled by jury is not very much restricted it will inevitably result in legislation that will deprive judges of that power, and probably go much further than it should. We have instances before us of such result.

At common law, the judges were not forbidden to express an opinion upon the facts. In fact, this right was very useful in practice as an aid to the jury, and the judges still possess such power in the federal courts and in many of our sister states as well as in England. But by reason of some abuse, as it was thought, in this state the judges were absolutely deprived of that power by the act of 1796, now Revisal, § 535, with the result that the slightest expression of an opinion on the facts by a judge in the course of a trial, however impartial or helpful it might be to the jury, is now ground for a new trial. Again, it was the right of the judges to prescribe the number and length of the speeches of counsel as it still is in the federal courts, and in most of the state courts and in England. But by reason of what was thought to be an abuse of this power by the judges it was absolutely taken away by statute with a great increase of the length of trials and expense to the public. Revisal, § 216, has somewhat restored the

former power of the judges in this respect but not to the full extent.

By reason of the holding of this court in *Owens v. R. R.*, 88 N. C. 502, that the burden was upon the plaintiff to negative contributory negligence, Ruffin, J., dissenting, the General Assembly promptly passed the act of 1887, now Revisal, § 483, which requires that the defense of contributory negligence "shall be set up in the answer and proved on the trial." In *Neal v. R. R.*, 128 N. C. 634, 36 S. E. 117, 49 L. R. A. 684, this court by a bare majority decided that the judge could hold as a matter of law, upon the demurrer to the evidence of the plaintiff, that contributory negligence was proven. Without repeating what was said in the dissenting opinions in that, and subsequent, cases, it is sufficient to say that the doctrine of *Neal v. R. R.*, has been extended until in the opinion of many good lawyers the beneficial intent of the Legislature in enacting Revisal, § 483, has been largely denied to the plaintiff in many cases.

The extent to which the courts are assuming on motions for nonsuit to judge of the "sufficiency of the evidence," and as to the defense of contributory negligence, the tendency to hold as a matter of law that the plaintiff is guilty of contributory negligence notwithstanding the statute put that burden upon the defendant, and clearly meant that whether it was "proven" or not was a fact to be determined by the jury, are to be deplored.

Without questioning in the slightest degree the right of the majority of the court to express their own views, I deem it my duty as well as my right to dissent earnestly against this claim of power on the part of the court. Men conscious of their own rectitude are especially prone to believe their own judgment correct, and judges are no exception. But under our Constitution parties to litigation have a right to have jurors and not judges pass upon the evidence, however slight, when beyond a mere *scintilla*. They can challenge jurors who are to pass upon the facts, but cannot except to a judge who feels competent to pass upon the facts in holding that the evidence is "not sufficient to justify a verdict for the plaintiff."

In the late decision of the United States Supreme Court in the *Standard Oil Case*, that court assumed to write into an act of Congress the word "reasonable" as Mr. Justice Harlan so clearly pointed out in his dissenting opinion. The majority of that court were doubtless sincere, but they attributed to their own intelligence powers which under the Constitution were vested in Congress. They doubtless believed that the court had "the last say." But the Constitution, from which they derive their powers (article 111, § 2, cl. 2), gives that court jurisdiction, "with such exceptions, and under such regulations, as the Congress shall

make." The courts have not even "the last say" in respect to the Executive, for when Chief Justice Marshall rendered a decision which the President deemed unsound he declined to obey it, and the decision has never been executed to this day.

Not concurring in the views of the majority of the court, it is not improper to call attention to some of the instances in which, in this state, the Legislature has dissented from this tendency in the courts to substitute their own judgment as to the extent of their powers by terming it a matter of law. In some instances the Legislature has probably gone too far in the opposite direction as was perhaps a natural consequence.

(155 N. C. 345)

HERRING et al. v. WARWICK et al.
(Supreme Court of North Carolina. May 31, 1911.)

1. MORTGAGES (§ 372*)—SALE BY MORTGAGEE UNDER POWER—REVESTING TITLE—ESSENTIALS.

Title purchased under a registered deed from a mortgagee did not revert in him because he accepted repayment of the price on the mortgagor refusing to give possession, especially since the purchaser afterwards attempted to secure possession.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 372.*]

2. MORTGAGES (§ 372*)—SALE BY MORTGAGEE UNDER POWER—VESTING TITLE—ESSENTIALS.

To vest title in the grantee under a registered deed from a mortgagee it was not essential that the grantee be given possession.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 372.*]

3. APPEAL AND ERROR (§ 169*)—REVIEW—QUESTIONS NOT CONSIDERED BELOW.

The Supreme Court cannot consider a question not considered by the trial court, and not affecting the verdict appealed from.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

Appeal from Superior Court, Sampson County; Whedbee, Judge.

Action by S. A. Herring and others against M. A. Warwick and others. Judgment for plaintiffs, and defendants appeal. Reversed for new trial.

This action was brought originally to recover the possession of land, with rents and profits and damages for waste, with a prayer for the redemption of the land from a mortgage. The case was finally tried only upon the issue as to waste. On December 27, 1894, S. A. Herring and his wife, Nellie A. Herring, executed a mortgage with power of sale upon the lands of the wife to John T. Gregory, to secure the payment of a note for \$125 with interest. The debt was not paid and the mortgagee regularly sold the land under the power, and M. A. Warwick, one of the defendants, became the purchaser, paid the price, and Gregory conveyed the land to him

by deed which was duly registered. Nellie A. Herring having died, M. A. Warwick, the purchaser at the sale, brought an action against S. A. Herring, her husband and tenant by the curtesy, for the possession of the land. S. A. Herring answered the complaint in that action, and averred that Warwick had bought the land at the sale, under the power contained in the mortgage, for John T. Gregory, the mortgagee, and that by reason thereof, the relation of mortgagor and mortgagee between S. A. Herring, the defendant in that suit, and John T. Gregory still subsisted. The heirs of Mrs. Gregory were not parties to the suit. The court submitted issues to the jury, which, with the answers thereto, are as follows: (1) Did the plaintiff bid off the land described in the complaint for J. T. Gregory, the mortgagee? Ans. No. (2) Did the purchase, under which the plaintiff claims, terminate the relation of mortgagor and mortgagee subsisting between the defendant, S. A. Herring, and the mortgagee, J. T. Gregory? Ans. No. (3) What are the plaintiff's damages? (No answer.) The court thereupon adjudged that the land be sold by a commissioner to pay the mortgage debt, which was done, and John T. Gregory became the purchaser, and the commissioner conveyed the land to him, upon payment of the purchase money, under the order of the court. He afterwards conveyed the land to M. A. Warwick, the defendant in the action. The testimony relative to the transaction between John T. Gregory, mortgagee, and M. A. Warwick, with respect to the sale under the mortgage, was that of M. A. Warwick, who testified: "I bought the land at the sale. Nobody bid but me. Auctioneer cried it off. I never agreed to buy the land for Gregory. I paid Gregory for the land and bought it for myself. When I got the deed, I came and had it recorded. I tried to dispossess Herring. After Gregory got possession under the commissioner's deed, I bought it again. I don't know how Gregory got in possession. I have been in possession for 10 or 12 years. First time I took a deed from Gregory, Herring would not give up the possession, and I went to Gregory and told him I would have nothing more to do with the land until he got possession. He paid me back the purchase money; at least, he gave me his note for the amount paid by me, and when I bought the land from him the second time, he gave me credit for the note. I knew the title was in Nellie Herring's name and her bodily heirs. I knew the land had come to her from her father. Nellie Herring was my aunt. She had been dead two years when I first bought the land from Gregory. I brought suit against Herring because he would not give up possession. Mr. Gregory was a witness in the suit. I testified on the trial myself. Mr. Gregory paid me back the money that I paid him for the land. He bought the land himself (under the judgment of the court). I then got a deed from

him and went into possession. It was in the spring of 1899. I don't know when, I took possession some time after Herring moved." The issues submitted in this case, with the answers thereto, are as follows: "(1) Is the defendant Warwick the owner of the land described in the complaint, for and during the life of S. A. Herring? Ans. Yes. (2) Are the plaintiffs, other than Lonnie Herring, the owners in remainder of said lands, subject to the life estate of said S. A. Herring? Ans. Yes. (3) If so, did defendant Warwick commit waste upon said lands? Ans. Yes. (4) If so, what are plaintiffs' (other than Lonnie Herring) damages? Ans. \$300.00. (5) What is the amount now due on original mortgage debt? Ans. \$126.50 with 8 per cent. interest from February 15, 1898."

The court charged the jury as follows: "The act and conduct of the defendant Warwick in accepting a repayment of the money paid by him to Gregory at the first sale, and the surrender of the lands conveyed to him by deed of Gregory and wife back to Gregory, was, in effect, a renunciation on his part of all right to the lands; and therefore the deed from Gregory and wife to Warwick (the second deed) had no more effect than to convey to him, Warwick, the life estate of S. A. Herring; and if you believe the defendant Warwick's own testimony, you will answer the first issue 'Yes.'" To this instruction, the defendant, M. A. Warwick, excepted and appealed from the judgment which was entered upon the verdict.

Faison & Wright and J. D. Kerr, for appellants. H. A. Grady and F. R. Cooper, for appellees.

WALKER, J. (after stating the facts as above). [1] We think there was error in the instruction of the court. In the first place, there was no sufficient evidence for the jury that Warwick surrendered possession of the land to Gregory. On the contrary, he demanded the possession of S. A. Herring, and upon his refusal to give it up, he brought suit against him to recover it, thereby continually asserting his right to the possession acquired by his purchase from J. T. Gregory, the mortgagee, and the deed the latter made to him, which was duly and promptly registered. Even had Warwick torn up or otherwise destroyed his deed, it would not have had the legal effect of revesting the title in Gregory. In *Linker v. Long*, 64 N. C. 296, it appeared that a deed for land had been executed by W. F. Taylor to Isaac Linker November 6, 1852, and on May 11, 1853, it was redelivered by Linker to Taylor, with the following indorsement upon it: "I transfer the within deed to W. F. Taylor again." Taylor kept the possession of the land during his life and his heirs retained possession to the time of bringing the suit. The lower court refused permission to read the deed in evidence. This court held that ruling to be erroneous, and with reference thereto, said: "This ruling is

based upon the idea that, as it appears from the indorsement upon the deed that it had been redelivered by the bargainee to the bargainor, the legal effect of this writing on the back was to nullify the deed, and make it as if it had never been executed. By force of the deed, and the operation of the statute 27 Hen. VIII, an estate of freehold of inheritance was vested in Linker on the 6th day of November, 1852. The question is, Has that estate been divested by any conveyance, or means, known to the law? Suppose that deed, upon the 11th day of May, 1853, had been canceled, torn up, or burnt, by consent of both parties, the estate would not have been thereby revested in Taylor, for, by the common law, a freehold estate in land can only pass by livery of seisin—under the statute of enrollments, by 'deed of bargain and sale indented and enrolled'—and under the act of 1715, by 'deed duly registered'; so, the freehold, having passed to Linker, could only be passed from him, either to a third person or to Taylor, by some kind of conveyance known to the law. A will, being ambulatory, may be revoked by cancellation; a covenant or agreement, being in fieri, a thing to be done—by cancellation or by deed of defeasance, which may be executed after the covenant. But a conveyance of a freehold estate of inheritance, being a *thing done*, cannot be *undone* by cancellation, or in any other mode, and the estate can only be revested by another conveyance; unless a condition or deed of defeasance executed *at the same time* and as a part of the conveyance, be annexed to the estate, giving to it a qualification by which it may be defeated. For illustration, a mortgage is a conveyance on condition. If the money be paid at the time fixed the estate is revested in the mortgagor, but if the condition be not performed by payment at the day, the estate becomes absolute, and although the money be paid and accepted afterwards, the estate can only be revested by another conveyance." The Chief Justice is referring, in the last clause, to a strict foreclosure, and not to the right or equity of redemption. He is illustrating the point by giving an example of a deed upon condition and applying the strict rule of the common law to the relation of the parties without regard to the equitable right of the mortgagor, and the illustration is an apt one. This decision has been approved in several cases, and among others we may cite: *Wharton v. Moore*, 84 N. C. 479, 37 Am. Rep. 627; *Hare v. Jernigan*, 76 N. C. 471; *Browne v. Davis* (opinion by Justice Shepherd) 109 N. C. 23, 13 S. E. 703; *Tunstall v. Cobb* (opinion by present Chief Justice) 109 N. C. 316, 14 S. E. 28; *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545. The law, as declared in *Linker v. Long*, has been recognized and acted upon to the present time. If the facts, as they appeared in that case, did not have the effect of revesting the title in the grantor, who remained in the possession of the

land after the indorsement was made on the deed and the latter was redelivered to him, how can it be said, as a matter of law, that the acts and conduct of Warwick divested the title which he had acquired by his purchase and the deed from the mortgagee, which was registered? J. T. Gregory paid the purchase money back to him for the reason that Herring had possession of the land and refused to surrender it. This was not an abandonment of his title or of the right he had acquired under the sale and deed. On the contrary, he almost immediately asserted his right to the possession and by suit attempted to enforce his claim as against one of the mortgagors.

[2] It was not necessary to the vesting of the title in Warwick that Gregory should have given him the possession of the land. The title vested by the deed and its registration, the latter taking the place of livery of seisin. The verdict upon the first and second issues resulted from an erroneous instruction of the judge to the jury.

[3] The question as to the legal effect of the proceedings and judgment in the case of Warwick v. Herring, upon the rights of the parties to this litigation, was not considered by the court, and therefore did not enter into the verdict or in any way affect it. We cannot, therefore, consider that question. The parties have had no opportunity to be heard in regard to it, and, apart from the fact that it was offered as evidence, it has played no part in the decision of the case. The defendant has had no chance to except to any ruling upon it, and it would not be right or in accordance with correct procedure, to pass upon it at this time. We will do so if it ever comes before us directly for our decision, but it is not now presented in any tangible form. It involves the application of an important principle of law, and is not at all free from difficulty. The plaintiff offered in evidence the proceedings, verdict and judgment in that case, and relied upon them to show that Warwick was seised only of a life estate, and was, therefore, liable to plaintiff, as reverser, for waste committed upon the premises, as it is alleged that his act produced lasting damage to the inheritance. The judgment professes to sell the entire estate in the land and not only the life interest, or to be more accurate, its operation is not, in terms, restricted to the life estate, though there is one expression in the decree of confirmation which indicates that such may have been the intention of the court. Did it operate upon the estate in reversion, and, if so, are plaintiffs bound by it, not having been made parties to the suit? Does it bind them by reason of the fact that they introduced it and rely upon it? Are they still required, notwithstanding the judgment and independently of it, to prove that the sale of the land by

Gregory, under the power contained in the mortgage from the Herrings to him, is not valid as to them, or, in law, does the judgment establish this fact although they were not parties to it? These are questions, and perhaps there are others, which may attract the attention of counsel in the further progress and development of the case, and upon which they will enlighten us if the matter again comes before us. All we can now say is that the verdict, in an essential particular, was rendered under the influence solely of an erroneous instruction, and it should, therefore, be set aside.

New trial.

(39 S. C. 54)

FAIN & STAMPS v. MANOS.

(Supreme Court of South Carolina. May 23, 1911.)

1. GUARANTY (§ 30*)—PARTIES.

Where, as a part of the consideration of a contract of sale of a stock of merchandise, a third person assumed as guarantor the indebtedness of the seller, a creditor of the seller though not a party to the contract of guaranty made for his benefit could sue thereon, the guaranty being supported by a sufficient consideration.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 31; Dec. Dig. § 30.*]

2. GUARANTY (§ 90*)—CONTRACTS—EVIDENCE.

Plaintiff sold a stock of goods which the purchaser sold to a third person. The buyer from the purchaser testified that on his purchase defendant guaranteed that nothing was owing on the stock, and that the creditors of his seller would not come against the stock. Held, that such evidence was relevant on the question of guaranty in an action thereon by the plaintiff, the original owner.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 90.*]

Appeal from Common Pleas Circuit Court of Anderson County; Geo. W. Gage, Judge.

"To be officially reported."

Action by Fain & Stamps against J. K. Manos and another. From a judgment of the circuit court dismissing the appeal of defendant named from a judgment for plaintiff, defendant named appeals. Affirmed.

Geiger & Wolfe, for appellant. Bonham, Watkins & Allen, for respondent.

GARY, A. J. This action was commenced in a magistrate's court, on an open account, against G. A. Manos as principal and J. K. Manos as guarantor, running from the 26th of June to the 17th of August, 1909. The magistrate rendered judgment against G. A. Manos by default, and against J. K. Manos after a trial. J. K. Manos appealed to the circuit court, but his appeal was dismissed, whereupon he appealed to this court. The first question that will be considered is whether there was any testimony tending to show that the alleged guaranty on the part of J. K. Manos was based upon a valuable consideration.

W. O. Stamps, one of the plaintiffs, testi-

fed as follows: "During the latter part of August, 1900, W. A. Holder, formerly of Toccoa, Georgia, exhibited to me a bill of sale, signed by G. A. and J. K. Manos, which bill of sale is not now in our possession; we do not know where it is. Along about the 1st of September, 1900, or a little later, we received a letter from J. K. Manos, offering to pay the bill, if we would send the statement to him. The letter attached and marked 'Exhibit A,' is the original letter. That relying upon the statements contained in this letter, Exhibit A, the said partnership and neither of the partners made any efforts to hold the stock of goods, liable for the debt of G. A. Manos, nor did said firm avail itself of all legal remedies against said G. A. Manos on account thereof."

Exhibit A is as follows: "Anderson, S. C. Aug. 31, 1900. Fain and Stamps, Atlanta, Ga., Gentlemen: Please send statement what G. A. Manos, Toccoa, Ga., owe you and will pay you myself when bills come due. Yours very truly, J. K. Manos."

W. A. Holder, a witness for the plaintiffs, said: "I was in business in Toccoa, Ga., latter part of August, 1900. I succeeded G. A. Manos. I bought out G. A. Manos. (Objected to on ground of irrelevancy. Objection overruled.) I asked J. K. Manos, where I could buy a fruit stand. He referred me to Mr. Sullivan at Seneca and G. A. Manos at Toccoa. I negotiated the sale with G. A. Manos. At the time I took charge G. A. and J. K. Manos executed something in the nature of a bill of sale, or a guaranty, that G. A. Manos owed nothing on the stock which I was taking, although I have made diligent search for the bill of sale, and have not been able to find it. Among other things that the guaranty contained was that both would stand between me and the creditors of G. A. Manos, and should see to it that I was not sued for any of the obligations of G. A. Manos. And that the creditors of G. A. Manos, if any, should not come against the stock of goods. I exhibited the guaranty to Fain & Stamps' representative, a week or ten days after I took possession of the stock of goods, about the 21st or 22d of August, 1900. (The above testimony objected to on the ground of irrelevancy. Objection overruled.) * * * Recross: This was a week or ten days after the transaction. [Signed] W. A. Holder."

Thomas Allen, another witness, thus testified in behalf of the plaintiffs: Thomas Allen, sworn, said: "On October 17th, 1910, I had a telephone conversation with J. K. Manos, relative to the payment of this account, in the course of which I said something to him about the instrument which was executed, at the time that W. A. Holder took charge, and he made this statement to me: 'We just sold the place to Holder and signed the thing to him, so that he would not

be bothered.' (Objected to on the ground of irrelevancy. Objection overruled.)"

[1] The foregoing testimony tends to show that, as a part of the consideration of the agreement, when the goods were sold to W. A. Holder, J. K. Manos assumed the indebtedness of G. A. Manos then existing, as a guarantor. Exhibit A tends to show that J. K. Manos so construed the agreement. It is true the plaintiffs were not parties to said agreement, but, if it was made for the benefit of G. A. Manos' creditors, and constituted a part of the consideration of the sale, to W. A. Holder, the plaintiffs have the right to recover against the appellant the amount then due them by G. A. Manos.

[2] The next question raised by the exceptions is whether there was error on the part of his honor the circuit judge, in overruling the appellant's objection to the testimony of W. A. Holder and Thomas Allen, on the ground that it was irrelevant. The said testimony tended to show that J. K. Manos was a party to the agreement when the goods were sold to W. A. Holder, and that he assumed the debts of G. A. Manos as a guarantor. The objection to said testimony was therefore properly overruled.

Affirmed.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(89 S. C. 106)

Ex parte MURRAY.

STATE v. MURRAY.

(Supreme Court of South Carolina. June 6, 1911.)

INTOXICATING LIQUORS (§ 128*)—DISPENSARY COMMISSION—ORDERS—CONTEMPT.

Under Act Feb. 24, 1908, § 8 (25 St. at Large, p. 1292), empowering the State Dispensary Commission to investigate the past conduct of the officers of the dispensary, and conferring on the commission the authority of the committee appointed to investigate the affairs of the dispensary, as prescribed by Act Jan. 24, 1906, § 3 (25 St. at Large, p. 335), empowering the committee to require the production of papers relevant to any investigation, and providing that any person refusing to act on notice of the committee to produce the books shall be guilty of contempt, the commission may compel the production of papers relevant to any investigation, and punish for contempt in case of disobedience; but the order to produce must be by subpoena duces tecum, without depriving the custodian of the papers of his possession and control, except for examination in the particular investigation, and an order directing the chairman of the former State Dispensary Commission to turn over to the commission vouchers for disbursement of money taken by the former State Dispensary Commission is unauthorized, and an order adjudging the chairman in contempt for disobeying the order is void, as in excess of jurisdiction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 128.*]

Application for writ of habeas corpus by W. J. Murray for his discharge from imprisonment under a judgment of the State Dis-

dispensary Commission adjudging him guilty of contempt. Petitioner discharged.

W. G. Belser and W. F. Stevenson, for applicant. Attorney General Lyon, for the State. Holman & Holman, amici curiæ.

PER CURIAM. The State Dispensary Commission adjudged W. J. Murray guilty of contempt in refusing to deliver to it certain vouchers for disbursement of money taken by the former State Dispensary Commission, of which he was chairman, and in default of purging himself of such contempt he was committed to jail. He now brings this proceeding in habeas corpus, claiming that his imprisonment is illegal and that the judgment of the commission is in excess of its powers and void.

Section 8 of the act of February 24, 1906 (25 St. at Large, p. 1292), provides that "the commission shall have full power and authority to investigate the past conduct of the officers of the dispensary and all the power and authority conferred upon the committee appointed to investigate the affairs as prescribed by the act to provide for the investigation of the dispensary, approved January 24, 1906, be and hereby is conferred upon the commission provided for under this act," etc. Section 3 of the act of January 24, 1906 (25 St. at Large, p. 335), provides: "The said committee be and the same is hereby authorized to send for and to require the production of any and all books, papers, or other documents or writings which may be deemed relevant to any investigation and to require said person or persons in custody or possession of such papers to produce the same before the said committee. Any person or persons who shall refuse to act on the order or notice of said committee to produce said books, papers, or other documents or writings, shall be deemed guilty of contempt of said committee, and be punished as provided in section 2." Under this statute it is clear that the commission has power to compel the production before it of papers relevant to any investigation it is authorized to make, and to punish for contempt in case of disobedience of the order to produce. The commission's order to produce must be in the nature of a subpoena duces tecum, and cannot operate so as to deprive the owner or custodian of his possession and control, except for the temporary examination and use in a particular investigation by the commission, wherein the owner's or custodian's possession and control are properly guarded.

The order of the commission in this case was not to produce for examination and use in a particular investigation, but to deliver and turn over to the commission the vouchers in question, thereby permanently depriving the petitioner of his custody and control. This was in excess of the power of the commission. If the commission was seeking

possession of the vouchers, claiming the right to them as the successors in office of the former commission, the remedy was not a proceeding in contempt. The vouchers in question relate to the disbursement of dispensary funds by the old Dispensary Commission, the members of which are under bond and claim the right to control these vouchers for the protection of themselves and their bondsmen until their accounts are settled after investigation by proper authority. In the opinion of the court these vouchers are so far private property that the members of the old commission cannot be deprived of their possession and control in the manner attempted.

The judgment in contempt, being in excess of jurisdiction, is void, and the petitioner is entitled to be discharged from custody; and it is so ordered.

(89 S. C. 100)

STATE v. SUBER.

(Supreme Court of South Carolina. May 30, 1911.)

1. CRIMINAL LAW (§ 918*)—NEW TRIAL—OBJECTION WAIVED.

Any right of objection, because of the judge not accompanying the jury when it viewed the place of the crime, was waived, if defendant's counsel, being aware thereof before rendition of the verdict, did not complain to the court till he moved for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2163-2196; Dec. Dig. § 918.*]

2. CRIMINAL LAW (§ 651*)—TRIAL—VIEW BY JURY—DISCRETION.

Under Civ. Code 1902, § 2950, providing that the jury in any case may, at the request of either party, be taken to view the place in question or pertaining to the controversy, when it appears to the court that such view is necessary to a just decision, the presiding judge has discretionary power to order the jury to view the place of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1516-1519; Dec. Dig. § 651.*]

3. CRIMINAL LAW (§ 651*)—TRIAL—VIEW BY JURY—"TAKING OF TESTIMONY."

In a constitutional sense, the viewing by the jury of the place of the crime is not the "taking of testimony."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1516-1519; Dec. Dig. § 651.*]

4. CRIMINAL LAW (§ 662*)—TRIAL—VIEW BY JURY—RIGHT TO BE CONFRONTED WITH AND TO CROSS-EXAMINE WITNESSES.

Defendant is not, by the viewing by the jury of the place of the crime, deprived of the right to be confronted with or to cross-examine any witness in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1538-1548; Dec. Dig. § 662.*]

5. CRIMINAL LAW (§ 634*)—TRIAL—VIEW BY JURY—ABSENCE OF JUDGE.

It cannot reasonably be supposed that defendant's rights would in any respect be prejudiced by the absence of the judge when the jury merely viewed the place of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1461-1464; Dec. Dig. § 634.*]

Appeal from General Sessions Circuit Court of Richland County; W. T. Aycock, Special Judge.

"To be officially reported."

Nannie Lee Suber was convicted of murder, and she appeals. Dismissed.

Frank G. Tompkins, for appellant. W. Hampton Cobb, Sol., for the State.

GARY, A. J. The defendant was indicted for murder, and found guilty, with a recommendation to mercy. From the sentence imposed upon her, she appealed to this court.

[1] The exceptions raise the question, whether there was error, on the part of his honor the presiding judge, in refusing the motion for a new trial, made on the ground that the presiding judge did not accompany the jury when it was sent by him to view the place where the homicide was committed. There is, however, a preliminary question, to wit, whether the appellant waived the right to raise this question by failing to interpose such objection before the verdict was rendered. It is true the record states that the defendant's counsel was not notified that the presiding judge would not accompany the jury when the premises were viewed, but it does not appear that the appellant's attorney was not aware of such fact until the rendition of the verdict. If the appellant's attorney had knowledge of this fact before the verdict was rendered, then the case comes within the principle announced in *State v. Ballew*, 83 S. C. 82, 63 S. E. 688, 64 S. E. 1019. In that case the jury, while inspecting the locality, made certain experiments in the presence of the defendant's attorney, who failed to inform the court of such fact, until he made a motion for a new trial. In refusing the motion for a new trial the court said: "The defendants, with full knowledge of the misconduct of the jury, having chosen not to complain to the court, but rather to take the risk of a verdict in their favor, could not afterwards, because the verdict was against them, have a new trial on this ground. The general principle that a party cannot take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just."

[2] But waiving this objection, the exceptions cannot be sustained. Section 2950 of the Code of Laws of 1902, provides that "the jury in any case may, at the request of either party, be taken to view the place or premises in question, or any property, matter, or thing pertaining to the controversy between the parties, when it appears to the court, that such view is necessary to a just decision," etc. Section 18, art. 1, of the Constitution, is as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, and to be fully informed, of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to be fully heard in his defense, by himself or by his counsel or by both." The presiding judge had the discretionary power, not only under the statute, but at common law, to order the jury to view the premises. "The court in its discretion may authorize the jury, properly attended, to go and examine—that is, view—the place of the offense, as a help to understanding the evidence. It was formerly supposed that, in a criminal case, this could be only by mutual consent. But the modern practice leaves it wholly within the discretion of the court. It may be at any appropriate stage of the trial; in one case, the jury asked it after the judge had summed up the evidence, and it was granted. It is the defendant's right to be present if evidence is given, perhaps at all events; but he may waive this right, either expressly or by the implication of declining, or even not asking to go. The court, in granting or refusing the view, will be governed mainly by the special circumstances; and, in granting it, will take the proper steps for the care of the jury." 1 *Bishop's New Criminal Procedure*, 965. *State v. Ballew*, 83 S. C. 82, 63 S. E. 688, 64 S. E. 1019 (reported in 18 Am. & Eng. Ann. Cas. 569); *Rodgers v. Hodge*, 83 S. C. 569, 65 S. E. 819 (reported in 18 Am. & Eng. Ann. Cas. 729). "The cases are divided upon the question, whether the purpose of the view is to furnish new evidence, or to enable the jurors to comprehend more clearly, by the aid of visible objects, the evidence already received. The latter proposition is well sustained, and seems more consistent with the conservative theories, on which the rules of procedure and jury trials are based; but the contrary theory, holding that the purpose of a view is to supply evidence, is supported by good authorities." 12 *Cyc.* 537; 11 *Enc. of Law*, 540. "Concerning a view of the premises made by the jury, in the absence of the judge and the defendant, there is great diversity of opinion found in the decided cases, based upon different grounds. It is held by high authority that the judge and officers of the court, as well as the defendant, must be present; that a view is taking testimony in the case, and, when made in the absence of the defendant, is in violation of his constitutional right of being confronted by the witnesses against him; and that such right cannot be waived. Other authorities, of equal high standing, and with greater force of reasoning, hold that the right of the defendant to be present, with or without the presence of the judge and court officers, if such right exists, is statutory, and not constitutional, and may be waived; that the defendant in a criminal case, who asks the benefit of the provisions of a statute, must take the benefit, just as the statute gives it; that the view is not taking evidence in the case, and is not intended to be so, but simply to enable the jury the better to

understand the testimony given in court; that whatever the nature of the rights of the defendant may be, in such case, and from whatever source such rights may be derived, he may and does waive the same, when the action of the court is taken, and the view made on his request, and without suggestion that he desires to be present at the view; and that in such case, it is too late to complain after verdict." *State v. Hartley*, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33. This language is quoted with approval in *Ellas v. Territory*, 9 Ariz. 1, 76 Pac. 605, 11 Am. & Eng. Ann. Cas. 1153. The principle is thus stated by Mr. Justice Brewer, in construing a similar statutory provision, in the case of *State v. Adams*, 20 Kan. 311: "This means that the place of trial is unchanged, and that the jury, and the jury only, are temporarily removed therefrom. Just as when the case is finally submitted to the jury, and they 'retire for deliberation,' there is simply a temporary removal of the jury. The place of trial is unchanged. And whether the jury retire to the next room, or are taken to a building many blocks away, the effect is the same. In contemplation of law, the place of trial is not changed. The judge, the clerk, the officers, the records, the parties, and all that go to make up the organization of the court, remain in the courtroom. The jury retire to discharge one duty, connected with the trial, and yet, though absent while discharging that duty, inasmuch as it is done under the direction of the court, and while in charge of an officer appointed by the court, they are in legal contemplation in the presence of the court. Though the defendant may not go with them into their place of retirement, he is nevertheless personally present during that portion as well as the rest of the trial."

In construing a statute of Utah, providing that the presiding judge should have the power to order the jury to view locality, the court used this language, in the case of *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562: "Nor does this provision of the statute conflict with section 4811, Rev. St., which provides that the accused must be personally present at the trial. This does not mean that the defendant must all the time be in the actual presence of the jury but rather that he must be at the trial in court and in its presence. The court is the real thing fixed and permanent. The jury is but a temporary adjunct for a partial purpose of the trial. For the defendant, then, to be personally present at the trial, he must be in the presence of the court, and thus the two sections are not repugnant to each other. Nor is such a view as is authorized by the statute, and, as the one had in this case, where the prisoner had an opportunity to be present, inhibited by the Constitution. The provisions in that in-

strument, which guarantee the accused, in a criminal action, the right to 'appear and defend in person and by counsel,' and 'to be confronted by the witnesses against him,' were designed to protect every person accused of crime, against judgment of condemnation without a hearing in open court, or by secret trial. The latter provision has reference to the persons or individuals, who may testify against the accused, and not to inanimate objects, although they be objects, which, when viewed in the light of the testimony of living witnesses, may give rise to inferences, and make human understanding more clear and perfect. The statute which authorizes the view was doubtless designed to aid such understanding through the power of perception and of comparison—that is, by giving the jury an opportunity to compare the objects, which the testimony had pictured in their minds, with the real things, as they might perceive them upon the premises—and thus to enable the jurors to draw just and proper inferences from the testimony of the witnesses."

Mr Greenleaf in his admirable work on the Law of Evidence in volume 1, p. 1620, subd. 4, observed: "Does the hearsay rule—i. e., as involving the right of cross-examination, and incidentally of confrontation, of witnesses—require that in criminal cases (where the Constitution secures the right, and therefore overrides any statutes regulating views), the defendant should be present at a view? The requirement of confrontation implies merely, that the party shall have the opportunity of cross-examining witnesses, and a view by the jury is not the consultation of witnesses, but merely the inspection of the thing itself, which is the subject of the controversy; so that the constitutional principle cannot properly apply to render improper a view at which the accused is not present. This is the result reached by the better judicial opinion; but there are courts which take the contrary view."

[3-5] The principles we deduce from the authorities are (1) that in a constitutional sense, the viewing of the premises by the jury is not the taking of testimony; (2) that the prisoner is not thereby deprived of the right to confront or cross-examine any witness in the case; and (3) that it cannot reasonably be supposed that the prisoner's rights would in any respect be prejudiced by the absence of the judge, if the jury merely inspected the locality. Of course, if the orders of the presiding judge are disobeyed to the prejudice of the defendant, the court would take such steps as would be deemed necessary to protect his rights.

Appeal dismissed.

JONES, C. J., and WOODS and HY-DRICK, JJ., concur.

(30 S. C. 111)

B. S. JOSEY & CO. v. BURRIS.

(Supreme Court of South Carolina. June 6, 1911.)

COURTS (§ 37*)—JURISDICTION—PERSONAL JURISDICTION.

The provision in Act Feb. 25, 1902 (23 St. at Large, p. 1194), carving Lee county out of Darlington county, that actions pending in Darlington county, where the defendant resides in that portion which had become Lee county, should be transferred to Lee county, relates to the jurisdiction of the person of the defendant, and may be waived, and, where waived by agreement of counsel, the courts of Darlington county have jurisdiction to proceed with such actions.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 37.*]

Appeal from Common Pleas Circuit Court of Darlington County; R. W. Memminger, Judge.

"To be officially reported."

Action by B. S. Josey & Co. against Davis Burris. From a judgment for plaintiffs, defendant appeals. Appeal dismissed.

Spears & Dennis, for appellant. W. F. Dargan, for respondents.

GARY, A. J. This is an action in claim and delivery of certain personal property. The plaintiffs, upon compliance with the requirements of the Code, required the sheriff to deliver the property to them. Thereafter, under proper proceedings, the property was returned to the defendant. On the trial of the case, the jury rendered a verdict in favor of the plaintiffs for the possession of the property, or \$300, the value thereof. The defendant appealed.

The only question which the defendant argued is whether the court had jurisdiction to try the case in Darlington county. The action was commenced in 1901, and at that time all the above-named parties resided in Darlington county, and the property in dispute was situated in that county. In February, 1902, the Legislature created Lee county. Act Feb. 25, 1902 (23 St. at Large, p. 1194). On the 20th of March, 1902, the attorneys representing the respective parties entered into an agreement that they would not have the case transferred to Lee county and that it should be tried in Darlington county. On the 4th of September, 1908, they also made an agreement to redocket the case in Darlington county and that it should be tried in that county. The provisions of the act creating the county of Lee are similar to those which were construed in the case of *State v. Bethea*, 70 S. E. 11, and the principles therein stated show that the jurisdiction related to the person and was waived.

The other questions presented by the exceptions were not argued by the appellant's attorneys; but, waiving this objection, they are without merit. It may be well at this time to state that the verdict rendered in favor of the plaintiffs, for the possession of the

property, does not determine their absolute right thereto, as they hold its possession merely as mortgagees, subject to the right of the defendant to invoke the provisions of section 3006 of the Code of Laws, which is as follows: "The mortgagor of any chattel, shall have the right to redeem the property mortgaged by him, at any time before sale by the mortgagee, by paying the mortgage debt and any costs incurred in attempting to enforce its payment, and a tender made by the mortgagor of an amount, sufficient to pay said debt and costs, if not accepted, shall render the mortgage null and void."

Appeal dismissed.

JONES, C. J., and WOODS, J., concur.
HYDRICK, J., did not sit in this case.

(136 Ga. 344)

LYNAH v. CITIZENS' & SOUTHERN BANK et al.

(Supreme Court of Georgia. May 12, 1911.)

(Syllabus by the Court.)

1. ASSIGNMENTS (§ 23*)—PROPERTY ASSIGNABLE—CAUSES OF ACTION.

An unpaid subscription to the capital stock of a corporation, after a call has been made, being a chose in action, is assignable in writing. Civ. Code 1910, § 3652; *Chattanooga R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988; 1 Cook on Corporations, § 111.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 40, 41; Dec. Dig. § 23.*]

2. PLEADING (§§ 32, 307*)—SUFFICIENCY OF PETITION.

Where writings relied on as the basis of a cause of action are set forth in substance, it is not a good ground of a special demurrer to the petition that copies of the writings are not set forth in it, nor attached thereto as an exhibit. *Social Benevolent Society No. 1 v. Holmes*, 127 Ga. 586, 56 S. E. 775 (3), and cases cited.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 58-57; Dec. Dig. §§ 32, 307.*]

3. PLEADING (§ 246*)—AMENDMENT—ATTACHMENT OF EXHIBIT.

There was no error in allowing the petition amended, by attaching a copy of the transfer of the stock subscription, upon which the suit was founded.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 246.*]

4. SUFFICIENCY OF PETITION.

The petition set forth a cause of action, and was not subject to general demurrer.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between S. H. Lynah and the Citizens' & Southern Bank and others. From the judgment, Lynah brings error. Affirmed.

Geo. C. Heyward, Jr., and Sheppard & Hewlett, for plaintiff in error. Adams & Adams and Cann, Barrow & McIntire, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(136 Ga. 344)

ESTES v. WINN.

(Supreme Court of Georgia. May 12, 1911.)

*(Syllabus by the Court.)***1. SPECIFIC PERFORMANCE (§ 29*)—SALE OF LAND—SUFFICIENCY OF CONTRACT.**

Specific performance of a contract for the sale of land will not be decreed, unless the land which is the subject-matter of the alleged sale is clearly identified in the contract. *Higginbotham v. Cooper*, 118 Ga. 741, 42 S. E. 1000; *Tippins v. Phillips*, 123 Ga. 415, 51 S. E. 410.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69-82; Dec. Dig. § 29.*]

2. SPECIFIC PERFORMANCE (§ 29*)—CERTAINTY OF CONTRACT—DESCRIPTION OF LAND.

Where the land is described in the contract as being "in De Kalb county, being part of land lot No. 150 and lot 159, containing 160 acres, more or less," such description is too vague and indefinite to locate the land. *Luttrell v. Whitehead*, 121 Ga. 699, 49 S. E. 691; *McSwain v. Ricketson*, 129 Ga. 176, 58 S. E. 655; *Tippins v. Phillips*, 123 Ga. 415, 51 S. E. 410.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69-82; Dec. Dig. § 29.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. C. Estes against S. C. Winn. Judgment for defendant, and plaintiff brings error. Affirmed.

Thomas L. Bishop, for plaintiff in error.
Joseph W. & John D. Humphries, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(136 Ga. 351)

DOUGHITT v. LOUISVILLE & N. R. CO.

(Supreme Court of Georgia. May 12, 1911.)

*(Syllabus by the Court.)***1. CARRIERS (§§ 280, 316*)—PRESUMPTIONS—NEGLIGENCE—INJURY TO PASSENGER.**

Upon proof of injury to a passenger of a railroad company by the running of its locomotives, cars, or other machinery, or by any person in its employment and service, the law raises a presumption that the injury was caused by the negligence of the company.

(a) Where an injury to a passenger is proved to have been thus caused, this presumption will not be rebutted by the company showing that it exercised only ordinary care and diligence, as railroad companies are bound to use extraordinary care and diligence for the safety of passengers. *East Tennessee, Va. & Ga. Ry. Co. v. Miller*, 95 Ga. 738, 22 S. E. 660.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1283-1294; Dec. Dig. §§ 280, 316.*]

2. CARRIERS (§§ 280, 316*)—PRESUMPTIONS—NEGLIGENCE OF RAILROAD COMPANY—INJURY TO PASSENGER—"REASONABLE CARE AND DILIGENCE."

This was an action for damages against a railroad company for injuries sustained by the plaintiff, while a passenger of the company, because of negligence of the company in the running of its train, and there was evidence suffi-

cient to authorize the jury to find that the plaintiff was thus injured. *Held:*

(a) It was not error to charge Civil Code 1910, § 2780, providing: "A railroad company shall be liable for any damage done to persons, stock or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

(b) After giving in charge this section, the court in immediate connection therewith charged as follows: "The definition of ordinary care is just that care which every prudent man would have exercised under the same or similar circumstances, and the use of it as to whether the defendant was negligent or not will be whether, in so far as the particulars specified in the plaintiff's petition are concerned, the agents and servants of the defendant company exercised that degree of care; that is, the care which every prudent man would have exercised under the same or similar circumstances. If they did, there would be no negligence. A failure to do so would be negligence, and negligence is a question of fact for your determination." This charge was error, and requires a new trial. *East Tennessee, Va. & Ga. Ry. Co. v. Miller*, 95 Ga. 738, 22 S. E. 660; *Sanders v. Southern Ry. Co.*, 107 Ga. 132, 32 S. E. 840; *Ga. Ry. & Electric Co. v. Gilleland*, 133 Ga. 628, 66 S. E. 944.

(c) Civil Code 1910, § 2780, above quoted, must be construed in connection with Civil Code 1910, § 2714, which provides that "a carrier of passengers is bound also to extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers. But he is not liable for injuries to the person after having used such diligence." And the words "reasonable care and diligence," used in the former section with reference to injuries, mean "extraordinary care and diligence."

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §§ 280, 316.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5954-5958; vol. 8, p. 7779.]

3. REVIEW ON APPEAL.

Except as pointed out in the preceding note, there was no error requiring a new trial.

Error from Superior Court, Fannin County; N. A. Morris, Judge.

Action by Thomas Doughitt against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

O. R. Dupree and Gober & Griffin, for plaintiff in error. D. W. Blair and Wm. Butt, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

(136 Ga. 351)

SOUTHERN RY. CO. v. GRIFFIN.

(Supreme Court of Georgia. May 12, 1911.)

*(Syllabus by the Court.)***1. PLEADING (§ 246*)—AMENDMENT—CROSSING ACCIDENTS.**

A petition against a railway company to recover damages for personal injuries alleged to have been sustained because of a failure of a defendant to observe the blow-post law (Civil

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s indexes

Code 1910, § 2675) is amendable by alleging that the defendant was also negligent, in that its servants in charge of the train, well knowing that the crossing on which the plaintiff was injured was a public crossing and that there was frequent traveling thereon, failed to keep a lookout, and also that the defendant's servants, with a knowledge of the plaintiff's perilous situation, failed to apply the brakes or check the speed of the train.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 676-683; Dec. Dig. § 246.*]

2. VERDICT SUPPORTED BY EVIDENCE.

The evidence supports the verdict.

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action by Amelia Griffin against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. R. Faulkner, Ed Quillian, and J. J. Strickland, for plaintiff in error. H. H. Perry, W. B. Sloan, and Johnson & Johnson, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(136 Ga. 345)

DARLEY et al. v. MALLARY BROS. MACHINERY CO.

(Supreme Court of Georgia. May 12, 1911.)

(Syllabus by the Court.)

COVENANTS (§ 114*)—BREACH OF WARRANTY—PETITION.

This case is controlled by the ruling in *White & Corbitt v. Stewart & Co.*, 131 Ga. 460, 62 S. E. 590, and *Joyner v. Smith*, 132 Ga. 779, 65 S. E. 68. The petition in a suit for a breach of general warranty of title to land having failed to allege any eviction or equivalent disturbance by an outstanding paramount title, it was properly dismissed on demurrer.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 189-202; Dec. Dig. § 114.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action between G. S. Darley and others and the Mallary Bros. Machinery Company. From the judgment, Darley and others bring error. Affirmed.

S. C. Townsend, for plaintiffs in error. R. P. Mallary, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 287)

NORT et al. v. HEALY REAL ESTATE & IMPROVEMENT CO.

(Supreme Court of Georgia. May 11, 1911.)

(Syllabus by the Court.)

1. DEEDS (§ 129*)—ESTATES CREATED—LIFE ESTATES.

Margaret Nort by a deed of gift conveyed to her sons, Peter Nort and John Nort, and to Charles Beerman, as trustee, their heirs and assigns, certain described realty, "together with

the understanding herein expressed that the interest hereby granted, bargained, given, and conveyed, as aforesaid, shall be one-third of said bargained premises as the interest of said Peter Nort, and one-third to John Nort, and the remaining one-third interest to Charles Beerman, to be held by him in trust for said minor children, Margaret, Henry, and Mary Beerman. The aforesaid one-third interest of said lot conveyed to John Nort shall be during his natural life, and after his death to his children; and, if he should die without children, one-half of his one-third interest shall go to his brother, Peter Nort, and the remaining one-half of his interest to Margaret, Henry, and Mary Beerman. This shall not prevent the said John Nort from selling his portion of said city lot, and using the interest of the proceeds thereof; but the corpus shall descend as heretofore stated." Charles Beerman, as trustee, was authorized by the deed "to sell the above-described portion of his three children," and pay over the proceeds to them as they respectively arrive at the age of 21 years. The said deed contained the usual warranty clause. *Held*, that under said deed John Nort took a life estate in the property conveyed, with power to sell and convey in fee simple the entire estate in the one-third interest of which he was life tenant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 360-365, 416-435; Dec. Dig. § 129.*]

2. DEEDS (§ 124*)—CONSTRUCTION.

In a deed executed subsequently John Nort sold and conveyed to Charles Nort, his heirs and assigns, "all and entire my one-third undivided interest in and to the land deeded to me on the 15th day of September, 1874, by Margaret Nort [this being the deed referred to in the preceding headnote], and described as follows: [Here follows the description set forth in the foregoing deed.] To have and to hold the said bargained premises, with all and singular rights, members, and appurtenances thereto, the same being, belonging, or in any wise appertaining, to the only proper use, benefit, and behoof of him, the said Charles Nort, his heirs, executors, administrators, and assigns, in fee simple. And the said John Nort, his heirs, executors, and administrators, the said bargained premises unto the said Charles Nort, his heirs, executors, administrators, and assigns, against the said John Nort, his heirs, executors, and administrators, and all and every other person or persons, shall and will warrant and forever defend by virtue of these presents." *Held*, that this deed was an exercise of the power of sale contained in the deed of Margaret Nort, conveying a one-third interest in the land to John Nort, and conveyed a fee-simple interest to the grantee named in his last deed, thereby divesting the children of John Nort of their remainder interest in the property.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 344-355, 416-435; Dec. Dig. § 124.*]

3. FORMER DECISION SUSTAINED.

The court, upon review of the case of *Ma-honey v. Manning*, 133 Ga. 784, 66 S. E. 1082, declines to overrule the decision in that case.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Charles Nort and others against the Healy Real Estate & Improvement Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

The surviving children of John Nort, deceased, and his grandson, who is the only child of his daughter, Margaret, deceased, brought their petition against the Healy Real Estate & Improvement Company, alleging

that the defendant is in possession and control of certain described real estate in the city of Atlanta in which petitioners claim an undivided one-third interest, and praying for an accounting between petitioners and the defendant, for a judgment in favor of petitioners for such sums as may be due them as tenants in common with defendant, and that petitioners be decreed to be the owners of an undivided one-third interest in the property referred to. Attached to the petition is a copy of the deed of gift from Margaret Nort, the mother of John Nort, deceased, dated September 15, 1874, covering the property in controversy, and which contains the following language:

"That the aforesaid Margaret Nort, for and in consideration of the love and affection which she bears to her sons, Peter and John Nort, and to Margaret Beerman, Henry Beerman, and Mary Beerman, the children of her deceased daughter, Julia Beerman, has granted, given, and conveyed, and by these presents doth grant, give, and convey, to the said Peter Nort, John Nort, and Charles Beerman, as trustee for his children, the said Margaret, Henry, and Mary Beerman, their heirs and assigns, all that tract or parcel of land lying and being in the city of Atlanta, county and state aforesaid, and known and distinguished in the plan of said city as part of city lot No. 42, containing 75 feet front and running back to the right of way of the Western & Atlantic Railroad 200 feet, being the house and lot whereon said Margaret Nort and Charles Nort now reside, together with the understanding herein expressed that the interest hereby granted, bargained, given, and conveyed, as aforesaid, shall be one-third of said bargained premises as the interest of said Peter Nort, and one-third to John Nort, and the remaining one-third interest to Charles Beerman, to be held by him in trust for said minor children, Margaret, Henry, and Mary Beerman. The aforesaid one-third interest of said lot conveyed to John Nort shall be during his natural life, and after his death to his children; and, if he should die without children, one-half of his one-third interest shall go to his brother, Peter Nort, and the remaining one-half of his interest to Margaret, Henry, and Mary Beerman. This shall not prevent the said John Nort from selling his portion of said city lot, and using the interest of the proceeds thereof; but the corpus shall descend as heretofore stated. Charles Beerman, as trustee, is also authorized to sell the above-described portion of his three children, Margaret, Henry, and Mary, and pay over the proceeds thereof to them when they respectively arrive at the age of 21 years. If not sold before the children arrive at the age of 21, said trustee shall control their interest for them; but when they arrive of full age each, they can control it themselves—that is to say, that each child can control his own part when it arrives at age. To have and to

hold said tract or parcel of land unto them, the said Peter Nort, John Nort, and Charles Beerman, as such trustee, under the conditions aforesaid, together with all of the rights and appurtenances thereof to the same in any manner belonging, to them and their own proper use, benefit, and behoof, under the conditions aforesaid. And the said Margaret Nort, for herself, heirs, executors, and administrators, the said bargained premises unto the said Peter Nort, John Nort, and Charles Beerman as trustee as aforesaid, their heirs and successors, will warrant and forever defend the right and title thereof against herself and all other persons whatever."

It is alleged in the petition that John Nort, one of the grantees named in the foregoing conveyance, executed a deed of conveyance to Charles Nort, a copy of which is attached to the petition, and which contains the following language:

"That the said John Nort, for and in consideration of the sum of six hundred (\$600) dollars in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents doth grant, sell, bargain, and convey unto the said Charles Nort, his heirs and assigns, all and entire my one-third undivided interest in and to the land deeded to me on the 15th day of September, 1874, by Margaret Nort, and described as follows: [Here follows the description set forth in the foregoing deed.] To have and to hold the said bargained premises, with all and singular rights, members, and appurtenances thereto, the same being, belonging, or in any wise appertaining, to the only proper use, benefit, and behoof of him, the said Charles Nort, his heirs, executors, administrators, and assigns in fee simple. And the said John Nort, his heirs, executors, and administrators, the said bargained premises unto the said Charles Nort, his heirs, executors, administrators, and assigns, against the said John Nort, his heirs, executors, and administrators, and all and every other person or persons, shall and will warrant and forever defend by virtue of these presents."

It is shown in the petition that Charles Nort conveyed the one-third interest last described, and that by successive transfers this and the other two-thirds interest were conveyed finally to the Healy Real Estate & Improvement Company. In an amendment to the petition it is alleged that the consideration flowing from Charles Nort to John Nort, to wit, \$600, was totally inadequate to represent the then value of an undivided one-third interest in and to the title in fee of said property, which was well worth \$1,800, and that the life estate alone in a one-third undivided interest in the property was, at the time of the conveyance by John Nort to Charles Nort, worth \$600.

The defendant filed a general demurrer to

the petition, which was sustained, and the plaintiffs excepted.

F. M. Hughes and R. B. Blackburn, for plaintiffs in error. Jno. L. Hopkins & Sons, for defendant in error.

BEOK, J. (after stating the facts as above). [1] 1. Giving effect to the plain import of the language used by the grantor, Margaret Nort, in her deed of gift to Peter Nort, John Nort, and Charles Beerman, trustee for his minor children, so far as relates to the portion of the property conveyed to the grantor's son, John, the latter was given a one-third interest or portion, with remainder over, with a power to sell the fee. In the first part of the granting clause, after the use of apt words of gift and conveyance of the entire property embraced in the deed, and in the same sentence, the grantor employs language defining and limiting the interest of the grantees, as follows: "With the understanding herein expressed that the interest hereby granted, bargained, given, and conveyed, as aforesaid, shall be one-third of said bargained premises as the interest of said Peter Nort, and one-third to John Nort [the ancestor of plaintiffs], and the remaining one-third interest to Charles Beerman, to be held by him in trust for said minor children, Margaret, Henry, and Mary Beerman. The aforesaid one-third interest of said lot conveyed to John Nort shall be during his natural life, and after his death to his children; and, if he should die without children, one-half of his one-third interest shall go to his brother, Peter Nort, and the remaining one-half of his interest to Margaret, Henry, and Mary Beerman. This shall not prevent the said John Nort from selling his portion of said city lot, and using the interest of the proceeds thereof; but the corpus shall descend as heretofore stated." Clearly, however inartificially it may be expressed, an intention of the donor to give a power to sell the one-third portion of the property conveyed to John Nort for life, with remainder over, is revealed in the language quoted. Unless the provision: "This shall not prevent John Nort from selling his portion, * * * and using the interest of the proceeds thereof; but the corpus shall descend as heretofore stated"—is construed as giving to John Nort a power to sell the fee, this part of the deed is entirely idle and nugatory; for without authority from the grantor he would have had the right to sell and convey his life estate, which is created by a preceding clause of the deed. By the use of the provision last quoted it is the manifest intention of the donor to create in the life tenant a power not inherent in him as a tenant for life merely. And while the donor did not undertake to safeguard the corpus by the creation of a trust for its management and control, she did expressly stipulate that the corpus should descend "as heretofore stated"; that

is, to the children of John Nort, giving to John Nort himself the right to use the interest of the proceeds of the sale of his portion of the lot of land conveyed by the grantor, Margaret Nort. The expression, "use the interest of the proceeds thereof," is not only consonant with the construction we have placed upon the deed, rendering harmonious all of the provisions thereof, but it utterly contradicts the contention of the plaintiffs to the effect that John Nort took only a life estate without a power of sale of the fee. The similarity in the language conferring authority upon John Nort to sell, and upon Charles Beerman as trustee to sell the "portion of his three children," for the purpose of dividing the proceeds among them, may also be considered in aid of the construction which we have given to that part of the deed under consideration, if any further argument is necessary to make it conclusive.

[2] 2. Having decided that the deed from Margaret Nort conferred upon John Nort authority to sell the fee of his interest or portion of the land, we still have left open the other question; that is, as to whether John Nort exercised that power in the execution of his deed of conveyance to Charles Nort. If, from the language of the latter deed, without the aid of extraneous circumstances, it can be gathered that it was the intention of the grantor to execute a power of sale, and that his deed was made in execution of that power, then the court below properly sustained the demurrer of the defendant and dismissed the plaintiffs' action. In the case of *Mahoney v. Manning*, 133 Ga. 784, 66 S. E. 1032, it was said: "The principle enunciated in *Sir Edward Clere's Case* is said to be the technical rule, which is thus stated in 4 *Kent's Com.* § 234: 'The general rule of construction both as to deeds and wills is that if there be an interest and power existing together in the same person over the same subject, and an act be done without particular reference to the power, it will be applied to the interest, and not to the power. If an act will work two ways, the one by an interest and the other by a power, and the act be indifferent, the law will attribute it to the interest, and not to the authority.'" Mr. Justice Evans, who delivered the opinion in the *Mahoney Case*, referring to the contention of one of the parties to that case, that the strict technical rule obtains in this state, examined and discussed the prior cases decided in this court bearing upon that question; i. e., *Terry v. Rodahan*, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420, *Lee v. Giles*, 124 Ga. 494, 52 S. E. 806, *Middlebrooks v. Ferguson*, 126 Ga. 232, 55 S. E. 34, *Clarke v. Land Co.*, 113 Ga. 22, 38 S. E. 823, *Holder v. American Investment Co.*, 94 Ga. 640, 21 S. E. 897, and *Mortgage Co. v. Buice*, 98 Ga. 795, 26 S. E. 84, and as a part of the discussion said: "These are the only cases which directly bear upon the subject we have in

hand. In none of them was the rule we are following in this case rejected; but, on the contrary, though recognizing its principle, its application was denied, because neither of the instruments made any reference to the will, which was the source of title and conferred the power. This negative pregnant is especially significant when we consider the throes through which other courts have gone in an effort at rationalization of the austere technical rule promulgated in *Sir Edward Clere's Case*. We take these cases to mean, if there had been a reference to the conveyance conferring the power, that such reference would evince an intention to execute the power, and would be so construed. So that we conceive the rule of law, as expressed in these cases, to be that in order for an instrument to be effective as an execution of a power, where the maker is the owner of an interest in the land conveyed and also of a power to convey the fee, the recitals in the instrument must either expressly refer to the power, or by necessary implication clearly indicate that an execution of the power is intended." See, also, the case of *Mayo v. Harrison*, 134 Ga. 737, 68 S. E. 497.

In the present case, upon examination of the deed from John Nort to Charles Nort, there is a reference to the deed of Margaret Nort, which contains the power of sale; and in addition to this reference to the instrument conferring the power we find in the deed of John Nort clear indications that he exercised and intended to exercise the power of sale by executing the deed to Charles Nort. In the first place, the deed of John Nort warrants the fee-simple title to Charles Nort, his heirs, executors, and administrators; and while, of itself, would not be a sufficient indication of his intent to exercise the power of sale conferred upon him, it is to be considered in connection with other indicia to be found in his deed of his exercise of the power. For in his deed it is recited that the grantor conveys "all and entire my one-third undivided interest in and to the land deeded to me * * * by Margaret Nort, and described as follows: * * * The other two-thirds interest in said land having been on the same day in the same deed conveyed by the said Margaret Nort to Peter Nort and Charles Beerman as trustee for his minor children." Now, when it is remembered that the one-third interest in the land given to Peter Nort and the one-third interest given to Beerman as trustee were fee-simple interests, the reference in John Nort's deed to his one-third interest as of the same quality as the interest of Peter Nort and Charles Beerman, trustee, and the further plain indication that the entire interest in the land is made up of the three interests mentioned in the deed of John Nort—that is, the one-

third interest of the grantor and the other two-third interest conveyed to Peter Nort and Charles Beerman as trustee—there is the clear indication that John Nort's deed was an exercise of the power of sale conferred upon him by the deed of gift from his mother. So finding in the deed of John Nort plain indications of the grantor's intention to execute the power of sale conferred upon him by the deed of Margaret Nort, as well as reference to the instrument conferring the power, we are of the opinion that the court below properly held that John Nort exercised and intended to exercise the power of sale conferred upon him, and that his intention is manifest from the instrument which was held to be an exercise of the power, and this intention could be arrived at without resorting to extraneous circumstances, such as a comparison of the purchase price of the property with its alleged value.

[3] 3. The court, upon review of the case of *Mahoney v. Manning*, supra, declines to overrule the decision made in that case.

Judgment affirmed. All the Justices concur.

(126 Ga. 345)

WINGFIELD, Ordinary, et al. v. KUTRES.
(Supreme Court of Georgia. May 12, 1911.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 101*)—LICENSES.

Under the proper construction of section 3 of the act approved September 5, 1908 (Acts 1908, p. 1112), a person, upon payment of one license fee of \$200, is entitled to a license provided for in that section of the act, and may carry on the business at any number of places in the county in which he obtained his license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 101.*]

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action by Nicholas Kutres against S. B. Wingfield, Ordinary, and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Nicholas Kutres instituted suit against S. B. Wingfield, as ordinary, and W. E. Jackson, as sheriff, of Clarke county, to restrain the collection of four executions which had been issued against the plaintiff by the ordinary and levied by the sheriff. The executions were issued on account of a failure to pay certain fees alleged to be due for licenses to sell near beer in the county of Clarke, under the provisions of section 3 of the act approved September 5, 1908 (Acts 1908, p. 1112); two of them issuing on account of the nonpayment of licenses for the year 1908, and others for the year 1909. Kutres had paid to the ordinary \$200, the amount of the prescribed license fee for one license for the year 1908, and also a similar amount for one license for the year

1909. The ordinary accepted payment, and in each instance issued a license which designated a particular place at which the licensee should carry on his business, but the license was not accepted; it being insisted upon the part of Kutres that under a proper construction of the act above referred to the payment of one license fee authorized him to sell near beer at any number of places in the county, and that the ordinary by the license could not restrict him to the transaction of business at one place. At the interlocutory hearing it was conceded that injunction should issue unless, under a proper construction, the act authorized the holder of a license to sell at any number of places in the county in which the license was issued, rather than that a separate license was required by the act to be obtained for each place of business. The trial judge construed the act as requiring only one license in the county, and granted the injunction. The defendants excepted, and in the brief of their counsel in the Supreme Court it was said expressly that the plaintiffs in error did not contend that Kutres was estopped by reason of his attorney having received the license and kept it in his possession, and that "there is only one question involved in this case, and that is whether the license prescribed by the act of September 5, 1908 (Acts 1908, p. 1112), when paid, authorizes the person paying the same to engage in the business of selling beverages of the character therein referred to in any number of places within the county that he may desire, or whether a payment of \$200 is required under said act for each separate and distinct place of business."

The caption of the act was: "An act to provide a revenue to be used for the development and conduct of the penitentiary system of the state and to buy farm lands and equipment as may be needed in connection with the management, control, and employment of the convicts of this state, by requiring a license to be obtained by all persons, firms or corporations manufacturing or selling in this state or maintaining therein supply depots or places for distributing any imitation of or substitute for beer, ale, wine, whisky, or other spirituous or malt liquors; to prescribe the terms and conditions on which such license may issue and the amounts to be paid therefor; to prohibit the carrying on of any business for which such license is required without obtaining such license; to provide penalties for violations of this act; to provide for the forfeiture of the licenses provided for in this act when the same are used as a cloak for the violation of the law; and to appropriate the money raised hereunder, and for other purposes." Section 1 prescribed a license fee of \$500 for each calendar year or part thereof, to be paid by every person, firm, or corporation manufacturing, within the limits of this state, any beverage or drink or

liquor in imitation of or intended as a substitute for beer, ale, wine, whisky, or other alcoholic, spirituous, or malt liquors, and required that the manufacturer obtain a license from the ordinary of the county wherein the business was carried on. Section 2 prescribed a license fee of \$500 for each calendar year or part thereof to be paid by every person, firm, or corporation who shall maintain a supply depot, warehouse or distributing offices or other place of business within the limits of this state where such beverages, drinks, or liquors as are referred to in the first section are kept for sale or distribution in quantities of more than five gallons, and required the person, firm, or corporation selling or distributing same to obtain a license so to do from the ordinary of the county wherein such "depot or place is kept." Section 3 was as follows: "Be it further enacted, that every firm, person, or corporation who shall sell or offer for sale in quantities of less than five gallons any such beverages, drinks or liquors as are referred to in the first section of this act shall obtain a license so to do from the ordinary of the county wherein such business is carried on, and shall pay therefor the sum of two hundred (\$200.00) dollars for each calendar year or part thereof." Section 4 prescribed that there should be no exception or license for any drink prohibited by law; and section 5 provided that the names of manufacturers should be plainly stamped on the vessel containing the liquid. Section 6 declared that all moneys collected under the provisions of the act should be paid over to the Treasurer of the state, to be held as a special fund to be used in the development and conduct of the penitentiary system of the state, and to buy such farms, lands, road equipment, or other properties as may be needed in connection therewith, or in connection with the management, control, and employment of the convicts, etc. Sections 7 and 8 prescribed penalties for violations of the law, while section 9 repeals all laws and parts of laws in conflict with the provisions of the act.

E. K. Lumpkin and Cobb & Erwin, for plaintiffs in error. W. M. Smith and Henry C. Tuck, for defendant in error.

ATKINSON, J. In support of the contention that section 3 requires a separate license for each place of business in the county of a dealer in the beverages therein referred to, counsel for the plaintiffs in error urged that the act is a police measure and also a revenue measure, and that whether it be considered as a revenue measure pure and simple, or police measure pure and simple, or as of the dual character, having for its purpose both regulation and revenue, it is inconceivable that the General Assembly intended that the payment of one license fee should authorize a license designating no place of business, but authorize the holder to en-

gage in business at any number of places in the county that he might see proper. It was pointed out that, if the licensee could carry on the business at any number of places, it would be possible for one person to have a monopoly of the sale of the imitations in each county in the state in which their sale was authorized, because the law does not compel the holder of the license to conduct the sales in person, and the sales might be conducted at numerous places by duly authorized agents acting in good faith; also, that it would open the door to fraud, so as to defeat the revenue purpose of the act by a collusive arrangement between different persons, all claiming to sell under the license of one person. It was further pointed out that the purpose of the license is to locate the business of the holder, in order that he may be under the supervision of the authorities, to see that no violation of law takes place, and that the business is conducted in such manner as not to interfere with the public peace and welfare, and that this purpose would be defeated to a large extent if the licensee should be permitted to engage in sales at numerous places. To locate the place of business of the holder of the license is not necessarily the sole purpose of a license. A business may be licensed, or a person may be licensed to transact business, and in neither instance is restriction to a particular place essential. The Legislature may not deem that the character of the business is such that for the purpose of police regulation it should be restricted to a particular place.

All of the reasons pointed out by the plaintiffs in error, as above enumerated, to show why the act should be construed as contended for by them, were appropriate matters for consideration by the Legislature in enacting the law; but they are all consistent with the construction placed upon the act by the trial court, and do not require a different construction. The act might produce less revenue if one fee and license authorize a person to deal at a single place, rather than in a number of places, or it might not; and whether it would or not, and whether the Legislature, in dealing with the matter as a revenue matter, was satisfied to exact but one license and fee from a dealer in each county in which he should carry on the business, was a matter for legislative consideration. It was also for the Legislature to determine what police supervision, if any, should be required for this particular character of business; and the argument that it might to a greater or less extent require such supervision would not necessitate the construction contended for by the plaintiffs in error. As a revenue measure the exaction of a license of \$200 for each dealer in each county in which he carries on the business of selling the imitations specified in the act comports with the object of the act. As a police measure the penalty imposed by other

sections of the act comports with that object. Section 3 omits any reference to location at which the licensed sales may be made, save only that, in declaring how licenses shall be obtained, it is provided that they shall be granted by the ordinary of the county wherein such business is carried on. The nature of the business is such as that it could be located at a given place or places, or be conducted in a transitory manner, and there is no attempt to confine its operation to one or more localities.

In construing statutes, subsequent acts of the Legislature on the same subject may be considered. *Barron v. Terrell*, 124 Ga. 1077-1079, 53 S. E. 181. Paragraph 3 of section 7 of the general tax act approved August 16, 1909 (Acts 1909, pp. 36-64), deals with the subject covered by section 3 of the act of 1908 involved in this case, and, in addition to raising the license fee to \$300, declares that it shall be paid "for each place of business," and also restricts the right to engage in such business to the limits of incorporated cities, towns, or villages of not less than a specified number of inhabitants. This seems to be a recognition by the Legislature that the former act did not exact a license fee for each separate place of business, and the manifestation of an intention to change the law, so that a separate license fee might be required for each place of business. In former general tax acts, such as the act approved August 15, 1904 (Acts 1904, p. 26), in dealing with licenses to engage in businesses of similar character, where it was intended that a license fee should be paid "for each place of business," it was expressly so declared. The right to sell near beer without the payment of a license is inherent, unless expressly restricted by statute, and statutes exacting licenses for such purposes are to be strictly construed. But it does not require a strict construction of this statute to hold that section 3 was not intended to exact a separate license for each place of business. While it might have done so, the General Assembly, dealing with the subject as it then appeared to it, was content to exact one fee, and require a license from every person, firm, or corporation engaging in the business in the county. Subsequent events seem to have caused the Legislature to view the matter differently, and change the law as already pointed out, not only as to the amount of each license fee charged, but by requiring a separate license for each place of business in each county, and restricting the right to carry on such business to the limits of incorporated cities, towns, and villages containing more than a specified number of inhabitants.

Counsel for plaintiff in error have cited the following authorities: *Malkan v. Chicago*, 217 Ill. 471, 75 N. E. 548, 2 L. R. A. (N. S.) 488; *Wason v. Severance*, 2 N. H. 501; *Murrell v. Bokenfohr*, 108 La. 19, 32 South. 178; *Matter of Lyman*, 59 App. Div. 217, 69

N. Y. Supp. 309; 21 A. & E. Enc. Law (2d Ed.) 814, note 7; 23 Cyc. 119 (C), note 69; 17 A. & E. Enc. Law (2d Ed.) 237; State v. Walker, 16 Me. 244. But an examination of all of them, except the last, shows that there were restrictions in the statutes or ordinances, and in some cases licenses (upon which the right to transact the business depended under the law of the state), which expressly confined the licensee to conduct the business mentioned at specified places. In the last case cited, to wit, State v. Walker, 16 Me. 241, the ruling, which restricted the operation of the license to one place, was based largely on the fact that the statute which exacted the license required that the person to be licensed should have certain moral qualifications, to be ascertained by the judgment of certain officers, and that any person so approved, before being licensed, should give bond, conditioned as prescribed in the statute. The decision was rendered in a case against the mere agent, who had not executed the bond. The act there under consideration also contained a provision that "no innholder, victualler, or retailer shall suffer any disorderly conduct in his house, shop, or dependencies thereof, nor suffer any person to drink to drunkenness or excess in his or her house or shop, or suffer any minor or servant to sit drinking there," which the court declared indicated but one house, and one shop, to be conducted by one person. The reasoning of the court in that case will not apply to a statute similar to that which we have under consideration, where no qualifications are prescribed, and no bond required, for one who desires to engage in such business, and where the act contains nothing to indicate that one particular place of business was in contemplation of the Legislature.

Judgment affirmed. All the Justices concur.

(186 Ga. 353)

WEST v. HACKETT.

(Supreme Court of Georgia. May 12, 1911.)

(Syllabus by the Court.)

TRIAL (§ 29*)—CONTRACTS (§ 353*)—DAMAGES (§ 78*)—APPEAL AND ERROR (§ 1064*)—ACTION FOR BREACH—INSTRUCTIONS—MISCONDUCT OF JUDGE—IMPROPER STATEMENTS.

A writing, signed by A. T. Hackett and S. P. West, recited that the former "is held and firmly bound unto" the latter, and the condition of this obligation is he has agreed to sell to West a described tract of land, and that "the condition of the foregoing is such that, whereas, the said S. P. West has this day made and delivered to the said A. T. Hackett six" described promissory notes, "and also the further condition that the said S. P. West and his family agree to furnish said Hackett with a comfortable room, no other person to occupy said room, board him for six years, at \$100 per year, including washing, and, further, said West and family are to treat him with that respect and consideration and kindness which his age and in-

firmity may require, and in the event said Hackett shall die, or from any other legitimate and legal reason shall cease board with said West, then and in that event the unused portion of \$800 for board shall be and become a money debt at 80 per cent. on the dollar, which the said West agrees to pay said Hackett or representative in lieu of unused money for board. Now should the said S. P. West fully carry out the foregoing agreement and pay said notes as stipulated, the said Hackett agrees to make or cause to be made to the said S. P. West good and sufficient titles in fee simple to the foregoing described property, which if the said Hackett should do then this bond to be null and void; else to remain in full force." Hackett brought suit against West to recover \$480, besides interest from the "date of the breach of the contract," alleging that West had refused to carry out his agreement to furnish Hackett with a comfortable room and treat him as provided in the above-quoted portion of the contract between them, and plaintiff had ceased to board with the said West "and the said debt becoming a money demand as per said contract and agreement." Upon a trial of the case a verdict was rendered in favor of the plaintiff for \$400 principal, besides interest, and to the order of the court refusing a new trial, the defendant excepted. *Held:*

(1) At the conclusion of the evidence, it was error for the court to state, in the presence of the jury: "I want to say, without prejudice to either side, that, if I represented the plaintiff, I would dismiss this case; if I represented the defendant, I would let him take a judgment for all he sues for. If there is an honest difference between the parties, you could find for the plaintiff."

(2) It was error for the court to charge: "If you find from the evidence that both parties have acted in good faith, Col. Hackett in good faith about his contention, and the defendant in just as good faith about his contention, and they cannot agree, then you would be authorized to divorce them; and if you divorce them, you would find in favor of the plaintiff for \$400, with interest at 7 per cent. from the 1st day of January, last year." The mere fact that either or both of the parties acted in good faith in regard to their respective contentions would not authorize a recovery by plaintiff under the contract.

(3) It was not error to refuse written request of West to charge the following: "That the clause of the contract providing that the defendant shall pay plaintiff 80 per cent. of amount due for board only liquidates or settles the amount of the damages for the breach, and does not make it fall due or become payable any sooner than would be the case without that clause, and that the contract is an entire contract for board for six years, and that no damages, whether liquidated or not, are recoverable under the contract sued on until the expiration of the six years referred to in the contract."

(4) There was no error requiring a new trial in the following charge of the court: "Now, gentlemen [referring to the clause of the contract alluded to in the statement of the preceding ground], this contemplates that Mr. West and his family are to furnish Col. Hackett with a comfortable room as here described, and that he is to live with the family, and they are to treat him in the manner set out here, and if for any legitimate reason he should fail to board the time out, or should die, the money becomes due, not the full amount, but 80 per cent. of the remaining unused portion of it."

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 29;* Contracts, Dec. Dig. § 353;* Damages, Dec. Dig. § 78;* Appeal and Error, Dec. Dig. § 1064.*]

Error from Superior Court, Catoosa County; A. W. Flite, Judge.

Action by A. T. Hackett against S. P. West. Judgment for plaintiff, and defendant brings error. Reversed.

J. H. Anderson and Geo. G. Glenn, for plaintiff in error. W. E. Mann, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

(136 Ga. 310)

GARNER v. DOUGLASVILLE BANKING CO.

(Supreme Court of Georgia. May 11, 1911.)

(*Syllabus by the Court.*)

LANDLORD AND TENANT (§ 255*)—LIENS FOR RENT—PERSONS ENTITLED TO ENFORCE.

An assignment before maturity of a written contract for rent does not operate to raise in favor of the assignee the general lien given to landlords, when it appears that before the levy of a distress warrant in favor of the transferee the consideration of such contract had entirely failed.

(a) One to whom a landlord transfers a note of his tenant for rent has the right to foreclose the general or special lien of the landlord for rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1047; Dec. Dig. § 255.*]

Error from Superior Court, Douglas County; Julian McCamy, Judge pro hac.

Action by the Douglasville Banking Company against W. T. Garner. Judgment for plaintiff, and defendant brings error. Reversed.

J. H. McLarty and H. W. Nalley, for plaintiff in error. J. S. James and Roberts & Hutcheson, for defendant in error.

HOLDEN, J. W. T. Garner, the plaintiff in error (hereinafter referred to as the defendant), in 1902 gave to Mrs. Mary Leathers a note for the rent of certain land for the year 1903. Some time in 1903 Mrs. Leathers transferred the note to the Douglasville Banking Company, defendant in error (hereinafter called the plaintiff). The latter caused a levy of a distress warrant to be made in October, 1904, on crops grown by the defendant that year on the same premises for the rent of which for 1903 the note was given. The defendant filed a counter affidavit, alleging that the rent distrained for was not due, which he afterwards amended by alleging that in March, 1903, there was filed to the May term, 1903, a suit in ejectment against his landlord, Mrs. Leathers, to recover the rented premises and mesne profits, to which he was made a party defendant in November, 1903, and enjoined from paying her any rents, and that in September, 1904, a receiver was appointed in this litigation to take charge of the rents, to whom

the defendant immediately thereafter paid the rent for which the note was given; that Mrs. Leathers was not the owner of the premises, they having been recovered from her in the ejectment action in November, 1904, and the defendant had received no consideration for the note. The jury found for the plaintiff, the defendant's motion for a new trial was overruled, and he excepted. In the bill of exceptions error is also assigned on certain pendente lite rulings made by the court below.

The proceeding was purely a summary one, based upon the alleged right of the transferee of the rent note to foreclose a landlord's lien for rent. Conceding that the purchaser of the note obtained a valid transfer of all the rights which Mrs. Leathers, as landlord, had against the defendant; could it subject the property levied upon in the distress warrant proceeding? This proceeding was an attempt to assert the general lien for rent provided by law in favor of a landlord. Under Civil Code 1910, § 3340, "such general lien shall date from the time of the levy of a distress warrant to enforce the same." The assignment of the rent note could pass to the assignee no greater rights with respect to the collection of rent by foreclosure of a landlord's lien than the landlord, Mrs. Leathers, possessed; and if at the time the distress warrant was levied on October 28, 1904, Mrs. Leathers, if she had retained the rent note, could not have established a lien by levying a distress warrant, because the right to collect the rents for 1903 never belonged to her, but to another, her transferee could not do so. It appears from the evidence that in March, 1903, an action in ejectment was filed against Mrs. Leathers to recover the premises for which the rent note was given, and that in September of that year the defendant Garner was made a party defendant in the ejectment proceedings and restrained from paying over to Mrs. Leathers any rents for these premises, and that in September, 1904, a receiver was appointed to take charge of the rents for 1903 and 1904, to whom, during that month, the defendant in the present action paid the rent for which the note was given. This payment to the receiver by direction of the court took away from the landlord any further right to proceed, by foreclosure of lien or otherwise, against the tenant for the recovery of the rent, and also deprived her assignee of any right to levy a distress warrant to assert a landlord's lien.

The charge of the court complained of, wherein reference was made to the judgment in the ejectment suit being the result of a fraud, was unauthorized by the evidence. Though the judgment in the ejectment suit in favor of the plaintiff in that suit for the recovery from Mrs. Leathers of the premises rented by her to the defendant in the present

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

suit and for the rent of these premises for the year 1903 was not rendered until after the levy of the distress warrant, this judgment was an adjudication that the payee of the rent note, if she had not disposed of it, would not have been, at the time the distress warrant was levied, or at any other time, entitled to the rent of the land for 1903. While the transferee of the rent note was no party to the case in which the judgment above referred to was rendered, the judgment is presumed to be valid. It having been adjudicated, in a case to which Mrs. Leathers and the one to whom she rented the land for 1903 were parties, that Mrs. Leathers never at any time had any right to the rent of the land for 1903, and the tenant having paid to the receiver appointed in the ejectment suit the rent for 1903 in accordance with a judgment rendered in that suit, neither Mrs. Leathers, nor her transferee of the rent note for 1903 given her by the tenant, had any lien for such rent. *Camp v. West*, 113 Ga. 304, 38 S. E. 822. No question arises in the present case as to the right of the transferee of the note, as an innocent holder of a negotiable instrument, to proceed with the collection of the note itself by suit thereon.

The charge of the court complained of in the first ground of the amendment to the motion for a new trial, not being in accord with the ruling we make, was error. Counsel for the plaintiff in error insist that the court erred in refusing to dismiss the levy, and in refusing to grant a nonsuit, on the ground that the transferee of a note for rent has no right to foreclose the general lien in favor of a landlord for rent, but only has a right to foreclose the special lien. We cannot agree with this view. One to whom a landlord transfers a note of his tenant for rent has the right to foreclose the general or special lien of the landlord for rent. *Civil Code* 1910, §§ 3346, 3347. Under the evidence, a verdict in favor of the defendant was demanded, and the court erred in refusing a new trial.

Judgment reversed. All the Justices concur.

(136 Ga. 313)

HAMMOND v. CLARK.

(Supreme Court of Georgia. May 11, 1911.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 68*)—AMENDMENT OF CONSTITUTION.

In the absence of some other exclusive method of determination provided by the Constitution, whether an amendment has been properly proposed and adopted according to the requirements of the existing Constitution, and has become a part of the fundamental law of the state, is generally a judicial question.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 126; Dec. Dig. § 68.*]

2. CONSTITUTIONAL LAW (§ 68*)—AMENDMENTS TO CONSTITUTION—LEGALITY.

Where an act of the Legislature proposing an amendment to the Constitution of the state directed the Governor to publish such proposition and submit it for ratification at the next general election, the fact that after the election he published a proclamation declaring that the amendment had been ratified was not conclusive on the courts.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 126; Dec. Dig. § 68.*]

3. CONSTITUTIONAL LAW (§ 6*)—AMENDMENTS TO CONSTITUTION—PUBLICATION IN NEWSPAPERS—SUFFICIENCY.

The requirement of article 13, § 1, par. 1, of the Constitution, that the proposed amendment shall be published in one or more newspapers in each congressional district for two months previous to the time of holding the next general election, was complied with, as to the publication in a particular newspaper, where the amendment was published once a week for nine weeks; the first publication being on August 5th, and the last being on September 30th, preceding the general election which was held on October 5th.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 5; Dec. Dig. § 6.*]

4. CONSTITUTIONAL LAW (§ 6*)—AMENDMENTS TO CONSTITUTION—VALIDITY.

Where an amendment to the Constitution has been proposed by the Legislature in the manner provided by that instrument, and it has been submitted to the voters for ratification at the prescribed time and in substantially the prescribed manner, and has been ratified by them, such amendment will not be declared void, even if it should appear that an executive or ministerial officer did not comply strictly with the law as to the extent of publication in a particular newspaper.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 6.*]

5. CONSTITUTIONAL LAW (§ 6*)—AMENDMENTS TO CONSTITUTION—PROCLAMATION OF GOVERNOR—SUFFICIENCY.

Where the Legislature by an act proposed an amendment to the Constitution, and directed the Governor to make the required publication and to submit the question of ratification to the voters at the next general election, and set forth the form of ballot to be used in voting for the amendment or against it, the publication by the Governor of a proclamation, setting forth the entire act and declaring that the proposed amendment was submitted for ratification or rejection to the qualified voters of the state at the next general election, to be held on a named date, was a sufficient compliance with the Constitution and the act as to the form of publication and submission.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 6.*]

6. CONSTITUTIONAL LAW (§ 9*)—AMENDMENTS TO CONSTITUTION.

The Constitution does not require that the journals of the two houses of the Legislature must be published and distributed before a proposed amendment can be submitted to the voters for ratification.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 9.*]

7. CONSTITUTIONAL LAW (§ 5*)—AMENDMENTS TO CONSTITUTION—VALIDITY.

Where an act of the Legislature and certain amending acts were declared unconstitutional by this court, and thereupon the Legislature proposed an amendment to the Constitution, curing the defect which had existed in the legislative acts, and also ratifying them as of the dates of their passage, and such amendment was rat-

fied by the qualified voters of the state, it will not be declared void on the ground that it did not set out in substance or in terms the legislative acts sought to be validated, but only described them by copying their captions and referring to the year in which they were passed, or because such acts were not copied in extenso on the journals of the Senate and House of Representatives as part of such proposed constitutional amendment.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 5.*]

8. CONSTITUTIONAL LAW (§ 9*)—AMENDMENTS TO CONSTITUTION.

Where a constitutional amendment was submitted to the qualified voters of the state for ratification or rejection, the fact that in one county the printed ballots contained only a form of vote for ratification, and no form for voting against it, will not alone cause the amendment, after ratification, to be declared void.

(a) This is especially true where it was not made to appear that any official was concerned in the preparation of such printed form of ballot, or that this had any substantial effect upon the general result of the election.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 9.*]

9. CONSTITUTIONAL LAW (§ 9*)—AMENDMENTS TO CONSTITUTION—VALIDITY.

The Legislature sought to increase the salaries of judges of the superior courts in certain circuits containing the largest cities in the state, and to have the difference between what was paid to judges from the state treasury and the amount so fixed paid from the treasuries of the respective counties in which such cities were located. The acts making such provision were declared by this court to be in violation of the Constitution. An amendment to the Constitution was proposed by the Legislature, and ratified by the people, which changed the Constitution as to the salaries of such judges for the future, and also ratified the acts of the Legislature as of their respective dates. *Held*, that such amendment will not be declared void on the ground that, in effect, it constituted two amendments, and its submission as one was violative of article 13, § 1, par. 1, of the Constitution, which provides that, "when more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately."

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 9.*]

10. CONSTITUTIONAL LAW (§ 24*)—AMENDMENTS—CONSTRUCTION.

If an amendment to the Constitution has been proposed by the Legislature, duly submitted to the voters of the state for ratification or rejection, and by them has been ratified, so that the amendment has become an integral part of the Constitution, it cannot be declared void on the ground that in some particular it does not accord with some other provision of the same instrument.

(a) The different provisions of the Constitution should be harmonized, if practicable. If an amendment duly adopted necessarily conflicts with some previous provision, the amendment, being the last expression of the sovereign will of the people, will prevail as an implied modification pro tanto of the former provision.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 21-29; Dec. Dig. § 24.*]

11. CONSTITUTIONAL LAW (§§ 243, 278*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAW.

An amendment to the Constitution of the character indicated in the ninth headnote will not, at the instance of a county affected by it, or of the treasurer of such county, be declared

void as being in conflict with the provision of the fourteenth amendment of the Constitution of the United States, that no state shall deprive any person of property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. §§ 243, 278.*]

12. CONSTITUTIONAL LAW (§§ 52, 278*)—AMENDMENTS TO CONSTITUTION.

Where the Legislature undertook to make an increase in the salaries of judges in certain circuits, and to have the increase paid by the counties therein containing cities of not less than a certain population, and such acts were declared by this court to be invalid, because violative of a provision of the Constitution of the state, an amendment to the Constitution thereafter duly made, which changed the constitutional provision on that subject so as to fix the rule in regard to such salaries for the future, and which ratified the legislative acts as of their respective dates, cannot be declared void at the instance of one of the counties concerned, or its treasurer, on the ground that it sought to overrule the former decision, invaded the province of the judiciary, and deprived the county of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. §§ 52, 278.*]

13. CONSTITUTIONAL LAW (§ 145*)—OBLIGATIONS OF CONTRACT.

Where, under the acts of the Legislature authorizing payment of a part of the salary of the judge of the superior court in certain counties, a judge was paid by warrants drawn by the county commissioner of one of such counties directing the county treasurer to pay to the order of the judge the amount thereof, "subject to any claim of the county," and such warrants were indorsed in collecting them, this did not amount to a contract on the part of the judge to pay back to the county such salary as was paid to him, in case the act of the Legislature under which it was paid should at some future time be declared unconstitutional by the courts.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 145.*]

14. CONSTITUTIONAL LAW (§ 145*)—OBLIGATIONS OF CONTRACT.

An amendment to the Constitution of the state, which ratified the acts of the Legislature under which such payments were made, was not violative of the provision of the Constitution of the United States which prohibits the passage of laws impairing the obligation of a contract.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 145.*]

15. STATES (§ 4*)—REPUBLICAN FORM OF GOVERNMENT.

Such an amendment to the state Constitution as that indicated in the preceding headnote was not violative of the clause of the Constitution of the United States which guarantees to every state a republican form of government.

[Ed. Note.—For other cases, see States, Dec. Dig. § 4.*]

16. PREVIOUS DECISION CONSTRUED.

In *Clark v. Hammond*, 134 Ga. 792, 68 S. E. 600, this court held that the effort by legislative enactments to supplement the salaries of judges of the superior courts in certain circuits, by requiring the payment of the increase over that payable from the state treasury to be paid by certain counties in the circuit containing cities having not less than a certain population, was in violation of the Constitution as it then stood. This provision for payment was an essential part of the legislative scheme expressed in the acts under consideration. It could not be stricken from them, and leave the acts as fixing an increased salary for the judges described,

payable from the state treasury, and no such construction was given to those acts by this court.

(Additional Syllabus by Editorial Staff.)

17. COUNTIES (§ 1*)—DEFINITION.

A "county" is one of the civil divisions of a state for judicial and political purposes, created by the sovereign power of the state of its own will, without the particular solicitation, assent, or concurrent action of the people who inhabit it; a local organization, which, for the purpose of civil administration, is invested with certain functions of corporate existence.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1653-1660; vol. 8, p. 7621.]

18. MUNICIPAL CORPORATIONS (§ 2*)—"PUBLIC CORPORATION."

A "public corporation" is one having for its object the administration of a portion of the powers of government, delegated to it for that purpose. Such are municipal corporations.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1½; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5781-5785; vol. 8, p. 7771.]

Error from Superior Court, Richmond County; D. W. Meadow, Judge.

Mandamus by H. C. Hammond against W. A. Clark. From a judgment refusing the writ, applicant brings error. Reversed.

By article 6, § 18, par. 1, of the Constitution, it was provided that the judges of the superior courts should have salaries not to exceed \$2,000 per annum; and by paragraph 2 it was provided that the General Assembly might at any time, by a two-thirds vote of each branch, prescribe another and a different salary for them. By the act of August 15, 1904 (Acts 1904, p. 72), the salary of the judges of the superior courts was fixed at \$3,000 per annum. By the act of August 6, 1904 (Acts 1904, p. 73), as amended by the act of August 15, 1905 (Acts 1905, p. 90), and by the act of July 31, 1906 (Acts 1906, p. 56), the Legislature provided that the judges of the superior courts of all judicial circuits which were or might thereafter be established, having therein a city with a population of not less than 34,000 inhabitants according to the United States census of 1900, should receive a salary of \$5,000 per annum, "the difference in amount between the sum paid said judges out of the treasury of the state and said \$5,000 to be paid out of the treasury of the counties in which said cities are located." In *Clark v. Hammond*, 134 Ga. 792, 68 S. E. 600, it was held that the effort in these acts to supplement the salaries of the judges of the superior courts from county treasuries was unconstitutional and void. Thereupon, by an act passed by the requisite two-thirds majority, and approved by the Governor on August 8, 1910 (Acts 1910, p. 43), an amendment to the Constitution was proposed, which was submitted to popular vote at the general election held on October 5th thereafter, and, upon receiving the requisite vote,

was proclaimed by the Governor to have been adopted.

After this Judge Hammond, of the Augusta circuit, which contains a city having more than 34,000 inhabitants according to the census of 1900, demanded of the county treasurer payment of the difference between \$3,000 per annum paid to the superior court judges from the state treasury and \$5,000 per annum. Some of the amount thus demanded accrued prior to the proclamation of the adoption of the constitutional amendment, and some thereafter. The demand was refused. He then applied for a writ of mandamus against the treasurer. An order nisi was issued. The respondent set up, in substance, the following reasons why the writ should not be granted:

(1) That before this amendment had been adopted Judge Hammond had sought a mandamus to compel the payment of his salary under the act whereby the Legislature sought to provide it, and that the judgment holding that provision of the act invalid and that he was not entitled thereunder was a judgment which concluded him and was an estoppel.

(2) That the amendment had not been duly adopted by the people, because in substance it was not a single amendment, but more than one, and was submitted as one.

(3) Because it could not be advertised until first published in the journals of the General Assembly after its adjournment, and that the Legislature adjourned less than 60 days before the October election, and the journals were not published until after the election.

(4) That the publication was not for two months before the election, as required by the Constitution.

(5) That the act was not separately submitted to the electorate for ratification or rejection after publication, or otherwise than by such publication, which itself contained the submission.

(6) It was claimed that the ballots in Richmond county were only printed with the form for ratification. (It was not claimed this was the act of any official.)

(7) It was claimed that the part of the amendment prescribing the salaries and that validating the previous legislative acts on the same subject contradict and cancel each other, and therefore render the amendment of no effect.

(8) Because the plaintiff's salary, payable from the state treasury, is already \$5,000, and therefore no demand exists on the county treasury.

(9) Because the amendment to the Constitution is a proviso inconsistent with the Constitution, and therefore void.

(10) Because the constitutional amendment of 1910 is destructive of the previous Constitution, in a most vital part, by de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

stroying equality of burden of superior court judges' salaries, and putting a greater burden on some counties than on others. This is alleged to be in conflict with the fourteenth amendment of the Constitution of the United States, and to deprive the respondent of moneys intrusted to him without due process of law.

(11) That Richmond county is only one of the four counties composing the Augusta circuit, while Chatham and Fulton each compose a circuit, and this amendment specially conflicts with the fourteenth amendment of the Constitution of the United States as to Richmond county.

(12) Because statutes cannot be validated by a constitutional amendment for such purpose.

(13) Because the amendment does not set out the text or substance of said acts, nor are they entered on the journals in connection with such amendment.

(14) Because the validation of these acts by the people by a constitutional amendment, after they were declared void as being in conflict with an existing constitutional provision, is obnoxious to the section of the state Constitution providing that the several departments of government shall remain separate, and to the constitutional provision against making donations, and that against retroactive laws; that to now allow the people by constitutional amendment to confirm this legislative act would enable them to reverse a decision of this court; and to allow a recovery from this defendant would violate the fourteenth amendment of the Constitution of the United States, and section 4 of article 4 thereof, which guarantees to every state a republican form of government.

(15) Because the amendment, so far as it ratifies payments heretofore made under the acts of 1904, 1905, and 1906, to the plaintiff, impairs the obligation of the contract between said Hammond and said county. He was paid by defendant, on warrants drawn by W. F. Eve, as county commissioner, which ordered the treasurer to pay to the order of Henry C. Hammond the amount thereof on the bill that day audited "subject to any claim of the county." These warrants were indorsed, "Henry C. Hammond," and he received the bill. This constituted a contract between said Hammond and said county to repay said sums, which it can enforce unless prevented by this constitutional amendment; and therefore this amendment impairs the obligation of a contract, and is void, under the Constitution of the United States.

On the hearing the judge to whom the application was made refused the mandamus, and the applicant excepted.

Wm. H. Barrett, E. H. Callaway, Jos. B. & Bryan Cumming, C. H. & R. S. Cohen, Boykin Wright, Archibald Blackshear, Jno. M. Slaton, L. Z. Rosser, and Alex C. King, for plaintiff in error. Salem Dutcher and W. K. Miller, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The judge of the superior court of the Augusta circuit sought by mandamus to compel the treasurer of Richmond county to pay him a part of his salary as fixed by the amendment to the Constitution of 1910 to be paid from the county treasury. This was resisted on a number of grounds. Broadly stated, the questions raised may be grouped under two general heads: (1) Did the proposed amendment (Acts 1910, p. 42) become a part of the Constitution? (2) If so, shall such part of the Constitution be itself declared unconstitutional and void, or to have no effect?

[2] 1-4. In dealing with the first question, counsel for plaintiff in error contended that the proclamation of the Governor declaring that the amendment was adopted was conclusive, and that the courts could not inquire into the question. To this contention we can not assent. The Constitution is the supreme state law. It provides how it may be amended. It makes no provision for exclusive determination by the Governor as to whether an amendment has been made in the constitutional method, and for the issuance by him of a binding proclamation to that effect. Such a proclamation may be both useful and proper, in order to inform the people whether or not a change has been made in the fundamental law; but the Constitution did not make it conclusive on that subject. When the Constitution was submitted for ratification as a whole, a provision was made for a proclamation of the result by the Governor. Const. art. 13, § 2, par. 2 (Civil Code 1910, § 6613). But in reference to amendments there is no such provision. Const. art. 13, § 1, par. 1 (Civil Code 1910, § 6610).

[1] In the absence of some other exclusive method of determination provided by the Constitution, the weight of authority is to the effect that whether an amendment has been properly adopted according to the requirements of the existing Constitution is a judicial question. The subject has been discussed at length and with citations of many authorities, in *State v. Powell*, 77 Miss. 543, 27 South. 927; *Bott v. Wurta*, 63 N. J. Law, 289, 43 Atl. 744, 881, 45 L. R. A. 251, and *McConoughy v. Secretary of State*, 106 Minn. 392, 119 N. W. 408. In considering the question whether a constitutional amendment has been properly proposed and adopted, the decisions of different courts have not been uniform as to the strictness or liberality with which constitutional provisions in regard to the manner of making amendments will be applied, and how small a deviation or failure of compliance with the letter of such provisions will require the state judiciary to declare such proposed amendment not to have been lawfully adopted, so as to become a part of the Constitution. In the *Constitutional Prohibitory Amendment Cases*, 24 Kan. 700, 710, Justice Brewer, who

later became a member of the Supreme Court of the United States, thus strongly set forth the position that mere immaterial omissions or errors, which work no wrong to substantial rights, should be disregarded: "The two important, vital, elements in any constitutional amendment are the assent of two-thirds of the Legislature and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because by them certainty as to the essentials is secured. But they are not themselves the essentials. Take a strong illustration: The Constitution requires that the 'Secretary of State shall cause the same to be published in at least one newspaper in each county of the state where a newspaper is published, for three months preceding,' etc. Suppose a unanimous vote of both houses of the Legislature, and a unanimous vote of the people in favor of a constitutional amendment, but that the Secretary had omitted to publish in one county in which a newspaper was published; would it not be simply an insult to common sense to hold that thereby the will of the Legislature and people had been defeated? Is it within the power of the Secretary, either through ignorance or design, to thwart the public decision?" In *People v. Sours*, 31 Colo. 369 et seq., 74 Pac. 167, 102 Am. St. Rep. 34, the same view was taken. Steele, J., said: "At the outset it should be stated that every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to the Constitution, when it is attacked after its ratification by the people." See, also, *State ex rel. Thompson v. Winnett*, 78 Neb. 379, 110 N. W. 1113, 10 L. R. A. (N. S.) 149; *State v. Laylin*, 69 Ohio St. 1, 68 N. E. 574; *Weston v. Ryan*, 70 Neb. 211, 97 N. W. 347. This liberal interpretation applies rather to the manner of compliance with constitutional requirements in regard to amendments than to a total omission or disregard of such a requirement. It has not generally been held that an essential requirement could be entirely omitted, nor does the present case require us to take that position.

[4] But we concur in the view that substance is more important than form, and that the will of the Legislature lawfully expressed in proposing an amendment, and the will of the people expressed at the proper time and in the proper manner at the ballot box in ratifying such amendment, ought not to be lightly disregarded and set at naught, even if an executive or ministerial officer should not strictly comply with his duty in connection with matters of detail, regarding the publication or the like, and which do not appear to have substantially affected the result. The decision in *Combs v. State*, 81 Ga. 780, 8 S. E. 318, and that in *Woodard v. State*, 103 Ga. 496, 30 S. E. 522, are not controlling on the contention that the Governor's proclamation was conclusive.

In each of those cases the Legislature had passed a local option law and provided a particular method for the declaration of the result. It is not necessary for us to consider how far the courts would go into the mere question of contesting the election or the number of votes cast, or whether they would go behind the consolidation by the Secretary of State. No such effort is made, and it is not disputed that a majority of the votes were cast in favor of the amendment. It is also unnecessary to discuss the effect of lapse of time or acquiescence, or of the making of an amendment to the Constitution affecting a radical change in the government, and continued action in reliance thereon, or how far federal courts would investigate the manner of the adoption of amendments to state Constitutions, or would deal with the situation as they found it, until the question had been passed on by the courts of the state. None of these things are here involved. *Dodd on Revision and Amendment of State Constitution*, 209 et seq.

[3] Article 13, § 1, par. 1, of the Constitution (Civil Code 1910, § 6610), reads as follows: "Any amendment or amendments to the Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, each proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon. And the General Assembly shall cause such amendment or amendments to be published in one or more newspapers in each congressional district, for two months previous to the time of holding the next general election, and shall also provide for a submission of such proposed amendment or amendments to the people at said next general election; and if the people shall ratify such amendment or amendments by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of this Constitution. When more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately." It was contended that the proposed amendment was not published for two months prior to the election as required by this paragraph. The first publication in the *Augusta Chronicle* was on August 5th. It was published weekly nine times, the last time being on September 30th. The election took place on October 5th. Under the decisions of this court as to computing months, the first publication was two months prior to election. *English v. Ozburn*, 59 Ga. 392; *Barrett & Carswell v. Devine*, 60 Ga. 632; *Western & Atlantic Railroad v. Carson*, 70 Ga. 388; *Peterson v. Georgia R., etc., Co.*, 97 Ga. 798, 25 S. E. 370. The Code declares that the word "month," employed in statutes,

means a calendar month. Civil Code 1910, § 5. It also provides that, when a number of days is prescribed for the exercise of a privilege or the discharge of a duty, only the first or last day shall be counted. Id. § 4, par. 8. Under these two provisions, two modes of calculations have grown up, under the decisions. *Rusk v. Hill*, 117 Ga. 722, 728, 45 S. E. 42. But even if the rule as to days were applied, as August has 31 days, between the first advertisement and the election full 60 days intervened.

It could hardly have been the intention of the Constitution that an amendment should be published daily for two months. When that instrument was adopted, in some congressional districts containing no large towns there was most probably no paper published every day, and it cannot be supposed that the purpose was to impose an impossible condition on the making of an amendment. Besides, a requirement of publication in a newspaper for a month or for two months has never been treated in this state as requiring a publication daily for that length of time. In some instances, where notice was required to be given a certain time in advance of action, a single notice has been considered sufficient, if given the required time in advance. But doubtless there is a closer analogy to be drawn from advertisements of sheriffs' sales, citations, etc. At the time when the Constitution was formulated and adopted, the act of 1876 (Acts 1876, p. 99) was in force. This provided that where the law required "citations, notices, etc., by ordinaries, clerks, sheriffs, administrators, guardians, or others," to be published in a newspaper for 30 days it should be sufficient to publish the same once a week for 4 weeks; and where they were required to be published for 60 days, it would be sufficient to publish them once a week for 8 weeks previous to the term or time when an order was to be granted or the sale to take place. In *Boyd v. McFarlin*, 58 Ga. 208, it was held that, where a sheriff's advertisement was required to be published once a week for 4 weeks before the sale, 28 days must elapse between the first advertisement and the sale (not the last advertisement). This has since been changed by the act of 1891 (Civil Code 1910, § 6063). These authorities are not controlling in the present case; but they serve to show that the requirement of publication of a notice for 60 days was not understood to mean every day for 60 days, at the time of the adoption of the Constitution of 1877. Much less would this be understood as necessary where the requirement was that a publication be made for 2 months. We are of the opinion that the weekly publication, which began two months prior to the election and ran for nine insertions, the last being on September 30th, before the election on October 5th, was a compliance with the law.

[5] 5. The Constitution provides that an

amendment shall be published in one or more newspapers in each congressional district for two months previous to the time of holding the next general election, and that the General Assembly "shall also provide for the submission of such proposed amendment or amendments to the people at said next general election." In this case the General Assembly directed the Governor to make the publication and submission. He published a proclamation in which was copied the entire act proposing such amendment, including the requirement of the submission to the people at the next general election, and the form of ballot to be cast in favor of the adoption of such amendment or against it, and declared that the proposed amendment was submitted for ratification or rejection to the qualified voters of the state at the election held on October 5, 1910. This was a sufficient compliance with the Constitution and the act as to the form of publication and submission. No separate proceeding to submit the proposed amendment, aside from the publication, was necessary.

[6, 7] 6. 7. There is no merit in the contention that the Constitution requires that the journals of the two houses of the Legislature must be published before such an amendment can be submitted for ratification. Nor is there any force in the contention that the amendment to the Constitution was invalid because it did not set out in substance or in terms the legislative acts sought to be validated by the latter part of it, or that such acts were not entered on the journals of the Senate and House of Representatives as part of such proposed constitutional amendment. It was not claimed that due entry of the proposed amendment itself was not made.

[8] 8. It was alleged that the ballots in Richmond county were printed only with a form of vote for ratification. This may not have been a very impartial or altogether proper mode of preparing a ballot. But it was not alleged that any official was concerned in the preparation of such printed form of ballots. If there were any irregularities in connection with the election in Richmond county, it does not appear that they were such as to have affected the general result of the election throughout the state. Civil Code, 1910, § 126.

[9] 9. It was contended that the proposed amendment which was submitted to the people for ratification contained several distinct propositions, and that each of these constituted in effect a separate amendment, and should have been separately submitted. The Constitution provides that, "when more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately." This amendment was to a single paragraph of the Constitution. While the amendment included more propositions than one, they were not wholly distinct and sep-

arate, or in regard to different subject-matters, but all tended to carry out one general purpose, and dealt with a single subject-matter—the salaries of judges in certain judicial circuits. It is true that it dealt with those salaries both in the past and in the future, but that is not a sufficient basis for a court to hold that it was necessary for the Legislature to have proposed two distinct amendments on that subject, instead of one. It was argued that some of the voters might have been willing to increase the salary for the future, but not to ratify its payment in the past (this court having held that the legislative provision for payment of the increase of salaries from the county treasuries was unconstitutional), and that the two things should have been separated. Had the Legislature seen fit to divide the two propositions in regard to the salaries of such judges, and to have submitted them separately, we do not say that they might not have done so. But we cannot hold that they were obliged to do so. Almost every amendment to the Constitution or to a legislative act involves more than a single proposition. Article 6, § 13, par. 1, of the Constitution deals with the subject of salaries of justices of the Supreme Court, judges of the superior courts, the Attorney General, and solicitors general—four different classes of officials. Suppose that the Legislature should determine to propose an amendment repealing this paragraph, or substituting another for it, or making a change in which it would affect all of the officers mentioned; could they not do so in a single amendment, or would they be compelled to propose four different amendments, because some voters might like to make the change in regard to one of the officials, but not in regard to another? Moreover, the same paragraph contains a provision that the Attorney General shall not have any fee or perquisite in cases arising after the adoption of the Constitution. Here is another distinct proposition, though still bearing on the question of the compensation of one of the officers named. Could not the Legislature propose an amendment repealing the entire paragraph, because some of the voters might like to vote separately on this proposition, disassociated from the rest of the section?

If the contention of counsel for defendant in error were sustained, it would be almost impossible to change many constitutional provisions by a single amendment, and such an amendment could not be submitted as a whole, but would have to be broken up into fragments, and submitted in disjointed propositions. In *State ex rel. Hudd v. Timme*, 54 Wis. 313, 336, 11 N. W. 785, 791, in dealing with a similar question, the court said: "In order to constitute more than one amendment, the proposition submitted must relate to more than one subject, and have at least two distinct and separate purposes, not dependent upon or connected with each other." The

purpose there, as stated, was to change from annual to biennial sessions of the Legislature, and incidentally and connected with this main purpose was a proposition to change the tenure of office of members of the General Assembly from one to two years, and to change the compensation of the members. In *State ex rel. Adams v. Herried*, 10 S. D. 120, 72 N. W. 93, the proposed amendment to the Constitution, by one section, changed the number of regents of the state educational institutions, and by two other sections abolished the trustees of such institutions. These sections were submitted together as constituting one amendment. It was held that this did not violate the constitutional requirement that amendments should be submitted in such a way that they might be voted on separately, as the single object of the amendment was to place such institutions under the control of a single board, and provisions incidental thereto would not constitute additional amendments. In *People ex rel. Elder v. Sours*, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34, supra, it was held that a constitutional requirement that each amendment should be separately submitted was not violated by a proposed amendment on the ground that it embraced several subjects where the amendment related to a single object, and that the subjects embraced therein, if several, did not have to be separately submitted, where they were germane to the general subject of the amendment. The amendment there involved provided for the consolidation of the city government of Denver and the county government of Arapahoe county, and contained various provisions touching the rights and duties of the new consolidated government. In *State ex rel. Morris v. Mason*, 43 La. Ann. 590, 9 South. 776, it was held that propositions auxiliary to the main purpose did not constitute such separate amendments as to require separate submission.

A leading case in which a proposed amendment was held to include within itself several distinct amendments, so that its submission as one was not in accord with the constitutional requirement that if more than one amendment were submitted at one time they should be submitted separately, was that of *State ex rel. McClurg v. Powell*, 77 Miss. 543, 27 South. 927, 48 L. R. A. 652, supra. There a single amendment to the Constitution was proposed, which made elective the judges of the Supreme, circuit, and chancery courts, and provided for the nomination of judges by districts, who should be voted for by the entire state, and which repealed five existing sections of the Constitution; three of them relating to the appointment of Supreme Court judges for specified terms and to the filling of vacancies, and two of them requiring the districting of the state into circuits and chancery districts, and the appointment by the Governor of such judges. It was held that the various sections of the Constitution sought to be repealed by one amendment

dealt with distinct and different subjects, and that the proposed amendment was in effect several amendments consolidated into one. The decision in *Rea v. City of La Fayette*, 130 Ga. 771, 61 S. E. 707, does not conflict with what is now held. That case arose under a proceeding to validate bonds of a municipality before their issuance. The Constitution limits the power of municipal corporations to incur any new debt, and requires a submission of the question to the voters. A statute provides for such election. It was sought to authorize the issuing of an aggregate amount of bonds, for several distinct purposes, by one submission—in effect the incurring of separate debts. The distinction is clear between such an election and submitting to the voters of the state an amendment to the Constitution.

The Constitution provides that no law shall be passed which refers to more than one subject-matter. Const. art. 3, § 7, par. 8 (Civil Code 1910, § 6437). But it has been held that this did not prevent the Legislature, in connection with the general subject-matter of creating a criminal court, from fixing its jurisdiction and powers, and prescribing the authority of its judge as a judicial officer, and in connection therewith amending previous acts establishing a city court, by withdrawing criminal jurisdiction therefrom. *Welborne v. State*, 114 Ga. 793 (6), 820, 40 S. E. 857. None of the grounds advanced as reasons why the constitutional amendment under consideration was not lawfully submitted and ratified, so as to become a part of the Constitution, can be sustained.

[10] 10. Treating the amendment as having been constitutionally submitted and ratified, and as having become an integral part of that instrument, we now come to consider whether it is void for any reason asserted by the defendant in error. Three errors pervade the arguments of learned counsel for defendant in error, and doubtless affected the decision of the presiding judge: First, a failure to keep in mind the difference between the power of the Legislature to pass laws, subject to the Constitution of the state and the limitations imposed thereby, and the power of the Legislature to propose and of the people to ratify, in the prescribed method, an amendment to the Constitution; second, a failure to recognize the difference between an effort on the part of the Legislature, or even of a constitutional convention, to overrule or reverse a decision of a court of competent jurisdiction, by granting a new trial or destroying rights of persons which have accrued thereunder, and the making of an amendment to the Constitution, whereby the authority to pass an act in reference to a county is conferred on the Legislature, or its previous action is confirmed, thus supplying the constitutional sanction because of the absence of which the previous legislative action has been de-

clared void; and, third, not discriminating between the status of an individual, or a private corporation with its rights of property as an artificial person, and a public corporation, a governmental agency to which has been intrusted the discharge of certain local governmental functions, and which is subject to legislative control, except where restrained by constitutional limitations, and a fortiori is subject to control by the Constitution of the state, unless it be in conflict with the Constitution of the United States. If these three points of distinction are carefully borne in mind, they will solve most of the questions which have been raised by the defendant in error.

The Constitution of the state places certain limitations and restrictions upon the action of the Legislature. Acts passed which conflict with the Constitution are invalid. But the Constitution itself may be amended in the manner provided by it; and when an amendment has been duly made, it becomes as much a part of the Constitution as any other part thereof. It can hardly be asserted that one part of the Constitution is unconstitutional, because it is not in perfect accord with another part of the same instrument. The general rule is that constitutional provisions will be harmonized where practicable. If there is to some extent an inconsistency between a provision in the Constitution as originally adopted, and another provision which has been added by amendment, so that one or the other must yield, the subsequent provision, being the last expression of the sovereign will of the people, will prevail as an implied modification pro tanto, rather than be declared void or of no effect because of such partial inconsistency. *City of Chicago v. Reeves*, 220 Ill. 274, 77 N. E. 237. We do not mean to decide, however, that there is such an inconsistency presented by the amendment under consideration. It would be unprofitable to treat this constitutional amendment as if it were simply an act of the Legislature, and to compare it with prior existing constitutional provisions in detail.

[11] 11. The amendment was further attacked as being violative of the Constitution of the United States. It was contended that it was obnoxious to the fourteenth amendment, which declares that no state shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

[17] A county has been defined to be: "One of the civil divisions of a country for judicial and political purposes, created by the sovereign power of the state of its own will, without the particular solicitation, consent, or concurrent action of the people who inhabit it; a local organization, which, for the purpose of civil administration, is invested with certain functions of corporate existence." 7 Am. & Eng. Enc. Law (2d Ed.)

900. In this state it is declared by the Constitution that "each county shall be a body corporate, with such powers and limitations as may be prescribed by law." Const. art. 11, § 1, par. 1 (Civil Code 1910, § 6594). There are also several provisions in regard to the method of changing county lines and county sites, and of dissolving a county and merging it with contiguous counties. Except as limited by the Constitution, counties are public corporations, which do not stand in the position of individuals or private corporations; nor, as against the state, do they own the taxes collected by them and the public property held by them as if it were private property.

[18] The distinction between private and public corporations is well recognized in this state; and, from its earliest Code to that last adopted, each has contained this definition of a public corporation: "A public corporation is one having for its object the administration of a portion of the powers of government, delegated to it for that purpose. Such are municipal corporations." Civil Code 1910, § 2190. If counties were purely legislative creations, they would be entirely subject to legislative enactment. While the power of the Legislature in regard to them is to some extent limited by the state Constitution, they are certainly subject to that Constitution. If they can have any private property at all, as distinct from public property, none is here involved. This is not the case of an individual who is being deprived of his liberty or his property by the public; nor is it the case of a private corporation whose property is being taken.

By amendment to the Constitution the people have commanded one of the counties of the state to make certain payments for public purposes; and the treasurer of the county is contesting the validity of the amendment. As he is a bonded officer, who may be liable for an unlawful payment made from public funds in his hands, we do not hold that he cannot question the legality of the command. But we are calling attention to the fact that the question is substantially between the state and one of its subordinate divisions or governmental corporations, through its official, in considering how the question should be answered.

In *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 311, 23 L. Ed. 552, a territorial Legislature organized two new counties and included within their limits a part of the territory of an existing county, but made no provision for apportioning debts or liabilities. It was declared that, "unless the Constitution of a state or the organic law of a territory otherwise prescribes, the Legislature has the power to diminish or enlarge the area of a county, whenever the public convenience or necessity requires;" and it was accordingly held that the old county, on discharging the debts and liabilities previ-

ously incurred, had no claim on the new counties for contribution. Mr. Justice Clifford said: "Public duties are required of counties, as well as of towns, as a part of the machinery of the state, and, in order that they may be able to perform those duties, they are vested with certain corporate powers; but their functions are wholly of a public nature, and they are at all times as much subject to the will of the Legislature as incorporated towns, as appears by the best text-writers upon the subject and the great weight of judicial authority. Institutions of the kind, whether called 'counties' or 'towns,' are the auxiliaries of the state in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the Legislature of the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything in the nature of compact."

But it was urged that the requirement that the county of Richmond should pay a certain amount of the salary of the judge of the circuit which included that county, over and above the salaries paid to certain other judges of the superior court, was a deprivation of the equal protection of the law, and an unconstitutional placing of a public burden upon that county, and thus indirectly upon its taxpayers. In *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, an assessment of certain real estate in New Orleans for draining swamp lands of that city was resisted. The Supreme Court held that "neither the corporate agency by which the work is done, the extensive price which the statute allows therefor, nor the relative importance of the work to the value of the lands assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the federal Constitution." In *County of Mobile v. Kimball*, 102 U. S. 691, 703, 26 L. Ed. 238, an act of the General Assembly of Alabama which provides for the improvement of the Mobile harbor at the expense of the county of Mobile was attacked. In the opinion Mr. Justice Field said: "Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole state. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the Legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the state, or lay the greater share or the whole

upon that county or portion of the state specially and immediately benefited by the expenditure." In *Giozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599, referring to the fourteenth amendment of the Constitution of the United States and its effect upon the state's police and taxing powers, Chief Justice Fuller said: "Nor, in respect of taxation, was the amendment intended to compel the state to adopt an iron rule of equality, to prevent the classification of property for taxation at different rates, or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class." See, also, *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892. In *Michigan Central R. Co. v. Powers*, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. Ed. 744, it was said: "There is no general supervision by the nation over state taxation, in regard to which the state has, generally speaking, the freedom of a sovereign, both as to objects and methods."

The amendment under consideration did not declare that certain persons should pay a tax, and that others in the same class should be exempted. It did not arbitrarily place the burden of supporting the state government upon certain taxpayers, or even certain counties. It classified certain judicial circuits having in them a county containing a city of not less than a certain population by the census of 1900. At the time of the adoption of the Constitution there were 16 judicial circuits in the state. It was recognized that there were certain inequalities in the business in those circuits and in the labor of the judges. An ordinance was passed which contemplated an equalization as far as practicable. Civil Code 1910, § 6616. Since then by various acts the number of circuits has been increased, and certain changes have been made in the counties included in them. But apparently no complete method of equalization has been found practicable. The Augusta circuit is composed of four counties. Of these Richmond county far exceeds in wealth and population any of the other three. Recognizing the increased business and the consequent increased need for the sitting of the superior court in that county, the Legislature provided for four terms to be held there each year, while in the other counties of the circuit two terms were held. It is to be presumed that the Legislature in proposing the amendment to the Constitution, and the people in ratifying it, found legitimate reason, growing out of the increased population, business, need for additional sessions of court, and demands upon the time and labor of the judge, to put into one class the circuits containing the three largest cities in the state, and to give larger salaries to the judges sitting in them than in other circuits. In the Atlanta and

Eastern circuits, the county containing the city constitutes the entire circuit. In the Augusta circuit, there are four counties, as mentioned above. But we cannot say that the recognition of the facts above mentioned and the placing upon that county of a corresponding duty of paying a greater part of the salary than each of the other counties, or not distributing this increase over the entire state, was such an arbitrary exaction, contained in an amendment to the Constitution of the state itself, as could be declared to deprive the county or its treasurer of the equal protection of the laws. There is, of course, some difference between assessments for local improvements and the payment of a part of a salary; but even the improvement of streets, roads, or harbors benefits others besides those who live in the immediate locality where the improvement is made.

It was argued, if such a precedent were set, a two-thirds majority in the Legislature and a mere majority of the voters could impose on any county, city, or set of taxpayers the burden of sustaining the entire state government, or any part of it, at their will, and thus some could make tyrannous exactions of others, to benefit themselves. We cannot accede to the proposition. The difference between such a procedure, and a bona fide classification of judicial circuits on account of population, wealth, business, and requirements of sessions of the court and services of the judge, is apparent. In *Grim v. Welsenberg School District*, 57 Pa. 433, 98 Am. Dec. 237, Sharswood, J., said that "perfectly equal taxation will remain an unattainable good as long as laws and government and men are imperfect." In *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798, Mr. Justice Miller said: "Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream." With the wisdom or expediency of the amendment this court does not deal. The Legislature and the people have passed upon that.

[12] 12. It was urged with great earnestness that this court had adjudicated that the legislative provision for payment of the additional salary of the judges from the county treasuries was unconstitutional, that the amendment was an effort to override that decision, that this was not keeping the three departments of government distinct, that the judgment operated as an estoppel, and that to now allow a recovery would be violative of the fourteenth amendment of the Constitution of the United States. This argument is based on an apparent misconception of what has transpired. The Legislature undertook to make an increase in the salaries of judges in certain circuits, and to have the increase paid by the counties therein containing cities of not more than a certain population. On account of provisions in the Constitution of the state, this court held that the Legislature could not supplement sala-

ries of the judges of the superior court from county treasuries. *Clark v. Hammond*, 134 Ga. 792, 68 S. E. 600. Thereupon, not seeking to reverse such adjudication, but recognizing it, the Legislature proposed, and the people ratified, an amendment to the Constitution, by which that was rendered constitutional which previously the Legislature could not constitutionally do. We think it requires no argument beyond this statement to show that the contention is not well founded. Aside from the limitations in a state Constitution, and tested only by the federal Constitution, such curative laws have recently been held valid by the Supreme Court of the United States in the case of *West Side Belt R. Co. v. Pittsburgh Construction Co.*, 219 U. S. 92, 31 Sup. Ct. 196, 55 L. Ed. —.

It was argued that this amendment was retroactive, and sought to confirm payments of salaries made before its passage under an unconstitutional act. The Constitution of the United States prohibits the passage of an *ex post facto* law, or law impairing the obligation of contracts. Const. U. S. art. 1, § 10, par. 1. It does not in terms prohibit retroactive legislation, though such laws may often be invalid as impairing the obligation of contracts, depriving persons of their property without due process of law, or depriving them of the equal protection of the laws. Prohibition of retroactive laws, *eo nomine*, is a safeguard of the state Constitution against dangerous legislation. In the absence of constitutional restriction, it was held in *United States v. Realty Co.*, 163 U. S. 427, 439, 16 Sup. Ct. 1120, 1125 (41 L. Ed. 215), that Congress has the power to determine whether claims on the public treasury are founded upon moral and honorable obligations, and upon principles of right and justice, and that, having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decision can rarely, if ever, be the subject of review by the judicial branch of the government. Mr. Justice Peckham, delivering the opinion of the court, said: "We are of the opinion that the parties, situated as were the plaintiffs in these actions, acquired claims upon the government of an equitable, moral, or honorary nature. Could Congress legally recognize and pay them, although the act of 1890 as to its bounty provisions might be unconstitutional? It is true that in general an unconstitutional act of Congress is the same as if there were no act; that is, regarding it in its purely legal aspect. Being in violation of the Constitution, that instrument must govern, and no one can base any legal claim as arising out of such an act. That is a very different principle, however, from that which we think governs in this case." See, also, *Guthrie National Bank v. Guthrie*, 173 U. S. 528, 19 Sup. Ct. 513, 43 L. Ed. 796; *Thompson v. Perrine*, 103 U. S. 806, 26 L. Ed. 612. In *Thompson v. Lee County*, 3 Wall. 827, 18 L. Ed. 177, it was said: "If the Leg-

islature possess the power to authorize an act to be done, it can, by a retroactive act, cure the evils which existed, because the power thus conferred has been irregularly executed." See, also, *Board of Commissioners of Tippecanoe County v. Lucas*, 93 U. S. 108, 23 L. Ed. 822. In this state the Legislature did not possess the power to make this classification and require this payment from the county treasuries; but the people, through the Constitution, had that power originally, and by an amendment duly made could cure the defect in the legislation.

[13, 14] 13, 14. It was also contended that this amendment impaired the obligation of a contract. Under the acts of the Legislature, a number of payments for salary were made to the judge. The county commissioner by warrants on the county treasurer directed the latter to pay to the judge or his order the amounts thereof on bills audited. Each warrant contained the words, "Subject to any claim of the county," and each was indorsed in obtaining payment. This merely meant that, if the county had a claim against the judge, it should be deducted from the amount of the warrant. It did not constitute a contract to pay back to the county such salary as was paid to him, in case the act of the Legislature under which it was paid should at some future time be declared unconstitutional by the courts. Such claim as the county may have had for restitution, after the act was held unconstitutional, did not rest on express contract. In *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 11 Sup. Ct. 790, 35 L. Ed. 446, it was held that: "An executive agency, created by a statute of a state for the purpose of improving public highways, and empowered to assess the cost of its improvement upon adjoining lands, and to put up for sale and buy in for a term of years for its own use any such lands delinquent in the payment of the assessment, does not, by such a purchase, acquire a contract right in the land so bought which the state cannot modify without violating the provisions of the Constitution of the United States. Such a transaction is matter of law, and not of contract, and as such is not open to constitutional objections."

[15] 15. It was further urged that the amendment was in conflict with the provision of the federal Constitution which guarantees to every state a republican form of government. It cannot be successfully claimed that the state of Georgia will cease to have a republican form of government because, by a constitutional amendment, certain judicial circuits were classified and a provision was made as to them in respect to the payment of the judges of the superior courts. Judge Story, in referring to the power of the states to change their Constitutions or forms, said: "The only restriction imposed on them is that they shall not exchange republican for anti-republican Constitutions." Story on Constitution, § 1817; Cooley on Constitutional Limitations (7th Ed.) 237 et seq.

[16] 16: It was contended that the act of 1904, as amended by those of 1905 and 1906, fixed the salary of those judges of the superior courts which were dealt with by them at \$5,000 each; that this court so construed such acts in *Clark v. Hammond*, 134 Ga. 792, 68 S. E. 600, *supra*; that it was held that the provision for payment from the county treasuries was void, thus leaving the amount fixed to be paid from the treasury of the state; that when the amendment ratified those acts of the Legislature, it did so with the construction which had been placed upon them by the Supreme Court; that, therefore, the salaries being already fixed at \$5,000 to be paid from the state treasury, there was no balance between what was to be paid by the state and \$5,000 to be paid from the county treasury, either in the past or in the future. This argument is ingenious, but fallacious. We cannot agree to the position that the amendment did nothing, because there was nothing to do. This court did not construe the acts mentioned as fixing a salary of \$5,000 to be paid to the judge of the superior court of the Augusta circuit out of the state treasury. We held that the effort by the legislative act to supplement the salaries of the judges of the superior court from county treasuries was unconstitutional. That feature of the act was not such an independent or detached provision as could be eliminated and leave the act to stand as fixing salaries to be paid from the state treasury. It is evident that the Legislature never intended any such enactment, and such a construction would be to make an entirely different legislative scheme from that promulgated by the General Assembly. With the decision that this inherent part of the acts was void, the acts themselves were left without force. The amendment revitalized the acts, established the rule for the future, and ratified what had been done in the past.

This case was not one turning upon contested issues of fact, but was controlled by questions of law. In their solution we have not been able to concur with the trial judge. The mandamus absolute should have been granted. Judgment reversed. All the Justices concur.

(9 Ga. App. 396)

HORNSBY v. STATE. (No. 3,187.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The instructions requested, so far as pertinent to the issue, were fully and fairly covered by the general charge. In view of the evidence in the record, all of the other exceptions are without merit. The evidence authorized the verdict rendered, and there was no error in refusing a new trial.

Error from Superior Court, Miller County; W. C. Worrill, Judge.

E. E. Hornsby was convicted of crime, and brings error. Affirmed.

W. I. Gear, for plaintiff in error. J. A. Laing, Sol. Gen., and R. R. Arnold, for the State.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 400)

MORING et al. v. MILLS. (No. 3,216.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

ACTION FOR PRICE.

This case is controlled by the decision of the Supreme Court in the case of *Pryor v. Ladden & Bates*, 134 Ga. 288, 67 S. E. 654.

Error from Superior Court, Jefferson County; B. T. Rawlings, Judge.

Action between P. L. Moring and others and J. B. Mills. From the judgment, Moring and others bring error. Reversed.

R. N. Hardeman, for plaintiffs in error.
R. L. Gamble, for defendant in error.

POWELL, J. Judgment reversed.

(9 Ga. App. 413)

PADGETT v. REIDSVILLE & S. E. R. CO.
(No. 3,319.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

DISMISSAL OF ACTION.

Under all the facts presented, the court did not err in dismissing the action for the plaintiff's failure to perfect service, and in refusing to allow further time for that purpose.

Error from City Court of Reidsville; Eschol Graham, Judge.

Action between C. C. Padgett and the Reidsville & Southeastern Railroad Company. From the judgment, Padgett brings error. Affirmed.

Way & Burkhalter, for plaintiff in error.
Hines & Jordan, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 395)

RAWLINS v. CLEMENTS. (No. 3,052.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The evidence supports the verdict.

2. INSTRUCTIONS.

The instructions to the jury on the subject of impeachment of witnesses were not confusing or otherwise erroneous.

3. NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered testimony does not demand a new trial, and this court will not overrule the exercise of discretion by the trial judge in relation thereto.

Error from City Court of McRae; Eschol Graham, Judge.

Action between J. T. Rawlins and M. N. Clements. From the judgment, Rawlins brings error. Affirmed.

L. C. Harrell, Tom Eason, B. M. Frizzell, and Hal Lawson, for plaintiff in error. Wooten & Mann, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 397)

INDEPENDENT SAWMILL CO. v. THOMAS. (No. 3,190.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

CERTIORARI (§ 68*)—REVIEW—SUFFICIENCY OF EVIDENCE.

As the plaintiff showed that, if he had any debt against any one, it was not against the defendant, the verdict in the plaintiff's favor was contrary to law, and the judgment of the superior court on certiorari should have set it aside.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 68.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by W. T. Thomas against the Independent Sawmill Company. From a judgment for plaintiff, defendant brings error. Reversed.

M. C. Tarver, for plaintiff in error. W. E. Mann, for defendant in error.

POWELL, J. Judgment reversed.

(9 Ga. App. 424)

ROYSTER v. STATE. (No. 3,350.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

REVIEW—EVIDENCE.

The evidence, though circumstantial, was sufficient to authorize the conviction. The exceptions to the charge of the court are not meritorious.

Error from City Court of Sylvester; J. B. Williamson, Judge.

Alberta Royster was convicted of crime, and brings error. Affirmed.

L. D. Passmore and Perry, Foy & Monk, for plaintiff in error. J. H. Tipton, Sol., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 413)

KING v. CITY OF JACKSON. (No. 3,328.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 994*)—REVIEW—CREDIBILITY OF WITNESS.

This court has jurisdiction only of errors of law. Whether a witness is credible is not a question of law. The case is controlled by *Plummer v. State*, 1 Ga. App. 507, 57 S. E. 969.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

Error from Superior Court, Butts County; R. T. Daniel, Judge.

Action between John King and the City of Jackson. From the judgment, King brings error. Affirmed.

H. M. Fletcher, for plaintiff in error. W. E. Watkins, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 448)

JAMISON v. STATE. (No. 3,391.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The assignments of error as to the charge of the court are not well taken. There is sufficient evidence to authorize the verdict.

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

O. L. Jamison was convicted of crime, and brings error. Affirmed.

Lipscomb, Willingham & Wright, for plaintiff in error. John W. Bale, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 326)

BRYAN v. MEADERS BROS. (No. 2,897.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 135*)—EXECUTION—AFFIDAVIT OF ILLEGALITY—DISMISSAL.

A justice of the peace is a collecting officer, and payment to him of a judgment rendered in his court is good payment. Hence, where an affidavit of illegality is filed to an execution issued upon a judgment rendered on the 9th of May, and it sets up that the affiant paid the amount of the judgment into the hands of the justice of the peace of the district on the 23d day of May of that year, it was error for the justice of the peace to sustain a motion to dismiss the affidavit of illegality on the ground that the defendant was endeavoring to go behind the judgment and was estopped from attacking the judgment on the ground that he had had his day in court.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 135.*]

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Affidavit of illegality between Meaders Bros. and J. O. Bryan. Affidavit dismissed, and Bryan brings error. Reversed.

P. Cooley and L. L. Ray, for plaintiff in error. R. L. J. Smith and S. J. Smith, Jr., for defendant in error.

POWELL, J. Meaders Bros., it appears, obtained judgment against Tanner and caused garnishment to be issued to Bryan. Bryan admitted indebtedness, and judgment was duly rendered against him on May 9, 1908. Execution was issued on July 27, 1908, upon

this judgment, and upon its being levied Bryan filed an affidavit of illegality, setting up that on May 28, 1908, he paid into the hands of the justice of the peace of the district in which the judgment was rendered the full amount of the execution. The plaintiff moved to dismiss this affidavit of illegality upon the ground that the defendant was endeavoring to go back of the judgment and was estopped from attacking the judgment on the ground that he had had his day in court. The justice of the peace sustained this motion and dismissed the affidavit of illegality. The case came to the superior court on certiorari, and in his answer the justice of the peace sets up a great many matters which could not have been made a part of the record in the case, relating to the manner of payment and giving reasons resting wholly outside of the record as to why he had sustained the motion to dismiss the affidavit of illegality. Of course, these recitals as to what the justice of the peace knew about the matter, outside of what was of record in the case, are not proper for consideration, even though they are included in his answer. A justice of the peace cannot cut off the plaintiff's case in limine, and then "answer him out of court," by setting up, in his answer to the certiorari, extraneous matters which he professes to know. It is hardly necessary for us to say that, if the payment was in fact made to the justice of the peace, it was a good payment. A justice of the peace in this state is a collecting officer, and authorized to collect debts sued before him. *Lewis v. Smith*, 99 Ga. 603, 27 S. E. 162; *Gholston v. O'Kelley*, 81 Ga. 19, 24, 7 S. E. 107; *Johnson v. Hall*, 5 Ga. 384. The certiorari should have been sustained in the superior court.

Judgment reversed.

(9 Ga. App. 406)

HENDLEY v. SIRMONS. (No. 3,245.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 205*)—CERTIORARI—DISMISSAL.

Inasmuch as the magistrate's answer (unexcepted to so far as this point is concerned) failed to verify the allegation in the petition for certiorari that a final judgment of the nature alleged had been rendered, the judge of the superior court did not err in dismissing the certiorari, irrespective of the correctness of the grounds upon which he based his ruling. *Landrum v. Moss*, 1 Ga. App. 216 (6), 57 S. E. 965. However, the judge of the superior court seems to have made a proper disposition of the matter, irrespective of this technicality.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 793-799; Dec. Dig. § 205.*]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action between M. H. Hendley and Dave Sirmons. After a judgment before a justice, Hendley applied for a writ of certiorari, and from an order dismissing the writ, he brings error. Affirmed.

Hendricks & Christian, for plaintiff in error. Alexander & Gary, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 337)

McINTIRE v. HARTFELDER-GARBUTT CO. (No. 2,900.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 301*)—TORTS OF SERVANT—LIABILITY OF MASTER.

The owner of an automobile is not usually liable for injuries inflicted by one who at the time is driving the automobile without his consent and contrary to his directions, even though the person driving the machine is an employé of the owner and did have the authority to use the machine at times for certain purposes.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1218; Dec. Dig. § 301.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Charles A. McIntire against the Hartfelder-Garbutt Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Cann, Barrow & McIntire, for plaintiff in error. Oliver & Oliver, for defendant in error.

POWELL, J. The plaintiff was injured by the negligent operation of an automobile driven at the time by a Mr. Starr. The only proof of any connection between the defendant and the machine or between the defendant and Starr was contained in a letter which was written by the defendant to the plaintiff's attorney and which was introduced in evidence. So far as material it is as follows: "Replying to your favor of the 19th in reference to Mr. Chas. A. McIntire being struck by our machine being operated by Mr. Starr, beg to say that we provide a machine for our city salesman for business use only. Mr. Starr occupies this position with us. The day he was unfortunate enough to strike Mr. McIntire with the machine, Mr. Starr took this machine without our permission to go to dinner. He was instructed to leave the machine at Bryson's, or Conrad's, I am not exactly sure which. He was going to dinner, and consequently we had no control over him, and while using our machine was doing so without our permission." The court granted a nonsuit, and plaintiff excepts.

Counsel for the plaintiff in error construe this letter as meaning that Starr had been directed by the defendant to take the machine to Bryson's or Conrad's garage, and

was on his way there, as well as on his way to dinner, when the injury occurred. We do not so construe the language. It seems to us to mean, when taken in connection with its entire context, that, notwithstanding Mr. Starr had been directed not to take the machine for the purpose of going to dinner, but had been instructed to leave it at the garage, he did the former. With the letter thus construed, it puts the case within the rule announced by this court in the case of *Lewis v. Amorous*, 8 Ga. App. 50, 59 S. E. 338. This case arose prior to the passage of the automobile act of 1910 (Laws 1910, p. 90), and we have not examined that act to see whether there is anything therein which changes the common-law rule previously in force in this state as to this question. Judgment affirmed.

(9 Ga. App. 325)

POPE v. GROVENSTEIN & BISHOP.
(No. 2,893.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

TRIAL (§ 203*)—INSTRUCTIONS—REFUSAL OF REQUESTS.

The principal issue in the case was an accord and satisfaction, and on this issue the evidence was in direct conflict. The presiding judge, in the hearing of the jury, refused a verbal request to charge the law relating to this defense, on the ground that it had not been proved. This was error demanding the grant of a new trial, for this was the controlling issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

Error from City Court of Greenville; H. H. Reville, Judge.

Action between Grovenstein & Bishop and D. T. Pope. From the judgment, Pope brings error. Reversed.

N. F. Culpepper, for plaintiff in error. J. E. Justiss, for defendant in error.

HILL, C. J. Judgment reversed.

(9 Ga. App. 396)

DURDEN et al. v. DE LOACH. (No. 3,173.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 588*)—AFFIRMANCE—FAILURE TO BRIEF EVIDENCE.

The determination of the questions presented depends upon a consideration of the evidence. The record contains no legal brief of the evidence, as the documents which were introduced at the trial are copied into what purports to be a brief of the evidence in extenso, and without any attempt at condensation or abridgment. Following the uniform practice of this court and of the Supreme Court as to this, the judgment must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2607-2610; Dec. Dig. § 588.*]

Error from City Court of Swainsboro; Frank Mitchell, Judge.

Action between W. M. Durden and others and Z. T. De Loach, administrator. From the judgment, Durden and others bring error. Affirmed.

Saffold & Larsen, for plaintiffs in error. G. S. Johnston and Williams & Bradley, for defendant in error.

POWELL, J. Affirmed.

(9 Ga. App. 440)

ANDREWS v. CITY OF ATLANTA.
(No. 3,395.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

REVIEW OF EVIDENCE.

The evidence, though circumstantial only, is not so inconclusive as to justify this court in setting aside the conviction.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between John Andrews and the City of Atlanta. From the judgment, Andrews brings error. Affirmed.

See, also, 7 Ga. App. 472, 67 S. E. 109.

Burton Cloud, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 344)

L. MOHR & SONS v. LENOX MERCANTILE CO. (No. 2,937.)

(Court of Appeals Georgia. June 7, 1911.)

(Syllabus by the Court.)

REVIEW OF EVIDENCE.

The controlling question was one of fact, which the jury properly decided, and the exceptions of law are entirely without merit.

Error from City Court of Nashville; W. D. Buie, Judge.

Action between L. Mohr & Sons and the Lenox Mercantile Company. From the judgment, L. Mohr & Sons bring error. Affirmed.

Hendricks & Christian, for plaintiffs in error. J. W. Powell, for defendant in error.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 423)

COLEMAN v. STATE. (No. 3,332.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

REVIEW OF EVIDENCE.

The evidence, though circumstantial, authorized the conviction.

Error from City Court of Americus; C. R. Crish, Judge.

Mose Coleman was convicted of crime, and brings error. Affirmed.

W. T. Lane, for plaintiff in error. J. R. Williams, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 442)

SCHLEY v. STATE. (No. 3,380.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

SALE OF LIQUOR.

No error of law is complained of, and the evidence for the prosecution fully supports the verdict. The accused introduced no evidence, and his statement to the jury fully authorized the inference that his claim that the bottle of whisky was a loan was simply a pretext for what was in fact a sale.

Error from City Court of Swainsboro; H. B. Daniel, Judge.

Alfred Schley was convicted of an illegal sale of liquor, and appeals. Affirmed.

S. J. Tyson and Augustus F. Lee, for plaintiff in error. A. S. Bradley, Sol., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 381)

PARISH v. BIRD. (No. 3,117.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

NEW TRIAL (§ 154*)—MOTION TO DISMISS—LACHES.

This court cannot say that there was such an abuse of discretion as to amount to reversible error in the trial judge's dismissing the motion for a new trial for want of prosecution, or in his refusal to reinstate it after the adjournment of the term.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 312, 313; Dec. Dig. § 154.*]

Error from City Court of Reidsville; C. L. Morgan, Judge.

Action between Wayne Parish, administrator, and W. B. Bird. From the judgment, Parish brings error. Affirmed.

H. B. Strange, for plaintiff in error. W. T. Burkhalter, for defendant in error.

POWELL, J. The exception is to the dismissing of the motion for new trial for want of prosecution, and to the refusal of the judge to reinstate it after the adjournment of the term to which it was set. After carefully considering the facts recited in the bill of exceptions and the record, we are of the opinion that, while counsel for the movant is to be exonerated from all charge of neglect in the prosecution of his motion, and while his failure to press the matter to an earlier hearing was due to his generosity to opposing counsel, on account of the state of the latter's health, still, after the motion

had been allowed thus to pend for nearly four years, and until the trial judge had forgotten the facts, it was not an abuse of discretion for him to dismiss the motion, and, even though it appeared that the order of dismissal was improvidently granted on the particular date on which it was granted, still there was no error in refusing to reinstate the motion after the adjournment of the term.

Judgment affirmed.

(9 Ga. App. 396)

AKRIDGE v. STATE. (No. 3,170.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

INDICTMENT AND INFORMATION (§ 166*)—ISSUES—PROOF OF VENUE—NECESSITY.

As the record fails to disclose any proof of venue, a new trial must be granted.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 523; Dec. Dig. § 166.*]

Error from City Court of Monroe; A. C. Stone, Judge.

Charley Akridge was convicted of crime, and brings error. Reversed.

Orrin Roberts, for plaintiff in error. H. G. Nowell, Sol., for the State.

POWELL, J. Judgment reversed.

(9 Ga. App. 322)

J. H. CARTER & CO. v. SWIFT FERTILIZER WORKS. (No. 2,873.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

CONTRACTS (§ 273*)—PARTIAL RESCISSION.

Where a promissory note is given in pursuance of a single contract, expressed in a set of contemporaneous writings, and the person to whom the note is given sues thereon, he cannot, when the opposite party seeks to recoup by setting up damages resulting from the breach of the terms imposed upon the holder of the note under one of the contemporaneous writings, set up that this contemporaneous writing never became binding, because it was made by his agent subject to his confirmation, and he had never confirmed it. Ordinarily, where there is an option to affirm or disaffirm a contract, it relates to the whole contract, and cannot be exercised partially.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1194; Dec. Dig. § 273.*]

Error from City Court of Baxley; A. B. Sellers, Judge pro hac.

Action by the Swift Fertilizer Works against J. H. Carter & Co. and another. Verdict for plaintiff, and the defendants named bring error. Reversed.

Wade H. Watson and Jas. R. Thomas, for plaintiffs in error. Parker & Highsmith and Tye, Peeples & Jordan, for defendant in error.

POWELL, J. The Swift Fertilizer Works sued Carter & Co. as principals and Johnson as surety on a promissory note. The defendants pleaded that this note was given under the following circumstances: The Swift Fertilizer Works had an unsecured debt against an old firm doing business under the name of Carter & Co., but composed of different persons from the partnership here sued; that the new firm agreed that they would give this note, and would give security thereon, if the Swift Fertilizer Works would appoint this new firm its agents for certain designated territory, and would sell to them during the season of 1908 fertilizer at certain specified prices; and that in violation of the contract it had revoked the agency and refused to furnish them fertilizer at the price named, whereby they lost a contemplated profit sufficient to pay off the balance that remained due upon the note, after deducting certain payments which had been made. This contract as to the appointment of the new firm of Carter & Co. as agents was in writing, and executed simultaneously with the note; but it provided on its face that it should not become binding until it had been approved by the manager of the Atlanta office, it being signed merely by the traveling salesman who took the note sued on. It appears that the Swift Fertilizer Works did notify Carter & Co. that they would not perform this written contract, which had been signed by their agent, and therefore declined to ship the fertilizer which Carter & Co. ordered out. There was some evidence as to the extent of the damage which resulted by reason of the plaintiff's failure to fill their order. The court directed a verdict in favor of the plaintiff.

It is undoubtedly true that the plaintiff did not become bound by the contract, which its agent had made, until its managing officer confirmed the contract; but it is equally true that, if the note was given merely as a part of a contract of which the agency agreement constituted another part, the plaintiff cannot hold the defendants upon the note without binding itself to the other contract. This agency agreement on its face provided that it should not become binding until it was confirmed, but that when it was confirmed it should be in force as of the date when the note was made. There are no words of confirmation in the record; but actions speak louder than words, and are often much more potent when they break the silence. If the plaintiff has never confirmed this contract, then it has no right to sue upon the notes. Under the circumstances, any attempt to collect the note operated as confirmation just as effectually as any written confirmation could have operated. The contract as submitted to the plaintiff was a proposition of give and take. Under

the provisional agreement, the plaintiff had the right to accept or to repudiate the proposition by which it would take the note and give the agency contract; but it cannot act upon the contract for the purpose of taking from the defendants, and then repudiate it so far as giving to the defendants is concerned. This proposition is elementary, and needs no further elaboration.

There is a suggestion that the defendants' proof of the damages which resulted to them in consequence of the plaintiff's breach is too indefinite. It may be that it is too indefinite as to some of the damages claimed; but it is certainly definite enough as to a part of them, and the court by the direction of the verdict ignored this entirely. It is proper that we should notice another exception, which relates to the rejection of testimony of the defendants that they had sold this fertilizer at a profit of \$2.50 a ton, and that it was contemplated at the time of the making of the contract that they should resell it at this amount of profit. The evidence was doubtless excluded on the ground that this would be an attempt to add to the writing, which was silent on this subject. This was a matter with which the contract did not attempt to deal at all, and the evidence was admissible. It did not vary the contract, and it tended to make out one of the elements of the defendants' case, namely, that the damage which they had suffered through the loss of this profit was in contemplation of the parties at the time the contract was made.

Judgment reversed.

(9 Ga. App. 385)

GRANITE CITY CRUSH STONE CO. v. SOUTHERN MARBLE & GRANITE CO.
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1001*)—REVIEW—SUFFICIENCY OF EVIDENCE.

The correspondence between the parties and what was done thereunder having made a prima facie case of liability in the plaintiff's favor, and the defendant not having proved any fact sufficient to discharge this liability, the verdict for the defendant is contrary to law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3934; Dec. Dig. § 1001.*]

Error from City Court of Statesboro; J. F. Brannen, Judge.

Action by the Granite City Crush Stone Company against the Southern Marble & Granite Company. Judgment for defendant, and plaintiff brings error. Reversed.

Johnston & Cone and L. B. Norton, for plaintiff in error. H. B. Strange, for defendant in error.

POWELL, J. The Granite City Crush Stone Company brought suit against the Southern Marble & Granite Company on ac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

count of the price of 36 stone window sills, of the value of \$3 each. There is but little dispute as to the facts, and the case involves the construction of a course of correspondence and of certain letters which took place in connection therewith. On July 9, 1909, the plaintiff received from the defendant the following letter: "Please ship to S. A. Rogers 36 window sills of the following dimensions and finish: 3—6 long, 5x8"—4 cut top and face quoted by you to us at \$3 apiece. Bill these to him at \$3.25 each, and you can remit us \$3 as soon as he pays you. Mr. Rogers, we are pretty sure, is all right. He is a contractor here, and does quite a large business; but if you do not care to ship them to him open, you can ship with B/L attached. We do not care to assume the responsibility for the payment of this bill for the amount we are to receive as a compensation. If you decide to ship with the B/L attached, notify Mr. Rogers. However, you can proceed with the order, as they want the sills as soon as they can get them." To which the plaintiff replied: "Your favor of 7—9—09 received this morning, ordering 36 window sills of the following dimensions and finish: 3—6 long 5"x8"—4 cut top and face, the same to be shipped to Mr. Rogers at \$3.25 each, 25 cents each to go to you, we understand. We will begin work on them at once, and when finished will ship to Mr. Rogers with B/L attached. As you are on the ground and know Mr. Rogers, and don't care to assume the responsibility, we had rather not take the risk. Do you desire us to write Mr. Rogers and state to him that we are cutting the sills for him and will ship B/L attached? We thank you very much for this order, and will appreciate any work you place with us, assuring you that we are ready and willing to allow you a certain per cent. on all work placed through you with us." The plaintiff shipped the sills to itself as consignee, "order notify" S. A. Rogers, and attached the bill of lading to a sight draft, and sent it to a bank in the defendant's city for collection. It turned out that Rogers had ordered only 12 sills, and on the 29th of July the defendant wrote to the plaintiff, telling of the mistake that had been made in transmitting the order, and asking that the plaintiff would wire the agent of the railroad company to let Rogers pay for 12 of the sills, and stating that the defendant would dispose of the balance for the plaintiff. What action was taken upon this letter does not appear. On the 27th of August the defendant again wrote the plaintiff as follows: "In regards to the sills here for Rogers, will state this to you: Rogers wants to pay for one dozen of these, including freight and demurrage. We can possibly dispose of the others here for you soon. We will do this without any compensation from you, and will see that Rogers takes up the draft for one dozen and pays freight and demurrage at once, if this suits you. As we

wrote you in the beginning that we would not assume any obligations in the matter, we do not feel like advancing this additional amount. If this will suit you, notify the bank here to let him pay for one dozen at the price sold, and you need not remit us anything, and we will dispose of the other for you at the same price, charging you no commission at all." To which the plaintiff replied: "Answering your favor of the 27th inst., beg to state that in the first place you have not treated us right in this matter. At this time, though, we have not got the time to spare in forcing payment in full for the stone shipped according to your order. We note that you are willing to pay at this time for 12 of the sills, and pay all freight and demurrage on the full amount, and would soon dispose of the balance and remit for them free of any charges to us. We are, under the circumstances, willing to accede to this proposition, with the full understanding that we are looking to you for the payment of all this stone, and do not know Rogers in the transaction, only as the man you directed us to ship the stone to. This will be your authority to the bank to allow payment for 12 of the sills, \$39, and you pay all freight and demurrage charges on all the stone, and you to take the other sills and dispose of them soon and remit." It further appears that Rogers acted upon the direction of the defendant company, and took and used 12 of the sills, and that he got them without the consent of the carrier; that the bill of lading was never taken up from the bank and surrendered to the carrier; that the carrier's charges were unpaid, and the remaining 24 sills of stone were sold for charges and bought in by Rogers. At some time during these transactions (the exact date not being disclosed by the evidence) the plaintiff's representative called upon the defendant's manager and asked for a settlement. The defendant's manager gave to the plaintiff's representative Rogers' check for \$39, which paid for 12 of the stone sills which Rogers had used, and said that he had been trying to dispose of the remainder, and had failed to do so, but would go to Savannah in a few days and dispose of the remainder and remit.

On this state of affairs the court charged the jury that under the letter first quoted above (the initial letter of the correspondence) the defendant assumed no liability; and in this we think that the court was correct, at least so far as reference to direct and primary liability was concerned. In regard to the letter written by the defendant to the plaintiff on August 27th, and the plaintiff's reply thereto, the court charged the jury the sections of the Code which provide that mutuality of assent is an essential of a contract, and that where a proposal is made by a letter and the proposal contains alternative propositions, the receiver of the letter may elect as to which he will accept.

Following the quotation of these sections, the court instructed the jury as follows: "Now, it is for you to say in this case what election was made by defendant in this case as to this letter here of August 8th from the Granite City Crush Stone Company. If they elected in this case to pay for those 12 and turn them over to Mr. Rogers and pay the freight and demurrage on them, and they elected also to pay the freight and demurrage on all of it and dispose of the others, why, they would be bound by that contract. It is for you to say whether or not they undertook to turn over these 12 and hold the other there liable, and pay the freight and demurrage on the other; and you find from the evidence whether or not they did that." We understand this instruction (as to which one of the exceptions in the record relates) as meaning that the plaintiff's letter in reply to the defendant's communication of August 27th contained an alternative proposition, and that under it the defendant had the right either to pay for 12 of the sills, together with the demurrage and freight on them, without being further bound, or to take the entire shipment, becoming bound accordingly. The court then further instructed the jury that before the defendant would be bound upon the contract, further than for the price of the 12 sills, which had already been paid for, it would have to appear that the plaintiff turned over the bill of lading to the defendant, since the title to the property had been reserved through the bill of lading with the draft attached. The jury thereupon found for the defendant, as it was not disclosed from the evidence what had become of the bill of lading.

We think that the court was in error in construing the plaintiff's letter in answer to the defendant's communication of August 27th as containing an alternative proposition. In our opinion it contained but one proposition, single and entire in its nature. Under that letter, when the defendant took 12 of the sills and delivered them to Rogers, it became bound to take all of the stone and to pay for it. It could not take a part and refuse to take a part. It is true that the bill of lading was retained by the bank as agent for the plaintiff; but the letter itself contained authority to the bank to turn over the bill of lading upon payment for 12 of the sills, and as the evidence does not show what became of the bill of lading, and as there is no plea that the plaintiff or the bank, as its agent, refused to turn over the bill of lading, it is to be presumed that the defendant merely neglected to take it up and to present it to the railroad company, and thereby allowed such of the sills as it did not move to be sold for the freight. It is apparent that many of the facts relating to the transaction are undisclosed. The defendant's manager, who handled the transaction at his

end of the line, was not produced as a witness, and it is not shown exactly or in what manner he got possession of the 12 sills which he did deliver; but it is sufficiently plain that he acted under the letter to the extent of taking charge of at least 12 of the sills, and thereby rendered his company at least primarily bound upon the contract, and as no act on the plaintiff's part sufficient to discharge this prima facie liability is shown or pleaded, the verdict in the defendant's favor was unauthorized.

Judgment reversed.

(9 Ga. App. 362)

TIPPINS v. DE LOACH et al. (No. 2,992.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 202*)—CERTIORARI—APPROVAL OF BOND.

The judgment of the superior court, dismissing the certiorari because the certiorari bond did not show on its face, or by any other written evidence, that it had been approved by the judicial officer before whom the case was tried in the first instance, is fully controlled by the decision of the Supreme Court in *Dykes v. Twiggs County*, 115 Ga. 698, 42 S. E. 36, and the decisions therein cited. The approval of the bond by the clerk of the court is not such an approval as the law requires. Where the application for the writ of certiorari is not applied for in forma pauperis, the plaintiff must file with his petition with the clerk of the superior court a bond, as required by Civil Code (1910), § 5185, approved in writing by the judicial officer or officers whose judgment it is sought to review; otherwise, the clerk has no authority of law to issue the writ of certiorari.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 789; Dec. Dig. § 202.*]

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Action between B. G. Tippins, administrator, and G. W. De Loach and others. From the judgment before a justice, Tippins brings certiorari, and from a judgment dismissing the certiorari, he brings error. Affirmed.

H. H. Elders, for plaintiff in error. E. C. Collins, for defendants in error.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 345)

CARTER-PATTERSON DETECTIVE
AGENCY v. HARRIS. (No. 2,952.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

WORK AND LABOR (§ 28*)—EVIDENCE—SUFFICIENCY.

The plaintiff proved a prima facie case of liability against the defendant on the account sued on. The defendant did not contradict by his evidence the fact that the services sued for were rendered, but set up a failure of consideration, which he failed to prove. The judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in favor of the defendant was without evidence to support it.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 28.*]

Error from City Court of Franklin; F. S. Loftin, Judge.

Action by the Carter-Patterson Detective Agency against W. B. Harris. Judgment for defendant, and plaintiff brings error. Reversed.

W. C. Hodnett, for plaintiff in error. D. B. Whitaker, for defendant in error.

POWELL, J. Judgment reversed.

(9 Ga. App. 448)

MADDOX v. STATE. (No. 3,392.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 776*)—INSTRUCTIONS—GOOD CHARACTER.

Evidence of the good character of the accused should be considered by the jury, in connection with all the other pertinent evidence tending to establish his guilt or innocence; and a charge to this effect was not erroneous because it failed to state that evidence of good character alone might be sufficient to generate in the minds of the jury a reasonable doubt. *Fordham v. State*, 125 Ga. 791, 54 S. E. 694; *Brazil v. State*, 117 Ga. 32, 43 S. E. 460.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838-1845; Dec. Dig. § 776.*]

2. CRIMINAL LAW (§ 828*)—INSTRUCTIONS—IMPEACHMENT OF WITNESSES.

In the absence of a timely written request, it is not error (as has been repeatedly held by this court and the Supreme Court) for the judge to fail to charge the law as to impeachment of witnesses. *Moore v. State*, 7 Ga. App. 77, 66 S. E. 377; *Strickland v. State*, 4 Ga. App. 445, 61 S. E. 841.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.*]

3. REVIEW ON APPEAL.

The evidence set out in the answer of the magistrate to the writ of certiorari is sufficient to support the verdict, and there was no error in the judgment overruling the certiorari.

Error from Superior Court, Putnam County; J. B. Park, Judge.

Love Maddox was convicted of crime, and brings error. Affirmed.

W. T. Davidson, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 369)

FELTON v. UNDERWOOD. (No. 3,079.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

POSSESSORY WARRANT (§ 2*)—STOLEN PROPERTY.

Under Civ. Code 1910, § 5731, the owner of personal property which has been stolen from his possession may by possessory warrant re-

cover it from one to whom the thief has recently delivered or sold it.

[Ed. Note.—For other cases, see Possessory Warrant, Cent. Dig. § 2; Dec. Dig. § 2.*]

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Action between A. L. Felton and J. H. Underwood. From the judgment, Felton brings error. Affirmed.

Jas. M. Du Pree, for plaintiff in error. Jere M. Moore, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 332)

BAKER v. KENDRICK. (No. 3,126.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 209*)—CERTIORARI—DETERMINATION.

Where there is no question of law presented in a certiorari, other than that the verdict rendered by the jury in a justice's court was without evidence to support it, and it appears that the verdict so rendered is without evidence to support it, and that it is the second concurrent finding in the plaintiff's favor under a similar state of facts, it is not error for the judge of the superior court, on the hearing of the certiorari, to sustain the certiorari, with direction that, if the evidence be substantially the same on the next trial, a verdict for the defendant shall be rendered. *Porterfield v. Thompson*, 4 Ga. App. 524, 61 S. E. 1055; Civ. Code 1910, § 5201.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 209.*]

Error from Superior Court, Taliaferro County; D. W. Meadow, Judge.

Action by Arter Baker against R. T. Kendrick. Judgment for plaintiff in the justice's court was reversed on certiorari, and he brings error. Affirmed.

A. G. Goluke and J. A. Beazley, for plaintiff in error. J. W. Hixon, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 422)

BENTON v. STATE. (No. 3,339.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 784*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

The fact of guilt in this case does not depend entirely upon circumstantial evidence, and there was no error in the failure of the trial judge to instruct the jury as to the probative value of circumstantial evidence, as defined in Penal Code 1910, § 1010. *Holt v. State*, 7 Ga. App. 77, 66 S. E. 279.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888; Dec. Dig. § 784.*]

2. CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE—INTOXICATING LIQUORS.

Courts judicially know that whisky, whether made out of corn or rye, will produce intox-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ication when drunk to excess. In this case, however, the evidence shows that the whisky bought and drunk by one of the state's witnesses made him drunk.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 716; Dec. Dig. § 304.*]

3. INTOXICATING LIQUORS (§ 224*)—ILLEGAL SALE—BURDEN OF PROOF.

The objections made to certain portions of the charge of the court are without merit, as the evidence showed that the accused received the money and shortly thereafter delivered the whisky to the party from whom the money was received, and this was sufficient to place upon the accused the onus of showing when, where, how, and from whom he received the liquor, and that in the transaction he was acting as agent for the purchaser, and was in no wise interested in the sale thereof. *Shaw v. State*, 3 Ga. App. 607, 60 S. E. 326, and cases there cited.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 275–281; Dec. Dig. § 224.*]

4. VERDICT SUPPORTED BY EVIDENCE.

The evidence supports the verdict, and no error of law appears.

Error from City Court of Sylvester; J. B. Williamson, Judge.

W. L. Benton was convicted of selling intoxicating liquor, and brings error. Affirmed.

Mark Tison and J. J. Forehand & Son, for plaintiff in error. J. H. Tipton, Sol., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 307)

WHITE v. STATE. (No. 2,742.)

(Court of Appeals of Georgia. June 7, 1911.)

(*Syllabus by the Court.*)

NATURE OF OFFENSE.

The question of law raised by the present writ of error having been decided adversely to the plaintiff in error by the Supreme Court in *White v. State*, 136 Ga. —, 71 S. E. 135, and the evidence being sufficient to authorize the verdict, the judgment is affirmed.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

F. M. White was convicted of crime, and brought error. Questions certified to the Supreme Court. 71 S. E. 135. Judgment affirmed.

Geo. W. Owens, for plaintiff in error. Walter O. Hartridge, for the State.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 371)

JOE v. STATE. (No. 3,096.)

(Court of Appeals of Georgia. June 7, 1911.)

(*Syllabus by the Court.*)

CITY COURTS.

The case is entirely controlled by the decision of the Supreme Court in answer to certified questions.

Error from City Court of Dawson; M. C. Edwards, Judge.

Mandy Joe was convicted of crime, and brings error. Case certified to the Supreme Court, and questions answered. 70 S. E. 1104. Judgment affirmed.

H. A. Wilkinson and M. J. Yeomans, for plaintiff in error. W. H. Gurr, Sol., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 391)

MAY v. CITY OF ATLANTA. (No. 3,149.)

(Court of Appeals of Georgia. June 7, 1911.)

(*Syllabus by the Court.*)

1. REVIEW ON APPEAL.

The evidence authorizes the verdict.

2. NEW TRIAL (§ 143*)—NEW TRIAL—IMPEACHMENT OF VERDICT.

"Jurors cannot impeach their verdict; much less will it be set aside, on the affidavit of the party for whose use the case is proceeding that some of the jurors told him that it was caused by mistake," or that one or more of the jurors were guilty of misconduct during the progress of the trial. *Smith v. Banks*, 65 Ga. 28.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 301; Dec. Dig. § 143.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by George S. May against the City of Atlanta. Judgment for defendant, and plaintiff brings error. Affirmed.

M. A. Hale, C. W. Smith, and Rosser & Brandon, for plaintiff in error. Jas. L. Mayson and W. D. Ellis, Jr., for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 363)

BOSTWICK v. MASSEE & FELTON LUMBER CO. (No. 3,028.)

(Court of Appeals of Georgia. June 7, 1911.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 1062*)—HARMLESS ERROR—SUBMISSION OF LAW QUESTION.

Although it is the duty of the trial judge to construe a written contract, still if, instead of doing so, he submits the contract to the jury for construction, the judgment will not be reversed therefor, where it appears that the proper construction would have been adverse to the contention of the complaining party. *Cement Co. v. Moss Mfg. Co.*, 1 Ga. App. 232, 57 S. E. 914.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4216; Dec. Dig. § 1062.*]

2. APPEAL AND ERROR (§ 1029*)—HARMLESS ERROR.

In this case, upon a proper construction of the contract, a verdict in favor of the plaintiff was demanded; and in this view the alleged errors in the rulings of the court are harmless.

even if the rulings complained of were in any wise erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.*]

Error from City Court, Calhoun County; H. M. Calhoun, Judge.

Action by the Massee & Felton Lumber Company against W. E. Bostwick. Judgment for plaintiff, and defendant brings error. Affirmed.

L. M. Rambo, for plaintiff in error. Lane & Park and Hawes & Pottle, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 365)

WOOD v. STATE. (No. 3,060.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 782*)—INSTRUCTIONS—POSITIVE AND NEGATIVE TESTIMONY—WEIGHT.

An instruction to the effect that "positive testimony outweighs negative testimony, the witnesses being equally credible," sufficiently qualifies a charge upon the subject of positive and negative testimony in which the jury are told that "the existence of a fact testified to by one positive witness is rather to be believed than that such fact did not exist because many witnesses who had the same opportunity of observation swore that they did not see or know of its having transpired." If the witnesses are of equal credibility and have a like opportunity of observation, positive testimony should outweigh that which is merely negative; and it is not error so to instruct the jury in a case where some of the testimony is plainly merely negative in its character.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.*]

Error from City Court of Dublin; K. J. Hawkins, Judge.

Earl Wood was convicted of crime, and brings error. Affirmed.

J. S. Adams, for plaintiff in error. W. O. Davis and Geo. B. Davis, Sols., for the State.

RUSSELL, J. The writ of error complains of the overruling of a motion for new trial in which the only ground which could be strongly insisted upon here is that the judge erred in charging the jury in the language of section 1011 of the Penal Code (1910), with the single explanation that "positive testimony outweighs negative testimony, the witnesses being equally credible." While it is true, as was held in the case of Peak v. State, 5 Ga. App. 56, 62 S. E. 665, that it is error to instruct the jury upon the subject of positive and negative testimony except in a very clear case, and that then they should never be instructed upon this subject, except when they are told in effect that the testimony of one credible witness swearing negatively may outweigh the testimony of a witness who testifies positively, and

yet who is unworthy of belief, still we think the instruction of the judge in the present instance covered the only substantial principle enunciated in the Peak Case. The credibility of the witnesses is exclusively for the jury. Ordinarily the conflict arises over the credibility of the witnesses. If the witnesses are equally credible, certainly every rule of law and logic would require that the witness who knew and asserted his knowledge of the facts should be believed in preference to a witness who did not know and confessed his ignorance of the truth of an alleged occurrence.

We are aware that there are other things besides the personal credibility of the witnesses which may affect the equation, and yet, in the broad sense, all of these circumstances are included in the general expression "the credibility of the witness." This includes any kind of corroboration arising from other testimony, as well as circumstances of any nature in the case which might tend to make the testimony of one witness more credible than that of another; for if, after every circumstance, of whatever nature it may be, has been scanned and dissected, the jury come to the conclusion that the witnesses are of equal credibility, then common sense would require that they should give preference to the positive testimony of a credible witness, rather than to the negative testimony of a witness not more credible than the first.

Judgment affirmed.

(9 Ga. App. 442)

WRIGHT v. STATE. (No. 3,387.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

CHATTEL MORTGAGES (§ 230*)—SALE BY MORTGAGOR—ELEMENTS OF OFFENSE.

In order for a mortgagor's sale of mortgaged property to be an offense, under section 720 of the Penal Code of 1910, three essential facts must appear: (1) That the sale was made without the consent of the mortgagee; (2) that it was made with intent to defraud the mortgagee; and (3) that loss was thereby sustained by the holder of the mortgage. Reece v. State, 5 Ga. App. 663, 63 S. E. 670, and cases there cited. The evidence in this case is not clear as to the first essential stated; but it is shown that, even if the sale of the property was made, it was made without any intent to defraud the mortgagee, and that the mortgagee in fact sustained no loss thereby. Denny v. State, 2 Ga. App. 146, 58 S. E. 318.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 489-493; Dec. Dig. § 230.*]

Error from City Court of Jefferson; W. W. Stark, Judge.

P. W. Wright was convicted of crime, and brings error. Reversed.

John B. Gamble and P. Cooley, for plaintiff in error. W. H. Quarterman, Sol., for the State.

HILL, C. J. Judgment reversed.

(9 Ga. App. 400)

CRAPPS v. SMITH. (No. 3,229.)

(Court of Appeals of Georgia. June 7, 1911.)

*(Syllabus by the Court.)***1. HABEAS CORPUS (§ 99*)—CUSTODY OF MINOR CHILD.**

While ordinarily it is the rule that in habeas corpus cases brought to determine the custody of a child the personal fitness of the respective contestants is a material element, still under the particular circumstances of this case there was no error in the court's confining the issue to the question of the child's age.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 90.*]

2. MARRIAGE (§ 5*)—HABEAS CORPUS (§ 99*)—VALIDITY—FEMALE UNDER 14 YEARS.

A female under the age of 14 cannot contract matrimony; and where a child under that age has run away from her father and gone through the form of a marriage ceremony, and her father sues out habeas corpus to recover the child from the man she has attempted to marry, it is no sufficient answer on the latter's part that the girl's father had treated her cruelly.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 24; Dec. Dig. § 5; Habeas Corpus, Dec. Dig. § 90.*]

Error from City Court of Baxley; W. C. Lankford, Judge.

Habeas corpus by Dennis Smith against Marvin Crapps. Judgment for petitioner, and defendant brings error. Affirmed.

V. E. Padgett, for plaintiff in error. Parker & Highsmith, for defendant in error.

POWELL, J. The contest is over the custody of a girl. She had run away and gone through the form of a marriage with a young man, when her father brought habeas corpus against the young man, alleging that the girl was only 13 years of age, and that the attempted marriage was void. The respondent set up that the girl was more than 14 years old, and that the marriage was legal. He further set up that the girl's father has mistreated her, but this portion of the answer was stricken, and the issue was confined by the court to the sole question as to whether the girl was as much as 14 years old; and this ruling of the court is made the basis for the chief exception contained in the record.

[2] The evidence as to the girl's age was very conflicting, but the judge settled this conflict by finding that she was not 14 years old, and thereupon awarded her to the custody of the father. A female under the age of 14 cannot contract marriage. Civil Code 1910, § 2931. Any attempt on her part to do so is wholly void. Smith v. Smith, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362. For the contracting parties to live together would be fornication, and would be punishable as such. The finding of the trial judge that the girl is less than 14 years old must be accepted as the truth of the case; and, this being so, it was undoubtedly proper for the court to refuse to award her to the custody of the

young man. The young couple seem to be very much in love, the intentions of both seem to be entirely honorable, and the proper thing for them to do is to wait until next winter, when she will unquestionably be 14, and then go back together, and, as it is customary to phrase it, "live together happy ever afterward." This will ratify the former attempt at matrimony and render it a legal marriage. Murchison v. Green, 128 Ga. 339, 57 S. E. 709, 11 L. R. A. (N. S.) 702; Smith v. Smith, supra.

[1] As to the exception to the court's refusal to let the respondent show that the girl's father had mistreated her: It is true that ordinarily, when habeas corpus is brought to determine the custody of a child, the court has a broad discretion, and may award it even to a stranger; the best interest of the child being the paramount consideration. Hence it is usually material and proper for one of the parties to show that the other is unfit for the custody; but we seriously doubt that either of the contestants can except to the court's refusal to give the child to an outsider. The present case is exceptional. If the girl was under 14, the court certainly could not award her to the custody of the respondent. That would have been a gross abuse of discretion. To restore her to parental control would not prevent investigation into the father's fitness in any other proceeding brought for the determination of that question. Therefore we think that in the present case the court did not err in confining the issue to the question of the girl's age.

Judgment affirmed.

(9 Ga. App. 307)

ELROD v. B. M. & L. F. GRANT.

B. M. & L. F. GRANT v. ELROD.

(Nos. 2,812, 2,813.)

(Court of Appeals of Georgia. June 7, 1911.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 549*)—BILL OF EXCEPTIONS — PRESENTATION OF EXCEPTIONS — JUDGMENT.**

Though the omission is apparently due to an oversight, the main bill of exceptions does not contain any distinct or express exception to the judgment rendered by the lower court, or assignment of error thereon. This court is without jurisdiction to consider the writ of error, and the main bill of exceptions must be dismissed. This disposition of the main bill of exceptions renders the determination of the cross-bill unnecessary, and it is therefore dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2441-2451; Dec. Dig. § 549.*]

Error from City Court of Atlanta; H. M. Reld, Judge.

Action between W. C. Elrod and B. M. & L. F. Grant. From a judgment of nonsuit, Elrod brings error, and the Grants assign

cross-bill. Main bill of exceptions and cross-bill dismissed.

C. W. Smith and M. A. Hale, for plaintiff in error. Candler, Thomson & Hirsch and Ogburn, Dorsey & Shelton, for defendants in error.

RUSSELL, J. In the main bill of exceptions filed in this case the full history of the litigation between the plaintiff in error and the defendants in error is incorporated in the bill of exceptions, which contains a copy of the original petition and a copy of the answer of the defendant, as well as a brief of the evidence submitted. It is related in the bill of exceptions that at the conclusion of the plaintiff's testimony the presiding judge granted a nonsuit in the following order:

"Upon the conclusion of the evidence of the plaintiff and a motion to grant a nonsuit by the defendants, said motion is granted and case withdrawn from jury, with cost against plaintiff. This May 31, 1910.

"H. M. Reid,

"Judge City Court of Atlanta."

Immediately following this the bill of exceptions proceeds as follows:

"(1) The testimony made out a case that should have been submitted to the jury as to the liability of the landlords, they being in possession of the second floor.

"(2) The testimony showed negligence on part of the landlords, because of leaving the doors and windows open, and because of defective plumbing.

"(3) Plaintiff in error had no control of the second floor or the cut-off thereon. These issues of fact should have been submitted to the jury.

"(4) And now comes the defendant, W. O. Elrod, within 30 days from the date of the order granting a nonsuit, and presents this his bill of exceptions, and prays that the same may be signed and certified, in order that the errors complained of may be considered and corrected."

There is nowhere any exception to the judgment rendered. It is not stated that the court erred in entering a judgment of nonsuit. Three of the paragraphs which we have quoted above could perhaps be properly treated as assignments of error, and it is to be inferred, by supplying a very material ellipsis, that the plaintiff in error intends to except to the judgment as a whole as an error; but it is manifest that there is no expressed or distinct exception to the judgment finally rendered, considered as an entity and as the conclusion of the whole matter. In any case there may be some reasons which would have required a judgment different from that which was rendered, and yet this may be completely overmastered and obliterated by some controlling fact or principle of law which required the result which

was reached. Whether the judgment of which it is sought to complain is one necessarily dependent upon some antecedent ruling which controlled it, or upon the grant or refusal to grant a motion for new trial, or concerns a ruling of the court which itself finally disposes of the case without submission to a jury, it must in every case be alleged that the plaintiff in error excepts to the judgment; that is, complains of it. After taking exception to the judgment generally, the plaintiff in error is then required plainly and specifically to set forth, or point out, the errors alleged to have been committed. Where it is sought to assign error upon a final judgment, it is ruled by the Supreme Court in *Lyndon v. Georgia Railway & Electric Company*, 129 Ga. 353-357, 58 S. E. 1047, 1049, exception must be taken to the judgment finally rendered, as well as the specific reasons why it is erroneous be stated. "If error inherent in the judgment itself is complained of, not only should it be excepted to, but the assignment should specify the error."

In the present case the statements of the plaintiff in error as to why the case should have been submitted to the jury would perhaps have been good as assignments of error, if they had been related to some exception; but (apparently due to an oversight) the judgment itself is not excepted to. Under the provisions of section 6140 of the Civil Code of 1910, as construed by the ruling of the *Lyndon Case*, supra, it is not only required that the plaintiff in error shall plainly and specifically set forth the errors alleged to have been committed, but he must primarily assert that the judgment rendered was error injurious to his cause. He must except to it. Certain specific assignments of error might be valid; but if there is no exception to the judgment it would have to be assumed that there were sufficient reasons authorizing the grant of the judgment rendered which prevented the plaintiff in error from being able to show the court that the errors of which he complained really injured him, or that he was in fact dissatisfied with the final judgment. To authorize a reversal of the judgment of a lower court, not only error, but injury, must be shown. Without regard to our personal views, we are of the opinion that the ruling in the *Lyndon Case*, supra, which requires a general exception to the judgment rendered, as well as specific assignments of error thereunder, leaves us no option except to sustain the motion to dismiss the present writ of error.

The disposition given to the main bill of exceptions renders the consideration of the cross-bill unnecessary; and it is also dismissed.

Main bill of exceptions and cross-bill dismissed.

(9 Ga. App. 391)

MILLEDGEVILLE COTTON CO. v. CARY.
(No. 3,150.)

(Court of Appeals of Georgia. June 7, 1911.)

*(Syllabus by the Court.)***SALES (§ 418*)—BREACH OF CONTRACT—DAMAGES.**

The courts will not construe a contract, so as to allow one of the parties to take advantage of his own wrongful breach thereof, unless it be plain and manifest that such was the intention of the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

Error from City Court of Sparta; R. W. Moore, Judge.

Action by the Milledgeville Cotton Company against C. S. Cary. From the judgment, plaintiff brings error. Reversed.

Burwell & Fleming and Hines & Vinson, for plaintiff in error. R. L. Merritt, for defendant in error.

POWELL, J. On August 31, 1909, Cary made a binding contract with the Milledgeville Cotton Company to deliver 50 bales of cotton between October 1 and November 15, 1909, at the price of 12 cents per pound. One clause of the contract provided that, if Cary should "dispose of any part of his crop before the contract is filled, then the entire number of bales due under this contract shall become due." Cary wholly failed to deliver the cotton. The difference between the contract price and the market price on November 15th was 2½ cents per pound in the buyer's favor. Cary made no denial of the contract, but set up, in defense to the suit brought to recover this difference, that on September 16, 1909, he sold a part of his crop, and that on that date the difference between the contract price and the market price was only one-half cent per pound in the buyer's favor, and that as, under the terms of the contract, if he disposed of any of the cotton before carrying out the contract, the entire amount should become deliverable at once, the damages for the breach should be assessed on the basis of this one-half cent per pound, instead of upon the basis of 2½ cents per pound, which came about by reason of the fact that the market price continued to rise. The evidence was practically undisputed, and the court charged the jury that, if they found that Cary sold a part of his crop on the 16th of September, they should assess the damages on the basis of the market price as of that date. It was proved without contradiction that this sale had taken place, and it was not shown that the Milledgeville Cotton Company had any knowledge of it; but, on the contrary, it was shown that during the life of the contract the company continued to demand the cotton. The jury assessed the damage in favor of the plaintiff at the rate

of one-half cent per pound, and the plaintiff excepts.

We think that the court erred in allowing the defendant to take advantage of his own wrongful breach of the contract. Under what we conceive to be a proper construction of the contract, the provision which related to Cary's disposing of any part of his crop before he fulfilled the contract gave to the plaintiff, and not to the defendant, the right to insist upon immediate delivery of all the cotton, as soon as that act took place. The plaintiff had the right to waive the defendant's breach in this respect, and, according to the evidence, did so by continuing to demand the fulfillment of the contract. It may be that if the defendant had renounced the contract, and had given the plaintiff notice of his renunciation, an anticipatory breach would have occurred, of such a nature as to make the day of the renunciation the day on which the damages should be measured; but in this case no notice to the plaintiff was shown. On the general question involved, the case of *Finlay v. Ludden & Bates*, 105 Ga. 264, 31 S. E. 180, is strongly in point. As the Supreme Court there said: "The law will not construe a contract so as to give the debtor the right to destroy it by a simple refusal to comply with it, unless the terms of the contract are so clear and unambiguous as to make irresistible the conclusion that no other result could possibly be reached, and that such was the intention of the parties. Civil Code, § 3675, par. 4 (Civil Code 1910, § 4268). Nor will a contract be so construed as to authorize one of the parties to take advantage of his own wrong, unless it be plain and manifest that such was the intention of the parties." The evidence demanded a verdict in the plaintiff's favor for the full amount sued for.

Judgment reversed.

(9 Ga. App. 389)

GELDERS v. KENNEDY et al. (No. 3,139.)
(Court of Appeals of Georgia. June 7, 1911.)*(Syllabus by the Court.)***BILLS AND NOTES (§ 534*)—ATTORNEY'S FEES—NOTICE—SUFFICIENCY.**

The legal title to a promissory note was in one person, but the equitable title was in another, who in fact physically held it. The maker of the note was aware of the relationship existing between the person to whom the note was payable on its face and the person who held it. The note called for attorney's fees. The person who thus held it gave statutory notice in the usual form that suit would be brought on the note and that attorney's fees would be claimed if the debt were not paid before the return day of the court. The suit was instituted in the name of him who held the equitable title only; but, pursuant to a ruling of the court invoked by a demurrer of the defendant, the plaintiff amended the action, so that it should proceed in the name of the holder of the legal title for the use and benefit of him (the holder of the equita-

ble title, the real prosecutor of the action). *Held*, that the notice as to attorney's fees was adequate to charge the defendant with liability therefor, notwithstanding the amendment.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 534.*]

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by L. Kennedy and others, executors, for use, against Isador Gelders. Judgment for plaintiffs, and defendant brings error. Affirmed.

Jos. B. Wall, for plaintiff in error. L. Kennedy and O. H. Elkins, for defendants in error.

POWELL, J. Gelders had executed a note payable "to the order of E. W. Ryman, executor of C. L. Blystone's estate." Ryman died, and L. Kennedy succeeded to the executorship on the estate of Blystone, and brought suit upon the note. The case came to this court, and it is reported sub nom. *Kennedy v. Gelders*, 7 Ga. App. 241, 66 S. E. 620. It was held in that case that the note was apparently payable to Ryman individually, and that the executor on his estate, and not his successor in the office of executor of the estate of Blystone, was the proper plaintiff, but that, since it was alleged that the consideration of the note was money belonging to the estate of Blystone and loaned to the defendant by Ryman as executor, an amendment would be allowable substituting the name of Ryman's executor, suing for the use of Blystone's executor as plaintiff. Upon the remittitur from this court being filed in the trial court, an amendment of this nature was made, and the case proceeded to trial in this form. The note called for attorney's fees. The notice required by our statute for the fixing of the liability for attorney's fees was given to the defendant in the name of L. Kennedy, as executor of the estate of Blystone, and was signed by his attorneys. The court, in directing the verdict in the case, directed a finding for attorney's fees, as well as for principal and interest, and the point now made is that, since the suit was finally converted by the amendment from a suit on the part of L. Kennedy as executor of the estate of C. L. Blystone to a suit of L. Kennedy and Lula B. Ryman, as executors of the estate of E. W. Ryman, for the use and benefit of L. Kennedy as executor of the estate of C. L. Blystone, the notice was inadequate to charge the defendant with liability for attorney's fees.

Statutory notice for the purpose of fixing liability for attorney's fees should disclose who is the holder of the note, and who it is that intends to bring suit, and to whom the payment should be made; and if the notice is so worded as to mislead, or as to be likely to mislead, the defendant in material re-

spects as to these features, it is inadequate. *Baskins v. Bank of Valdosta*, 5 Ga. App. 600, 63 S. E. 648; *Edenfield v. Bank of Millen*, 7 Ga. App. 645, 67 S. E. 893. In the present case the notice did disclose who was the holder of the note, so far as the physical holding and equitable title was concerned, and it was given in the name of the person who actually did institute the action. It is true that it afterwards became necessary, in order to comply with a rule of pleading, that an amendment should be made, substituting the name of the holder of the legal title of the note as nominal plaintiff; but this same person who had originally instituted the suit was retained as the usee. It further appears that the maker of the note knew and understood the manner in which the note was held and had recognized the usee as the owner of the note by making payments thereon to him. Under these circumstances, we think that the statute was sufficiently complied with.

There is a motion to assess damages for delay; but we think that this question was sufficiently doubtful, in view of the rulings made on the particular facts of the case just stated, to justify the plaintiff in error in bringing the case to this court; so the motion to assess damages for delay is denied, but the judgment is affirmed.

(9 Ga. App. 350)

WEST YELLOW PINE CO. v. KENDRICK.
(No. 2,965.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. SALES (§ 475*)—CONDITIONAL SALES—ASSIGNMENT OF CONTRACT.

Where the payee named in an instrument evidencing an indebtedness for the purchase price of personal property, and reserving to the payee as seller the title thereto until the indebtedness shall be paid, assigns the instrument, and not merely the indebtedness evidenced thereby, the assignee thereof may maintain trover for the property upon the title so reserved, although the assignment may have been made "without recourse."

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1403-1406; Dec. Dig. § 475.*]

2. EVIDENCE (§ 423*)—PAROL EVIDENCE—ADMISSIBILITY.

Parol evidence is admissible to explain an indorsement in blank.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957-1965; Dec. Dig. § 423.*]

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by the West Yellow Pine Company against S. L. Kendrick. Judgment for defendant, and plaintiff brings error. Reversed.

Woodward & Smith and Denmark & Griffin, for plaintiff in error. G. A. Whitaker and O. M. Smith, for defendant in error.

POWELL, J. Kendrick executed to one Griffith an instrument whereby Kendrick

agreed to pay to W. A. Griffith, or order, a certain sum of money. In the instrument it was recited that the indebtedness was for the purchase price of certain mules, and that the title to the mules was not to pass to the purchaser until the indebtedness was paid. The instrument was duly witnessed and recorded. On the back of the instrument were found the following entries: "Without recourse. W. A. Griffith. I. L. Griffith." "Georgia, Lowndes County. For value received we hereby transfer the within paper to West Yellow Pine Company, without recourse. This July 3, 1908. Citizens' Bank of Valdosta, by J. F. Lewis, Pres." The West Yellow Pine Company brought suit in trover for the recovery of the property from the purchaser, who had failed to pay the indebtedness. At the trial this note and the entries thereon were introduced in evidence, and Mr. Lewis, president of the Citizens' Bank of Valdosta, testified that the bank bought the notes from W. A. Griffith, and that he and I. L. Griffith merely indorsed their names upon the back of the notes, and that the words "without recourse" were not then written upon them, but that afterward, when he, as president of the bank, again sold the paper, he wrote these words, "without recourse," upon the back of the paper and above the signatures of the Messrs. Griffith. The plaintiff attempted to prove by this witness that his object and intention in writing these words above the signatures of the Messrs. Griffith was to effectuate the object of the transferring of the indebtedness and the title to the property to the West Yellow Pine Company, but on condition that neither the Messrs. Griffith nor the bank should be held liable upon the indebtedness as indorsers. The court excluded this testimony, and there is an exception as to this ruling. There being no further evidence, the court granted a nonsuit, and the plaintiff excepts.

[1] We recognize, as the Supreme Court itself recognizes (see the comments of Mr. Justice Evans in *Townsend v. Southern Product Co.*, 127 Ga. 342, 344, 56 S. E. 436, 119 Am. St. Rep. 340), that as to the general question here involved there is a conflict in the decisions of the Supreme Court. The case of *Cade v. Jenkins*, 88 Ga. 791, 15 S. E. 292, and cases following it, are in conflict with *Burch v. Pedigo*, 113 Ga. 1157, 39 S. E. 493, 54 L. R. A. 808, and cases following it. *Cade v. Jenkins* is the oldest case, and is controlling so far as it goes, and the late case of *Townsend v. Southern Product Co.*, supra, seems to recognize that that case expresses the correct rule. This court, in the case of *Dawson v. English*, 8 Ga. App. 585, 69 S. E. 1133, undertook to distinguish *Burch v. Pedigo* on the ground that the note in-

volved in that case was made prior to Acts 1899, p. 90, as well as upon the fact that the assignment in that case related to the indebtedness alone, and not to the paper as a whole. In the decisions of the Supreme Court which are in conflict with the case of *Cade v. Jenkins*, the act of 1899, embodied in Civil Code 1910, § 3345 et seq., is not referred to. It is not necessary for us to decide in this case as to what effect follows where purchase-money notes reserve title in the payee of the notes, and the notes alone are transferred "without recourse"; for, in this case, we construe the transfer as relating, not merely to the indebtedness, but also to the title reserved in the original payee of the instrument. The indorsements of the Messrs. Griffith are silent as to this; but the indorsement of the bank states that "the within paper is transferred," and as the paper to which the transfer related was not merely a note, but was also an instrument reserving title, we think that the only fair construction to give to the act of the parties is to say that it was their intention to transfer, not merely the indebtedness, but also the title to the property. In this view of the case, our decision in *Dawson v. English*, supra, is controlling.

[2] 2. Of course, we are not unmindful of the fact that, if the prior indorsements had operated to divest the title of the holder of the paper as to the property and to vest it in Kendrick, the indorsement of the bank would not be effectual to transfer any title, so that it is necessary for us to decide as to the effect of these prior indorsements. Civil Code 1910, § 5796, provides: "Blank indorsements of negotiable paper may always be explained between the parties themselves, or those taking with notice of dishonor or of the actual facts of such indorsements." An indorsement in blank usually consists of the indorser's writing his name on the back of the paper; but it does not become an "indorsement in full" until the name of a payee is inserted. In the present case the indorsement in blank had been partially completed by the subsequent indorser writing the words "without recourse." The indorsement, therefore, had not become an indorsement in full, but still suffered from the same character of ambiguity as inheres in an indorsement in blank. The words "without recourse," followed by the signature of the payee, did not make a complete indorsement; hence parol testimony was admissible to explain that the intention was that the title to the property, as well as to the indebtedness, should pass, but that the transferror should not become liable as an indorser upon the evidence of indebtedness.

Judgment reversed.

(9 Ga. App. 363)

GIBSON v. WARD. (No. 3,042.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

PRINCIPAL AND AGENT (§ 92*)—PAYMENT TO AGENT—EFFECT.

Where, for the purpose of paying a debt, the debtor turns over to the creditor's agent, authorized to receive payment, a draft for more than the amount of the debt, and under circumstances indicating an intention that, when the draft is collected, the debt shall be paid out of it, and the balance retained for the debtor's benefit, and the draft is duly honored, and the agent receives the money, payment to the creditor is effected, though the agent fails to pay over to the creditor the money which thus came into his hands.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 246; Dec. Dig. § 92.*]

Error from City Court of Waynesboro; W. H. Davis, Judge.

Action by J. P. Gibson against C. E. Ward. Judgment for defendant, and plaintiff brings error. Affirmed.

Wm. H. Fleming, for plaintiff in error. E. L. Brinson, for defendant in error.

POWELL, J. Gibson held a note, secured by a deed to realty, against Ward. He sent the note to an attorney at Waynesboro, Ga., with instructions to collect the debt. The attorney represented another lender of money, and Ward, through the attorney, made application to this third person for the loan of an amount slightly more than sufficient to take up Gibson's debt. (The old note amounted to about \$700, and he applied for a loan of \$800.) Ward drew a draft in favor of the attorney on the person with whom this loan was negotiated, for \$800, and turned it over to a clerk in the attorney's office for the purpose of paying Gibson's debt from the proceeds. In response to this draft, the lender sent to the attorney a check, payable to the attorney, for \$800. The attorney placed the lender's check to his own account at the bank. Soon afterward the attorney died, without ever paying over the amount to Gibson. Gibson sued Ward upon the note. Ward pleaded payment, and, with the foregoing facts appearing, the court directed a verdict for the defendant. We think the correct legal result was reached. Payment to Gibson's attorney, who had special authority to collect, was payment to Gibson. That this is the ordinary rule is conceded; but it is insisted that no payment was made, and that when Ward turned the draft over to the attorney, and when the new lender sent his check for \$800 to the attorney, the attorney held the sum as agent for Ward, and not for Gibson, and that no payment was effectuated, because there was no segregation or setting apart of that portion of the draft and of the check which was to go to Gibson.

Able counsel for the plaintiff in error asserts that the solution of the question de-

pends upon whether Ward could have demanded the \$800 of the attorney when the check for that sum came into his hands, and we think that this assertion is correct; but we do not assent to his minor premise that Ward could have demanded it. The draft which Ward turned over to the attorney was turned over as an act of payment, and while a draft is not payment until it itself is paid, still in this case the draft was paid, and hence became payment. Civ. Code 1910, § 4314. As the draft was paid, it seems to us that the case stands just as if Ward had turned over to the attorney eight \$100 bills, with the request that his debt to Gibson be paid out of it, and with direction to hold the remainder to his credit; and we do not think that Ward could have demanded any portion of the money back, except whatever surplus might have remained after paying the Gibson debt. While the attorney may, in a certain sense, have been a dual agent, or even a triple agent, so to speak (as he seems to have represented Gibson, Ward, and the person from whom Ward borrowed the money to pay Gibson), still the special circumstances did not make his so acting improper or unlawful, as none of his duties, under the circumstances, were in conflict.

Judgment affirmed.

(9 Ga. App. 366)

ROCKMORE v. GARNER. (No. 3,086.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

EXECUTION (§ 207*)—CLAIM OF THIRD PARTY—FORTHCOMING BOND—LIABILITY.

Where an execution is levied upon property, and a third person files claim thereto and executes a forthcoming bond, and upon trial of the claim case the property is found subject, and thereafter the property is duly advertised for sale and is not produced, a breach of the bond ensues; and the constable to whom the forthcoming bond has been given, suing for use of the plaintiff in execution, may recover upon the forthcoming bond, notwithstanding that the property has been taken in the meantime from the possession of the claimant under the levy of a *fi. fa.* against a stranger to the litigation, unless it appears that the process under which the property was seized in the second instance was superior to the execution first levied upon the property, or that the property was in fact subject to seizure under the second execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 589-591, 593; Dec. Dig. § 207.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by N. A. Garner, for use of one Brown, against M. L. Rockmore. Judgment for plaintiff, and defendant brings error. Affirmed.

Thos. B. Brown, for plaintiff in error. Scott & Davis, for defendant in error.

POWELL, J. A *fi. fa.* in favor of Brown was levied on property of W. L. Rockmore,

and M. L. Rockmore filed claim and gave forthcoming bond. After the property was found subject upon trial of the claim case, the constable advertised it for sale, and it was not produced. The constable, for the use of Brown as plaintiff in *fi. fa.*, sued on the forthcoming bond. In defense to this action it was set up that, while the claimant was in possession of the property, it was seized under a distress warrant in favor of a Mrs. Goodrum against the Kola Company. To a judgment in favor of the plaintiff in an action on the bond the present exception is taken.

A *prima facie* breach of the bond is conceded; but it is said that the defense is good, because the failure to produce property under a forthcoming bond is sufficiently excused by showing that performance was rendered impossible, either by the act of the obligee in the bond, by interference of the law, or by an act of God. We recognize the general correctness of the proposition of law asserted. *Floyd v. Cook*, 118 Ga. 526, 45 S. E. 441, 63 L. R. A. 450; *Allen v. Allen*, 119 Ga. 278, 45 S. E. 959. A familiar application of the principle is where a defendant in *fi. fa.* has given a forthcoming bond, and the property is afterwards levied on by another process superior to the execution originally levied; but wherever the defendant in an action on such a bond attempts to set up the act of the law as an excuse for noncompliance with the condition of the bond, he has the burden of showing that the process by which the property was taken from his possession was legally adequate for that purpose. In the case before us there is no evidence whatever that the constable who levied the distress warrant on the property as the property of the Kola Company had any right to do so. The Kola Company was, so far as the record shows, an entire stranger to the transaction. If the levy was rightful, under the circumstances, the defendant has utterly failed to show it. Hence he failed to make good his proffered excuse for noncompliance. The attitude in which the evidence in the case leaves him is that, under a claim which was found to be not meritorious, he got possession of this property, which was subject to the execution of the plaintiff, upon a covenant and bond to return it, when called for, for purposes of sale, in the event his claim was not sustained; and while he was thus in possession of the property, certain outsiders, the nature of whose rights is not disclosed, caused it to be levied on under process which is not shown to be in any way paramount to that under which it had already been seized, and now he attempts to hold the plaintiff in *fi. fa.* responsible for the interference of the outsider. The act of the law justifies nonproduction; but there is a vast difference between the act of the law and the act of a constable, for the act of the

constable may or may not be the act of the law.

The plaintiff in error urges that it was not incumbent on him to resist with force the act of the constable in levying on the property and thereby to lay himself liable to prosecution for resisting an officer in the execution of legal process. We may well agree with him as to this, but at the same time we are aware that the law has afforded ample remedies by which illegal seizures under color of process may be defended against, and by which property may be released from illegal levies. The plaintiff in error brought the trouble on himself when he gave the bond and took the property under a claim which he could not sustain.

Judgment affirmed.

(9 Ga. App. 409)

JOHNSON v. STATE (No. 3,307.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 189*)—DEGREES OF OFFENSE—LARCENY FROM THE HOUSE—SIMPLE LARCENY.

Under an accusation which in the language of the statute charges larceny from the house, there may be, if the facts warrant it, a conviction of simple larceny; the latter offense being included within the former.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 594; Dec. Dig. § 189.*]

2. LARCENY (§ 17*)—ASPORTATION—EVIDENCE.

To complete the offense of larceny, the slightest change of location, whereby complete dominion of the property is transferred from the true owner to the trespasser, is sufficient evidence of asportation.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 30; Dec. Dig. § 17.*]

3. CRIMINAL LAW (§ 1159*)—APPEAL—SUFFICIENCY OF EVIDENCE.

The evidence as to the existence of criminal intent is exceedingly weak and unsatisfactory; but, the intent with which an act is done being peculiarly a question of fact for determination by the jury, this court does not feel authorized to set aside the verdict on that ground.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3078; Dec. Dig. § 1159.*]

Error from City Court of Lexington; Joel Cloud, Judge.

Anthony Johnson was convicted of larceny, and brings error. Affirmed.

Anthony Johnson was indicted for larceny from the house, and was convicted of simple larceny. His motion for a new trial being overruled, he excepted. Besides the general grounds, the motion for a new trial contains several special assignments of error. It is contended that the conviction of the offense of simple larceny was not authorized by the evidence; the facts showing that, if the accused was guilty of any offense, it was larceny from the house. It is further contended that the evidence failed to show that the cotton seed, which the accused was charged

with stealing, were removed from the house, and therefore the proof does not correspond with the allegations in the accusation, and does not complete the crime as charged, or the crime of simple larceny as found by the verdict.

The evidence for the prosecution, briefly stated, is as follows: The prosecutor testified that the accused lived on his farm and was employed by him as a tenant; that on the day of the alleged larceny he went down to his seedhouse and saw the accused therein, and there was a sack of cotton seed close by him. "I asked him who put those seed in the sack, and he said he did. I asked him what he was going to do with them, and he said he was going to feed them to his calf." The prosecutor then took him into custody and carried him to his storehouse, where he had him repeat in the presence of his brother and his clerk the same statement he had made to him in reference to the cotton seed. The cotton seed house was open, and consisted of two rooms, in one of which was a pile of cotton seed owned by the prosecutor. In the other room there were some cotton seed scattered on the floor, and these were owned by the brother of the prosecutor. The accused, with the sack, when discovered by the prosecutor, was in the room where the cotton seed were scattered on the floor. The sack held about 2 or 2½ bushels of seed, and was full, and the seed were worth about 50 cents a bushel. The prosecutor and his clerk kept the accused under arrest during the night in the storehouse. The next morning the brother of the accused came to the store, and he and the accused entered into a written agreement with the prosecutor. The evidence does not clearly disclose the subject of this agreement; but it is reasonably inferable therefrom that the prosecutor, in consideration of not prosecuting the accused for the larceny, coerced him into making a contract to work for the prosecutor for 12 months as a laborer without wages. After the contract was made, the accused was released from custody, and he worked for the prosecutor for a month. The prosecutor, after he had thus secured the services of the accused as a laborer, induced the wife of the accused to assume the contract of rent which he had with her husband. The accused did not take any of the cotton seed out of the house, but they were left therein when he was detected and arrested by the prosecutor. The alleged larceny took place in March, and the prosecutor did not press the prosecution against the accused until the following August, after the accused had made and harvested his crop and paid the landlord his part.

The accused introduced no evidence, but stated to the jury that he was living on the prosecutor's place and owned a "little calf"; that he had nothing with which to feed the calf, and went up to the house where the cotton seed were stored, and gathered up

some that were scattered on the floor; that he did not think the prosecutor intended to use those seed, as in the other room there were two bales of cotton seed; that he thought that the seed left scattered on the floor were worthless, and had been abandoned by the prosecutor, and for this reason he gathered them up and put them in a sack, but did not intend to steal them, and did not think he was stealing the seed, as he lived on the prosecutor's place, and the prosecutor knew he had nothing to feed his calf on; that he thought he was raking up off the floor waste seed, which the prosecutor did not intend to use; that when the prosecutor came down and saw him in the seedhouse, and asked him what he was doing, he told him, and the prosecutor said, "I have got you now; come and go with me to my store;" that he kept him there all night, and next morning told him that, if he would make a contract to work with him for 12 months without wages, he would settle the case, otherwise he would send him to the chain gang for two years; that the judge would not impose any fine on him, but would do whatever he (the prosecutor) said about it, and that under these circumstances he thought it was best to make the contract with the prosecutor, and did so, and began work the next day under the contract, the prosecutor having induced his wife to assume the rent contract he had with him; that after working with the prosecutor for one month he was informed that the prosecutor had no right to settle a case of larceny, and that he could work the year out with him for nothing and then be prosecuted, so he thought it best to quit work as a laborer, and went back and worked the land which he had rented from the prosecutor, and in the fall paid him the full rental of 1,000 pounds of lint cotton. The prosecutor made no denial of the statement, and it is substantially corroborated by the evidence.

The trial judge sentenced the accused to work on the chain gang of the public works of the county for six months, without any alternative.

Paul Brown and E. P. Shull, for plaintiff in error. Hamilton McWhorter, Jr., Sol., for the State.

HILL, C. J. (after stating the facts as above). [1] 1. Under an accusation which charges in the terms of the statute larceny from the house, a conviction may be had for simple larceny; the latter offense being included in the former. *Brown v. State*, 90 Ga. 454, 16 S. E. 204.

[2] 2. To complete the offense of larceny there must be a taking and carrying away, with intent to steal, the personal property described in the indictment; but the slightest change of location, whereby complete dominion of the article or property is transferred from the owner to the trespasser, is sufficient evidence of the asportation. *Lundy*

v. State, 60 Ga. 143; 2 Russell on Crimes, 152. The evidence in this case showed that the cotton seed were at least taken up by the accused from the floor where the owner had left them and placed in the sack. The asportation, though slight, was sufficient to show this element of the offense. Indeed, we are inclined to think that a verdict for larceny from the house would not have been unauthorized, as there are some circumstances that tend to show that the accused took the cotton seed from the room of the prosecutor into the room of the seed-house owned by the prosecutor's brother. However, as there was some evidence supporting the theory of simple larceny, we do not think the matter is of sufficient legal consequence to justify the grant of a new trial.

[3] 3. The question of intent is one of fact, to be determined by the jury under the evidence, yet the writer doubts if the accused really had any criminal intent in attempting to take the cotton seed from the house. We are sure that, if his statement was the truth of the transaction, he did not have such intent. He was working for the prosecutor, and the cotton seed were scattered on the floor, apparently going to waste. It is the universal habit of negro employes to take possession of the overplus of the substance of their employers and appropriate it to their own use. The habit is one of the results growing out of the relation of master and servant, especially in our section, and, with the liberality characterizing the master in dealing with his servants, such conduct has been rarely treated as criminal. If the employers of negro servants in the South were to prosecute for larceny their servants who take possession of what they regard as waste material not desired by their masters, "crumbs which fall from their masters' tables," domestic servants would be much harder to secure than at present, and the chain gangs of our country would be very largely increased. The employer in this case, however, seems to have entertained a different view on the subject.

It is usually not the duty of reviewing courts to criticise the conduct of those who assume the rôle of prosecutors, and where the prosecution is in good faith and for the purpose of vindicating the law, such criticism would be inexcusable; but here the undisputed conduct of the prosecutor is so reprehensible that we cannot refrain from placing upon it our unmeasured condemnation. He caught this negro man in what, at the worst, was only a petty larceny. He took advantage of this situation to drive a hard bargain, and to condemn him practically to a condition of peonage for 12 months, and actually held him in this bondage for one month. With a threat of prosecution and the infliction of severe punishment, he forced

the accused to make a written contract with him to labor without wages for 12 months. The prosecutor's offense against the rights of this man and the principles of justice furnishes no excuse whatever to the accused; but by contrast with the offense of the latter it is a much greater and more inexcusable infraction of the law. The writer of this opinion is tempted to say that under the facts of this case, illustrating the conduct of both the prosecutor and the accused, the latter seems to be "more sinned against than sinning," and, although he may have been guilty, I am sure a verdict of not guilty would have done no violence to the cause of justice, and would have satisfied the judgment and conscience of the community, without in the slightest degree imperiling the stability of the criminal statute.

Judgment affirmed.

(9 Ga. App. 442)

WILLIAMSON v. STATE. (No. 3,390.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 317*)—FAILURE TO PRODUCE EVIDENCE.

Section 1015 of the Penal Code of 1910, relating to the presumption against a party which arises on his failure to produce evidence within his reach to repel a charge against him, is not applicable on the trial of a criminal case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 732; Dec. Dig. § 317.*]

2. SUNDAY (§ 29*)—VIOLATION OF SUNDAY LAW.

The verdict is without any evidence to support it, and is therefore contrary to law.

[Ed. Note.—For other cases, see Sunday, Dec. Dig. § 29.*]

Error from Superior Court, Bartow County; A. W. Fite, Judge.

J. R. Williamson was convicted of violating the Sunday law, and brings error. Reversed.

D. W. Blair and Neel & Neel, for plaintiff in error. T. C. Milner, Sol. Gen., and G. W. Stevens, for the State.

HILL, C. J. J. R. Williamson was convicted of violating section 416 of the Penal Code of 1910, which declares that "any person who shall pursue his business, or the work of his ordinary calling, on the Lord's day, works of necessity or charity only excepted, shall be guilty of a misdemeanor." His motion for a new trial being overruled, he brings error.

The evidence in support of the accusation, briefly stated, is as follows: Williamson was foreman of a crew connected with the yard of the Louisville & Nashville Railroad Company at Junta, Ga. Between the hours of midnight and 3 o'clock a. m. Sunday he was directing the switching and movements of

certain railroad cars in the yard of the company at that place. The actual movement of the cars was carried on by three or four other employes of the company, who were acting under the directions of Williamson as foreman or conductor. These facts were not controverted by the accused, but it was insisted that they did not constitute a violation of the statute, for the work in question was incidental and necessary to the operation of the regular passenger trains passing through the yard at Junta, going north and south, and also to the running of freight trains during the hours mentioned, through the said yard, all of which trains were running within the statute, and not in violation of any penal law of the state, it being insisted that it was necessary for the operation of these passenger and freight trains that the tracks in the yard should be kept clear, and that it was absolutely necessary that other cars that had reached their destination at the Junta yard should be taken from the main line and placed where they would be out of the way of the other trains that were expected to pass through the yard later; and it was contended by the defendant that this work could only be performed by the yard crew under his control, and was absolutely necessary for the proper and safe running of the regular passenger trains, as well as such other trains as were entitled, under the statute, to run over the road on Saturday night and reach their destination in Atlanta not later than 8 o'clock Sunday morning.

1. In addition to the general grounds of the motion for a new trial, two special assignments of error are made: First, it is insisted that the court erred in instructing the jury as follows: "It is not in the power of the state to put up any of the crew. They were, as the state contends, all engaged in the work being carried on, and could not be forced to swear one against the other; but the defendant could, but fails to, put them up and explain the nature of the work going on, and one contention of the state is that this is a circumstance you can consider in determining whether or not that was a work of necessity." The indictment was against Williamson alone. If other persons were present and saw him violating the statute, they would have been competent witnesses to prove the fact, whether they were connected with the same work or not. Even if these persons had been jointly indicted with the accused, they would still have been competent witnesses for or against each other on separate trials. Section 995 of the Penal Code of 1910 provides that, "when two or more persons shall be jointly indicted * * * and are separately tried, they shall be competent to testify for or against each other." If, however, they were engaged in the same criminal act, they would not have been compelled to state any fact of an incriminatory nature; but this exemption has repeatedly been held to be a personal privi-

lege of the witness, which he could claim or not as he chose. In any event, we fail to see how the fact that these other persons may have been engaged in the same work could relieve them from testifying as to what the accused was doing at the time. They need not have been asked any question as to their own conduct; but, if they desired to take advantage of any exemption on the ground above indicated, their testimony could, and doubtless would, have been confined by the court to the acts of the accused. In addition to this, if the fact of their complicity in the alleged work entitled them to the privilege of silence, this privilege could have been claimed by them, whether they had been introduced by the accused or the prosecution. But how could the court know that, if these persons were introduced as witnesses, they would claim any privilege, or that they were engaged in the same violation of the law as that charged against the accused, until they had been introduced as witnesses and their testimony elicited? We fail to see how it was not in the power of either party, the state or the accused, to put any member of the crew on the stand as a witness, if either desired the testimony.

[1] 2. Error is assigned upon the following charge: "The witness for the defendant was not present and knows nothing of his own knowledge about the work being done. That is weaker testimony in its nature, he not knowing as much about it as the men who were doing the work. In this connection I shall read you this section of the Code and give it in charge: 'When a party has evidence in his power and within his reach, by which he may repel a claim or charge against him, and omits to produce it, or, having more certain or satisfactory evidence in his power, relies upon that which is of a weaker nature, a presumption arises that the charge or claim is well founded; but the presumption may be rebutted.' Now, then, it is within the power of the defendant to place upon the stand the witnesses who were with him, as he claims, and who know more about it than the superintendent, who was not there. That is one fact you may consider, along with the other evidence in the case, in determining whether or not the work that was being done, if any was done, was a work of necessity at that particular time, or whether it could have been postponed until Monday morning and then done." This excerpt of the charge was objected to on the ground that there was nothing in the evidence to authorize it—nothing to indicate that any of the witnesses were under the power or control of the accused, or were prevented from giving testimony for him by any act on his part. It is also objected to as being wholly inappropriate and inapplicable in a criminal case.

This instruction in effect told the jury that they were authorized to infer, from a failure on the part of the accused to pro-

duce the employes who were engaged with him at the time, that the prosecution was well founded. In *Mills v. State*, 133 Ga. 155, 65 S. E. 368, it is held that in a criminal case the court should not give in charge the section of the Penal Code to the effect that the omission to produce evidence within a party's reach to repel a charge raises a presumption that the charge is well founded. Penal Code 1910, § 1015. In all criminal cases the burden is on the state to establish the defendant's guilt beyond a reasonable doubt. In the case just cited the learned justice who delivered the opinion of the court says: "A diligent investigation fails to disclose any case where it has been ruled that it was proper to give in charge to the jury, in a criminal case [this section] of the Penal Code. We can hardly conceive of a criminal case where an instruction in the language of this Code section would be authorized." And in *Knox v. State*, 112 Ga. 373, 37 S. E. 416, Mr. Justice Little states that this section of the Code is entirely inapplicable to criminal cases. In effect it tells the jury that if the defendant had evidence by which he might repel or rebut the charge, and fails to introduce it, the presumption arises that he is guilty. This violates the fundamental principle of criminal law that the guilt of the accused must be shown by competent evidence before a legal conviction can be had. One accused of crime has a right to stand mute, and unless it affirmatively appears by the evidence that he is guilty he cannot be legally so held. The presumption of law is that he is innocent, and this presumption remains until he is proved to be guilty. This principle, being inapplicable to criminal cases, has no proper place in the Penal Code. In the case of *Davis v. State*, 4 Ga. App. 442-444, 61 S. E. 843, referring to the same section of the Code, this court says that, where the evidence is clearly accessible to both parties, this presumption does not arise.

Here the brief of evidence shows that the other members of the crew were known to the prosecution and were entirely accessible, and no reason whatever appears why, if their testimony had been regarded as material, it could not have been obtained by the state as well as by the accused. Under these circumstances, as was said in the *Davis Case*, the mere failure of the defendant to introduce the witnesses did not give rise to any presumption that this testimony would have been unfavorable to him. See, also *Willson v. State*, 8 Ga. App. 816 (3), 70 S. E. 193. In view of the repeated decisions of the Supreme Court on the inapplicability of this section in criminal cases, any other discussion of the question would be superfluous. We think the court erred in giving in charge to the jury the principle embodied in this section of the Code, and that the error was prejudicial.

[2] 3. On the merits of the case, however, which seem to be not materially controverted, we do not think the conviction was authorized. The work done by the crew in charge of the accused was done between midnight and 3 o'clock on Sunday morning. The evidence shows that during these hours several trains had passed through Junta, and none of them in violation of the statute. Unquestionably the railroad company had a right to run its passenger trains at all hours during Sunday, and had a right to run its through freight trains through the yard so they could reach their destination before 8 o'clock Sunday morning. An official of the road testified that this work that was done in the yard was absolutely necessary for the operation of the trains which the railroad company was authorized to operate; and he further testified that this defendant and those whom he had in charge constituted the crew of the yard engaged in this necessary work as an incident of the lawful operation of its passenger trains and those freight trains which it could lawfully operate through the yard. The evidence further shows that there were cars which had reached the yard and were on the main tracks, and that the tracks had to be cleared of these cars in order that the regular passenger trains might pass through. It therefore follows, since the Legislature has expressly, or by necessary implication, made it lawful to operate passenger and mail trains on Sunday, and, under named conditions, freight trains up to 8 o'clock a. m., and this work in the yard at Junta was necessary to a safe and proper operation of such trains through its yard, that the accused and the crew under his charge were engaged in a work of necessity, and were therefore within the exception contained in section 416 of the Penal Code. *Southern Railway Co. v. Wallis*, 133 Ga. 553, 66 S. E. 370, 30 L. R. A. (N. S.) 401; *Kellam v. State*, 7 Ga. App. 575, 67 S. E. 683.

The evidence of the superintendent (which seems not to have been controverted) is that on this occasion there had been, through no fault whatever of the railroad company, a congestion of cars in the yard at Junta; that this congestion rarely occurred, and when it did occur, as in the present instance, it was absolutely necessary to clear the tracks of the cars and switch them from the main line, in order that the passenger trains and freight cars which were properly scheduled to arrive at their destination in the state before 8 o'clock on Sunday morning might pass through; otherwise there would have been great interruption and delay in the traffic of the railroad company. It seems clear, from the evidence, that the railroad company was not violating the law in doing this work, which was absolutely necessary for the proper and lawful operation of its trains; and it appears from the evidence that it was en-

deavoring in every way possible to conform to the statute, and not to violate it.

Judgment reversed.

(9 Ga. App. 361)

ALBRITTON v. TYGART. (No. 2,975.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

NEW TRIAL (§ 132*)—APPEAL AND ERROR (§ 933*)—FILING BRIEF OF EVIDENCE—EXTENSION OF TIME—DISCRETION OF COURT.

The law in this state contemplates that the brief of the evidence accompanying a motion for new trial, as well as the motion itself, shall be filed at the term at which the trial takes place; and in order to authorize a later filing of the brief of the evidence, an order of court must be taken during that term, granting the privilege. An order continuing the hearing of the motion does not of itself extend the time within which the brief of the evidence may be filed. If an order is taken which is ambiguous or equivocal in its terms, so far as it relates to the question as to whether the movant shall have time beyond the term in which to present the brief of the evidence, the reviewing court will not reverse the trial judge in construing it against the movant.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 273-275; Dec. Dig. § 132;* Appeal and Error, Dec. Dig. § 933.*]

Error from City Court of Nashville; W. D. Buie, Judge.

Action by R. C. Tygart against E. J. Albritton. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 134 Ga. 485, 68 S. E. 79.

J. W. Powell and W. G. Harrison, for plaintiff in error. J. P. Knight, Alexander & Gary, and Hendricks & Christian, for defendant in error.

POWELL, J. The case of Tygart v. Albritton was tried at the April term, 1910, of the city court of Nashville. Verdict having been rendered in favor of the plaintiff, the defendant filed what is commonly called a "skeleton motion for new trial," and took thereon a rule nisi, returnable on the 17th of May, in vacation. No brief of the evidence was filed, but the following order was taken: "The defendant having made a motion for a new trial in said case, on the grounds herein stated, and said grounds having been approved by the court, and it appearing that it is impossible to make out and complete a brief of the testimony in

said case before adjournment of court, it is ordered by the court that said motion be heard and determined on the 17th day of May, 1910, in vacation, at Nashville, and that movant may amend said motion at any time before the final hearing, and if not heard then to go over to regular term." It will be noticed that, while this order purports to extend the time within which amendments may be made to the motion itself, it does not extend the time for the filing or presenting of the brief of the evidence. On the 17th of May, and from time to time thereafter, orders were taken extending the time of hearing, and in some of the orders, if not all of them, the right to file a brief of the evidence was preserved; that is to say, preserved so far as it was in the power of the court then to preserve it. Finally the matter came on for hearing on the 5th of September, 1910. Movant then presented a brief of the evidence. The court held that it was too late to file it, and dismissed the motion.

The case seems to be controlled by the decisions of the Supreme Court in the cases of Pinnebad v. Pinnebad, 129 Ga. 267, 58 S. E. 879, Barnes v. Macon R. Co., 105 Ga. 495, 30 S. E. 883, and Cohen v. Lester, 108 Ga. 565, 29 S. E. 823. It is true that the present order is somewhat equivocal, in that it recites as one of the reasons for continuing the hearing from the first term that "it is impossible to make out and complete a brief of the testimony in said case before adjournment of court"; but the cases just cited all go to the extent of holding that, where the order is equivocal, the construction placed thereon by the trial judge who granted the order will be adopted by the reviewing court. It takes no special order to allow the movant to amend his original motion for new trial. The right of amendment seems to exist at all times, until the motion is finally disposed of; but the right to file a brief of the evidence stands upon a very different footing. Under Civil Code 1910, § 6089, it seems that, if the motion and the brief of the evidence are filed during the term, either of them may be amended thereafter, and that the judge may enter his approval upon the brief of the evidence at any subsequent time, either in term time or in vacation, when the matter lawfully comes before him for hearing.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(59 S. C. 106)

WARREN et al. v. WILSON.

(Supreme Court of South Carolina. June 6, 1911.)

1. APPEAL AND ERROR (§ 564*)—CASE—FILING—TIME OF—EXTENSION—SUPREME COURT.

Under Code Civ. Proc. 1902, § 349, providing that the Supreme Court in its discretion may permit acts necessary to an appeal and omitted through mistake or inadvertence to be done out of time, if satisfied that the appeal was taken in good faith and the notice was given in due time for serving a proposed case with exceptions, which, under section 345, must be served within 30 days after notice, can be extended by the Supreme Court after the expiration of the first 30 days.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 564.*]

2. APPEAL AND ERROR (§ 564*)—CASE—FILING—TIME OF—EXTENSION.

A failure to serve the proposed case and exceptions within 30 days after notice of appeal, as required by Code Civ. Proc. § 345, will be excused where no judgment has been entered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 564.*]

3. APPEAL AND ERROR (§ 134*)—DISMISSAL—JUDGMENT—APPEAL FROM.

Upon proper motion, an appeal from a judgment not yet entered will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 898; Dec. Dig. § 134.*]

4. APPEAL AND ERROR (§ 564*)—FILING—TIME OF—EXTENSION—DISCRETION OF SUPREME COURT.

Where an appeal was in good faith taken from a judgment not entered, the notice of appeal being served within due time, the Supreme Court should under Code Civ. Proc. § 349, grant the appellant an extension of time for serving his proposed case and exceptions, where his failure to serve them within the statutory period was occasioned by the appellee's failure to enter judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 564.*]

Action by G. L. Warren and others against P. J. Wilson. From a judgment for defendant, plaintiffs appeal. On motion to dismiss appeal. Denied.

Warren & Warren, for G. L. Warren.

PER CURIAM. This is a motion to dismiss the appeal herein on the ground that no case with exceptions was served within 30 days after notice of intention to appeal. The action was for the recovery of real estate, and the verdict was for the defendant.

[1] Judge Watts made his order refusing a new trial on February 18, 1911, and notice of intention to appeal from this order and the judgment rendered in the case was served on February 23, 1911. Proposed case with exceptions was served by the sheriff on April 10, 1911, 44 days after notice of intention to appeal. Section 345 of the Code of Procedure requires that case, with exceptions, be served within 30 days after no-

tice of appeal. Section 348 provides that the circuit judge who heard the cause, or any one of the justices of the Supreme Court, upon four days' notice, may extend the time for taking any proceeding in the perfection of an appeal, except the time of giving notice of appeal. Relief under this section requires that notice of motion for extension of time be given before the expiration of the time limited, which was not done in this case. However, sections 339 and 349 provide that the Supreme Court in its discretion may permit acts to perfect an appeal out of time omitted to be done through mistake or inadvertence, if satisfied that the appeal was taken in good faith, and notice of appeal was given in due time. The requirement of section 348 that notice of motion to extend time must be given before expiration of the time limited does not apply, when the application is to the Supreme Court. In determining whether to dismiss the appeal for failure to serve case and exceptions in time, this court will consider whether the excuse offered by the appellant in opposition to the motion is such as would move the court to grant an extension of time to perfect the appeal. The appellant explains his delay in serving proposed case and exceptions on the ground that, after diligence, he was unable to procure the stenographer's report of the charge and testimony in time, and upon the further ground that on March 21, 1911, he discovered for the first time that respondent had not entered judgment in the case, whereupon he concluded under the case of Publishing Co. v. Gibbes, 59 S. C. 219, 37 S. E. 753, that he had 30 days after entry of judgment to serve case and exceptions. It appears that no judgment had been entered up to the time of hearing this motion, but appellant declares his intention to have such judgment promptly entered himself if respondent does not.

[2] The fact that no judgment has been entered may excuse the failure to serve within 30 days after notice of appeal the case and exceptions on appeal from the judgment. Pub. Co. v. Gibbes, supra.

[3] Upon a proper motion the court would be warranted in dismissing an appeal from a judgment not entered, but the motion to dismiss is not based upon that ground, but solely upon the ground that case with exceptions was not served in time, which goes upon the theory that judgment has been entered.

[4] We are satisfied that the appeal from the judgment to be entered and from the order refusing new trial is taken in good faith, and the notice of appeal having been given within time, we must decline to dismiss the appeal on the ground stated in the motion.

Motion refused.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(155 N. C. 356)

ATLANTIC COAST LINE R. CO. v. CITY OF GOLDSBORO.

(Supreme Court of North Carolina. May 31, 1911.)

1. RAILROADS (§ 98*)—STREET CROSSINGS—CHANGE OF GRADE—RAILROAD CHARTER.

The charter of a railroad, authorizing it to construct its road to cross any public way, provided that, whenever it crosses such public road, it shall cause its road to be so constructed as not to impede the passage along the public road, is not limited to public roads existing when the railroad was constructed, but requires it to conform its grade to streets subsequently constructed across it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 291-296; Dec. Dig. § 98.*]

2. RAILROADS (§ 98*)—STREET CROSSINGS—CHANGE OF GRADE—POWER TO ORDER.

Revisal 1908, § 1097(10), authorizing the Corporation Commission to require the raising or lowering by a railroad of its track at any crossing, and to designate who shall pay for the same, does not deprive a city of the right to exercise its police power, under its charter, in that regard; but is supplementary merely.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 291-296; Dec. Dig. § 98.*]

3. RAILROADS (§ 98*)—STREET CROSSINGS—CHANGE OF GRADE—LIMITATIONS.

Revisal 1908, § 388, providing that no railroad shall be barred by limitations as to its right of way by occupation of it by another, has no application where a city is not contending for the soil of any part of a right of way, but is merely contending for the right to require the railroad to change the grade of its roadbed where it is crossed by streets, so that public travel and the drainage of the city may not be impeded.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 291-296; Dec. Dig. § 98.*]

4. RAILROADS (§ 231*)—MOVING CARS IN CITY—ORDINANCES—"SHIFTING CARS."

An ordinance prohibiting a railroad running through the city from "shifting" cars—that is, cutting out and putting in cars in the making up of a train—within certain four blocks in the heart of the city, except between 6:30 and 8:30 a. m. and between 4:30 and 6:30 p. m., or from allowing any car to stand for longer than five minutes within such space, is a valid reasonable exercise of the police power. (Per an equally divided court.)

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 745; Dec. Dig. § 231.*]

For other definitions, see Words and Phrases, vol. 7, p. 6485.]

Appeal from Superior Court, Wayne County; W. J. Adams, Judge.

Action by the Atlantic Coast Line Railroad Company against the City of Goldsboro. Judgment for defendant, and plaintiff appeals. Affirmed.

W. C. Munroe, Geo. B. Elliott, and Geo. M. Rose, for appellant. D. C. Humphrey and Aycok & Winston, for appellee.

CLARK, C. J. The Atlantic Coast Line Railroad, originally the Wilmington & Weldon Railroad Company, occupies with its track the chief street of the city of Goldsboro. Its right of way, 65 feet on each side of its roadbed, embraces the whole of what is known as East and West Center streets,

which extend north and south the entire length of the city. The right of way was originally acquired about 1835, and the town has been built up on either side and became incorporated in 1847. The city of Goldsboro, under the authority of the powers granted in its charter, has instituted a system of grading its streets and of drainage extending throughout the city. In pursuance of this work, the roadbed of the railroad on Center street in some places is now six inches and from that to eighteen inches higher than the grade of that street and of the other streets of the city which cross East and West Center streets at right angles. The city authorities have passed an ordinance providing that "all railroad companies owning tracks on East and West Center streets, between Walnut and Vine streets, in said city of Goldsboro are hereby required to lower said tracks, so as to make the same conform to the grade line of said streets and said tracks to be filled in between rails; the grade line of said street being as follows: Beginning at the present grade line, corner of Walnut and East and West Center streets to be lowered 6 inches to corner of Mulberry and East and West Center streets, 10 inches to corner of Ash and East and West Center streets and 18 inches to corner of Vine and East and West Center streets." Another section of the ordinance provides that failure or refusal to comply with the ordinance should be a misdemeanor and fined \$50. The plaintiff attacks this ordinance as being unconstitutional and void, and sought to enjoin all enforcement of the ordinance by a criminal proceeding. The city has heretofore graded and paved at its own expense said East and West Center street outside of that part of the street occupied and used by the defendant as its roadbed. The injunction was refused, and the plaintiff appealed.

The city has from time to time laid out numerous streets crossing said right of way, and has worked and maintained its streets and cross-streets for more than 60 years, including all of East and West Center streets outside of the actual space occupied by plaintiff's roadbed. As a general rule, a court of equity has no jurisdiction to restrain a state from prosecuting for a violation of its statutes and ordinances. The ordinances in question were made by the city in pursuance of its governmental authority. We need not enter into the learned and elaborate discussion as to what cases, if any, present exceptions to this general rule, for we are of the opinion that the ordinance requiring the plaintiff to lower its track from 6 to 18 inches at the points where the cross-streets pass over the railroad track is a legal exercise of the public authority vested in the defendant. The plaintiff took its charter expecting that towns and cities

would grow up along the line of its road, and knowing that with the development of the country new roads, and in the cities and towns that new streets, would be laid out across its right of way. And it took its charter knowing, too, that the state would have the right to lay out such roads and new streets, and to require the railroad to make such alterations as would prevent the passage over its track by the public being impeded. In *English v. New Haven*, 32 Conn. 241, it was held that the city had the right to require the railroad company to widen the crossing of a street over its track, or to make such other changes as the public convenience and necessity might require, in order that there should be no hindrance to the public in crossing the railroad track. In *Railroad v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269, it was held that the imposition upon a railroad company of the entire expense of a change of grade at a railroad crossing is not a violation of any constitutional right. In *Cleveland v. Augusta*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638, the subject is fully discussed in a very able opinion which holds that a railroad corporation must make such alterations in the change of its grade as will conform to the new grading of the streets adopted by the city. In *railroad v. Duluth*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, it was held that: "The right to exercise the police power is a continuing one that cannot be limited or contracted away by the state or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based. Such power when exercised in the interest of public health and safety is to be maintained unhampered by contracts and private interests; hence an ordinance by a city compelling a railroad to repair a viaduct constructed after the opening of a road is valid though the city for a substantial consideration had contracted to relieve the railroad company from making such repairs for a term of years."

[1] In the present case, however, there was no contract exempting the railroad from changing its grade at such crossings when required. Indeed, section 27 of plaintiff's charter in the laws of 1833 (Priv. Acts 1833-34, c. 78) expressly requires the plaintiff to do what the city now requires. Said section provides: "It shall be lawful for the said railroad company in the construction of its said road to intersect or cross any public or private way established by law; and it shall be lawful for them to run their road along the route of any such road; provided whenever they intersect and cross such public or private road the president or directors shall cause the railroad to be so constructed as not to impede the passage of travelers on said public road or private way aforesaid." In *Minneapolis v. Railroad*, 98

Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 307, 120 Am. St. Rep. 581, the Supreme Court of Minnesota held that an almost identical provision in the charter of a railroad company was as applicable to new public roads laid out across the right of way as it was to old roads over which the right of way ran, and said: "The purpose of incorporating this particular provision in the charter of the railroad company was in the interest of the public and to require the railroad company to keep in good repair all crossings at the intersection of highways. * * * The evils intended to be guarded against are the same, and apply equally to both new and old streets. There was no reason why the Legislature should deem it prudent to provide for existing highways only, and we do no violence to the rules of statutory construction in holding that the provisions of defendant's charter were intended to include all streets and highways intersected by railroads whether laid out before or after building of the railroad. The expression of the statute is special perhaps; but the reason therefor is general. The expression must therefore be deemed general. A railroad company accepts and receives its franchise subject to the implied right of the state to lay out and open new streets and highways over its tracks, and must be deemed as a matter of law to have had in contemplation at the time its charter was granted, and is bound to assume all burdens incident to new, as well as existing, crossings." The same doctrine has been held in Maine, Connecticut, Illinois, New York, Tennessee, Indiana, Texas, Mississippi, Ohio, Nebraska, New Jersey, Vermont, Wisconsin, and by the United States Supreme Court. Indeed, the above case from Minnesota was affirmed 214 U. S. 497, 29 Sup. Ct. 698, 53 L. Ed. 1060. In the above-cited case of *Cleveland v. Augusta*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638, the railroad ran across the public road which was not then a street. When the territory was taken into the city, its authorities changed the road to a street and raised the grade at that point, and required the railroad to raise its grade. This the railroad refused to do unless the city would pay the expense. The court held that the railroad company was liable for the expense of raising its roadbed to conform to the city grade, and said that it must yield to the reasonable burden imposed by the growth and development of the country or the city; and, where the public welfare demands a change of grade of the highway or street, the railroad company must, at its own expense, make such alterations in the grade of its crossing as will conform to the new grade. That case is exactly in point. In the course of its opinion the court said: "Upon streets or highways crossed by it, or subsequently laid out, the railroad company must construct proper crossings" (*Lancaster*

v. Railroad, 29 Neb. 412, 45 N. W. 469; Railroad v. Smith, 91 Ind. 119, 13 Am. & Eng. Ry. Cas. 608), and must alter, change, or otherwise reconstruct such crossings whenever the public welfare demands (English v. New Haven Co., 32 Conn. 240). The doctrine is further clearly stated thus by the court: "When the railroad company laid its track across the highway, it did so subject to the right of the public authorities to make such alterations or changes in the highway, either by lowering or raising the grade, widening or otherwise improving the same, as the public safety and welfare might require. In doing so the presence of the railroad necessitates a certain character of crossings and safeguards which otherwise would not exist; and, with however much plausibility it might be argued that the public authorities should be required to do just such work as they would have to do did the railroad not exist, it is certain that the railroad company should bear the burden of such work as is made necessary by reason of the peculiar and dangerous character of its operation. The principle of the common law is embodied in this statute. It is the railroad which makes the construction of a railroad crossing necessary, whether the highway be laid out before or after the construction of the railroad."

In Railroad v. Minnesota, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, it is said: "As the Supreme Court of Minnesota points out in its opinion (98 Minn. 380, 108 N. W. 261, 28 L. R. A. [N. S.] 298, 120 Am. St. Rep. 581), the state courts are not altogether agreed as to the right to compel railroads without compensation to construct and maintain suitable crossings at streets extended over its right of way after the construction of the railroad. The great weight of state authority is in favor of such right. See cases cited, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581. There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a corporation or an individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of obligations of contract." Here the city, in pursuance of its right, has graded the streets of the city and put in a system of drainage, both of which are impeded by the railroad maintaining its roadbed on Center street from 6 to 18 inches above the level of the streets crossing it; its roadbed extending through the entire length of the city on this main street.

[2] The plaintiff earnestly contends that, inasmuch as Rev. 1908, § 1087 (10) authorized the Corporation Commission to require the

raising or lowering by a railroad of its track or highway at any crossing and to designate who shall pay for the same, this deprives the city of Goldsboro of the right to exercise its police power in that regard. The provision just cited giving the Corporation Commission the power stated is not in derogation of that conferred in the charters of towns and cities, but is supplementary merely.

[3] The plaintiff also contends that Revisal, § 388, that no railroad company, etc., shall be barred by the statute of limitations as to its right of way, etc., by occupation of the same by any person whatever, deprived the city of the right there claimed. This is a misconception. The defendant is not contending for the ownership of the soil of East and West Center streets. It is merely asserting its right to require the railroad company to change the grade of its roadbed where it is crossed by other streets so that public travel and the drainage of the city may not be impeded.

[4] A further ordinance of the city prohibits the railroad from doing any "shifting on East and West Center streets between Spruce and Ash at any other time than from the hours of 6:30 and 8:30 a. m. and from 4:30 to 6:30 p. m., or to allow any car to stand for a longer period than 5 minutes at any point on East and West Center streets between Spruce and Ash under a penalty of \$50 for each offense." East and West Center streets constitute the main street of the town, and that portion of it between Spruce and Ash—four blocks—is the very heart of the city. In a former action, in which this plaintiff in this case was a defendant (Dewey v. Railroad, 142 N. C. 392, 55 S. E. 292), the plaintiff herein, which was defendant in that action, alleged in its answer as follows: "The operation of the trains along said Center street increases annually and the danger accordingly. Trains are constantly passing, and the crossings, notwithstanding the utmost diligence and care on the part of the railroad, are necessarily blocked. Said Center street is the main business street in the city. It is frequently crowded with pedestrians and vehicles, and the operation of so many trains daily throughout the length of said street is fraught with danger to life and property." This statement, admission, and averment of the plaintiff herein, made under oath, is set up in the answer in this case in which an injunction is sought, and it is admitted in the reply. We understand the ordinance in forbidding "shifting" within the limited space of four blocks, on the main street in the center of the town, to refer to what is commonly understood by that expression, to wit, the "cutting out and putting in" cars in the making up of a train before it is dispatched on its journey. Such a regulation certainly cannot be held void, and is a rea-

sonable exercise of the police power necessary for the convenience and safety of the public at the four crossings designated. Whether such ordinance would be reasonable in smaller towns is a question not before us. We certainly do not understand the term "shifting" to refer to the "transfer" of a train of cars already made up and to be delivered by the plaintiff company to another railroad company to be transported. The ordinance does not apply to the transfer of a car or cars from one railroad to another through the city. Whether an ordinance forbidding the transfer of the cars from one railroad to another through said street except at specified hours would be reasonable in view of the fact that at Goldsboro such cars can be transferred by way of the physical connection of the tracks of all the railroads on the edge of town at the new Union station might admit of debate. But that question is not before us. The plaintiff railroad company has its shifting yards further out, where its trains can be made up, and where at least the chief part of the necessary shifting can be done. Certainly it is a reasonable exercise of the police power to forbid such "shifting" except at specified hours on four blocks of the plaintiff's track in the heart of the town. The plaintiff's official returns show \$223,000,000 of property owned by it. The defendant's counsel having adverted to the very large proportion of this property held by the plaintiff in this state, the plaintiff's counsel replied that Goldsboro had only 6,107 population, and contended that for "a little town like that to interfere with the operation of so vast an enterprise" was, to use his expression, "like the tail wagging the dog." It is such a mistaken standpoint that doubtless induced the plaintiff on this occasion, and has so often induced such corporations, to assert what they deem their rights in defiance of the evident convenience and desires of the public by means of whose patronage such corporations thrive, and make their profits. It is true the city of Goldsboro is not large. But the powers it has exercised in making these ordinances it exercises in the name of and by the right of the sovereignty of the people of this state. From that sovereignty the plaintiff derives its rights and its very existence. It was incorporated solely for the public convenience and subject to public regulation. Its stockholders were exempted from personal liability, and it was granted the power of the state's right of eminent domain to procure its right of way and to exercise its vocation. The right of the plaintiff to derive a profit from its business is an incident of a private nature and subject to the right of the sovereign to regulate its operations and to "alter or repeal its charter, at will." Const. art. 8, § 1.

The requirement by the authorities of

Goldsboro that the plaintiff railroad company shall at its own expense (\$3,400) change its grade where its road is crossed by other streets to conform to the grade adopted by the city and its prohibition of "shifting" to make up trains on the main street of the town, within four blocks in the heart of the city, except in specified hours, is a lawful exercise of the police powers conferred upon the city by the sovereign power in this state. *Cooper v. Railroad*, 140 N. C. 229, 52 S. E. 982, 3 L. R. A. (N. S.) 391; *Wilson v. Railroad*, 142 N. C. 348, 55 S. E. 257; *Gerringer v. Railroad*, 146 N. C. 85, 59 S. E. 152. The only unreasonable aspect of the controversy is that the plaintiff should have resisted such requirements, instead of yielding immediate assent, or indeed preventing the necessity of the passage of such ordinance, by anticipating the wishes of the public in a matter so essential to the safety, comfort, and health of the town.

Affirmed.

BROWN, J. (concurring in part). The following ordinances of the city of Goldsboro are attacked by the plaintiff upon the ground that they are an unlawful interference with the chartered property rights of the plaintiff as well as an impediment in the discharge of its duty to the public, viz:

"Sec. 2. That the shifting limits on East and West Center streets shall be on the south from Spruce street to the city limits, and north from Ash street to city limits.

"Sec. 3. That it shall be unlawful for any railroad or railway company to do any shifting on East and West Center streets, between Spruce and Ash streets, at any other time than from the hours of 6:30 to 8:30 a. m., and from 4:30 to 6:30 p. m. Any railroad or railway company violating this ordinance shall be subject to a fine of fifty dollars for each offense.

"Sec. 4. That it shall be unlawful for any railroad or railway company to place any car and allow said car to stand for a longer period of time than five minutes at any point on East and West Center streets, between Spruce and Ash streets. Any railroad or railway company violating this ordinance shall be subject to a fine of fifty dollars for each offense.

"Sec. 5. That all railroad and railway companies owning tracks on East and West Center streets between Walnut and Vine streets in said city of Goldsboro are hereby required to lower said tracks, so as to make the same conform to the grade line of said streets, and said tracks to be filled in between the rails; the grade line of said street being as follows: Beginning at the present grade line, corner of Walnut and East and West Center streets, to be lowered six inches to corner of Mulberry and East and West Center streets, ten inches to corner of Ash and East and West Center streets, and eighteen inches to corner of Vine and East and West Center streets."

I concur fully in the opinion of the Chief Justice in so far as it refers to Ordinance No. 5, requiring the railways entering the city to lower their tracks at street crossings so as to conform to the grade line of the streets. This requirement does not interfere with the traffic of the railways, or impede them in the performance of their obligations as common carriers, and evidently will add materially to the safe and convenient use of the streets. This ordinance seems to be supported by the weight of authority. But I find no authority to support the ordinance fixing shifting limits and undertaking to prohibit the use of portions of plaintiff's tracks for shifting purposes during the large part of both the day and night, and none has been cited to us. I take it to be settled now by abundant authority that when it is shown that a municipal ordinance unlawfully interferes with the chartered rights, duties, as well as business of a common carrier, and will seriously obstruct the carrier in the discharge of its duties to the public, the enforcement of such ordinance will be enjoined.

In *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, the Supreme Court of the United States says: "It is well settled that where property rights would be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity." *Smyth v. Ames*, 139 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Prentiss v. A. C. L. Co.*, 211 U. S. 228, 29 Sup. Ct. 67, 53 L. Ed. 150; *Waterworks v. Vicksburg*, 185 U. S. 82, 22 Sup. Ct. 585, 46 L. Ed. 808; *Milwaukee E. R. & L. Co. v. Bradley*, 108 Wis. 467, 84 N. W. 875. In *Schlitz Brewing Co. v. City of Superior*, 117 Wis. 300, 93 N. W. 1121, the Supreme Court of Wisconsin says: "This court has recently had the general subject under discussion, and, after full consideration, has laid down the rule that equity may enjoin such prosecutions where they are resorted to or threatened as a means of preventing the enjoyment of property rights, and there is not any way to adequately remedy the mischief." The principle upon which injunctive relief may be given in cases of this character is stated by this court in *Railroad v. Olive*, 142 N. C. 285, 55 S. E. 266: "Injunctive relief against interference with the use of the right of way of a railroad company is not given because of any special consideration for these corporations, but because they are public agencies chartered, organized and given the right of eminent domain in the contemplation of law to serve the public; they are a part of the system of highways of the state." The federal courts take the same ground and for a similar reason. "It is settled," said the court, in *Southern Exp. Co. v. Ensley* (C. C.) 116 Fed. 756, "that a court of equity should enjoin the enforcement of a municipal ordinance, though violations of

it are punished criminally, when its enforcement will affect the illegal destruction of, or a grave interference with, a corporate franchise, in the operation of which the public have an interest." If this were not true, any municipal corporation by repeated arrests of the carrier's servants for violation of some ordinance might bring its trains to a standstill, paralyze its business, and seriously injure the interests of the public, who are dependent upon the carrier's service.

The defendant's counsel base the right to enact the switching ordinances upon the police power of the city, contending that it is per se a nuisance to conduct such operations in a public street, because dangerous to persons crossing the street, and disagreeable and annoying to those doing business and residing on both sides of the plaintiff's track. In the first place, the plaintiff's track is not a public street, although there is a public street partly on the right of way on both sides of the track. The plaintiff was chartered by the General Assembly before the defendant, and acquired its right of way and built its road some years before the defendant became a municipality. In the second place, operating a railroad, whether in moving its trains or in switching its cars, is a lawful business; and a business properly conducted under the sanction of law cannot be a nuisance per se, as is held by the Supreme Court in *Transportation Co. v. Chicago*, 99 U. S. 640, 25 L. Ed. 336. It is said in that case: "A Legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which, without authority, would be nuisances; but in such a case, if the statute be such as the Legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded." In the case of *Atchison, T. & S. F. Ry. Co. v. Armstrong*, 71 Kan. 366, 80 Pac. 978, 1 L. R. A. (N. S.) 113, 114 Am. St. Rep. 474, the court says that an authorized business properly conducted at an authorized place is not a nuisance, for whatever is lawful cannot be wrongful. To same effect is *Cooley on Torts*, p. 67. It was held in *Drake v. Railroad*, 7 Barb. (N. Y.) 508, that a railroad passing through streets in New York City when the cars were drawn by steam power into a crowded part of the city was not per se a nuisance. Similar decisions are *Railroad v. Applegate*, 8 Dana (Ky.) 289, 33 Am. Dec. 497; *Moses v. Railroad*, 21 Ill. 516; *Murphy v. City of Chicago*, 29 Ill. 279, 81 Am. Dec. 307. In *Yates v. Milwaukee*, 10 Wall. 498, 19 L. Ed. 984, the Supreme Court of the United States holds that: "The question of nuisance or obstruction must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a city declare any particular business or structure a nuisance, in such a summary mode, and enforce its decision at its own pleasure." In that case Mr. Justice Miller says: "This

would place every house, every business, and all the property of a city at the uncontrolled will of temporary local authorities." In commenting on the powers of municipal corporations to declare what is a nuisance Smith in his *Modern Law of Municipal Corporations* (vol. 2, § 1106) says that "the city council may not, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination." In a note to the above is the following: "In *Chicago, etc., R. Co. v. City of Joliet*, 79 Ill. 25, an action by the city to enjoin the railroad company from running its trains through the public streets and over certain public grounds of the city, which the city council by ordinance has declared to be a nuisance, the Supreme Court of Illinois reversed the court below, which had granted the injunction, and remanded the case with directions to dismiss the bill declaring that they would regard the ordinance as without effect upon the case, although the charter conferred upon the common council the power to abate and remove nuisances, and to punish the authors thereof, and to define and declare what shall be deemed nuisances upon the authority of *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, and *State v. Mayor, etc.*, 29 N. J. Law, 170. This is not only the universal doctrine in this country, but is so held in England in *Railway Co. v. Brand*, 4 Eng. & Ir. App. 171-196, in which case it is said that "no court can treat that as a wrong which the Legislature has authorized." In the case of *New Orleans v. Lefant*, 126 La. 455, 52 South. 575, it is held that "an ordinance which absolutely prohibits the doing of things, upon property which appears to be the subject of private ownership, which are harmless in themselves, and may or may not become nuisances, according to the manner in which they are done, is unconstitutional, because it seeks unduly to regulate and trammel the use of such property; and, where it imposes arbitrary and unreasonable obligations, it is illegal, for that reason." In that case the city of New Orleans by ordinance undertook to prohibit the railway company from parking its cars on its own tracks on Elysian Fields street, and the ordinance was held to be an infraction of the company's chartered rights. This principle is clearly recognized and enforced by this court in *Thomason v. Railroad*, 142 N. C. 318, 55 S. E. 206, wherein it is held: "When a railroad company acquires a right of way, in the absence of any restrictions either in the charter or the grant, if one was made, it becomes invested with the power to use it, not only to the extent necessary to meet the present needs, but such further demands as may arise from the increase of its business and the proper discharge of its duty to the public. A railroad company may, if neces-

sary to meet the demands of its enlarged growth, cover its right of way with tracks, and, in the absence of negligence, operate trains upon them without incurring in that respect additional liability either to the owner of the land condemned or others." In *Taylor v. Railway*, 145 N. C. 400, 59 S. E. 129, 122 Am. St. Rep. 455, it is held that the lawful operation of a railway on its own right of way and premises cannot be an actionable nuisance; the court saying that "the several acts charged against the defendant are well within its chartered powers, provided they are performed with reasonable care." In *Morgan v. Railroad*, 98 N. C. 247, 3 S. E. 506, this court recognized the right of a railroad company to move its engines and cars at will when necessary on its tracks along the streets of an incorporated town; Mr. Justice Merrimon saying: "The defendant certainly had the right on its roadway to move its locomotive with or without cars attached to it, in the orderly course of such work, to and fro in making up its trains, detaching cars from one already formed, and shifting them from one train or place to another." There is nothing in *Railroad v. Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, which contravenes this principle as is pointed out in *Taylor v. Railroad*, supra, and in *Railroad v. Armstrong*, 71 Kan. 368, 80 Pac. 980, 1 L. R. A. (N. S.) 113, 114 Am. St. Rep. 474. The railroad company had built a roundhouse and shops for storing, cleaning and repairing its engines up against a church, and the Supreme Court sustained a recovery upon the ground that the right given by Congress to enter the city of Washington did not authorize it to purchase a lot and build roundhouses and shops at any place it should select; the court saying: "As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol." In commenting upon that case, the Supreme Court of Kansas says: "The plaintiff was permitted to recover, but it was because the company had no authority to build its engine house at the place where it did." *Railroad v. Armstrong*, supra.

In our case the plaintiff has the right to use its tracks, granted by the Legislature in 1845, for all purposes incident to its business as a common carrier. The movement of detached cars and shifting engines is as necessary to enable the plaintiff to discharge its public duties as is the running of its freight and passenger trains. The plaintiff's freight depot is at the southern end of Goldsboro, and those of two other railroad companies are at the north end, and the tracks over which shifting is prohibited for 20 hours out of 24 connects the respective freight stations. There must be a frequent shifting and transfer of cars from one carrier to the other, absolutely essential in the transportation of freight. To restrict the

HOKE, J. The provisions of our Constitution applicable to the question presented and authoritative decisions construing statutes of similar import are against the ruling of the lower court by which these bonds were declared invalid.

[1] Thus in *Jones v. Commissioners of Madison County*, 137 N. C. 579-596, 50 S. E. 291, 297, speaking to the action of counties in matters governmental and the power of the Legislature over them in this respect, the court said: "In the exercise of ordinary governmental functions they are simply agencies of the state constituted for the convenience of local administration in certain portions of the state's territory, and in the exercise of such functions they are subject to almost unlimited Legislative control except when restricted by constitutional provision"—citing *Hamilton v. Miguels*, 7 Ohio St. 109; 1 Dillon on Mun. Cor. § 23; *Smith's Law of Municipal Corporations*, § 10; *People v. Flagg*, 46 N. Y. 401; *Galveston v. Posnain-sky*, 62 Tex. 118, 50 Am. Rep. 517; *Philadelphia v. Fox*, 64 Pa. 169; *Locomotive Co. v. Emigrant Co.*, 164 U. S. 559-576, 17 Sup. Ct. 188, 41 L. Ed. 552; and authorities from our own court, *Tate v. Commissioners*, 122 N. C. 812, 30 S. E. 352; *White v. Commissioners*, 90 N. C. 437, 47 Am. Rep. 534; *Mills v. Williams*, 33 N. C. 558; and many others could be cited, notably with us *McCormac v. Commissioners*, 90 N. C. 441. On this subject in *Mills v. Williams* it was held: "The Legislature has the constitutional power to repeal an act establishing a county. It has the same power to consolidate, as to divide, counties; the exercise of the power in both cases being upon considerations of public expediency."

2. "The purpose of making all corporations is the public good. The only substantial difference between corporations is that in some cases they are erected by the mere will of the Legislature; there being no other party interested or concerned, and these are subject at all times to be modified, changed, or annulled." And in *Locomotive Works v. Emigrant Co.*, supra, the position is referred to in this way: "The county of Calhoun is a mere political subdivision of the state, created for the state's convenience and to aid in carrying out within a limited territory the policy of the state. Its local government contains no will contrary to the will of the state, and it is subject to the paramount authority of the state as well in respect to its acts as of its property and revenue held for public purposes. The state made it, and could, in its discretion, unmake it, and administer such property and revenue through other instrumentalities." In *McCormac's Case*, supra, Merrimon, Judge, for the court, said: "That it is within the power and is the province of the Legislature to subdivide the territory of the state and invest the inhabitants of such subdivisions with corporate functions, more or less extensive and varied

in their character, for the purposes of government, is too well settled to admit of any serious question. Indeed, it seems to be a fundamental feature of our system of free government that such a power is inherent in the legislative branch of the government, limited and regulated, as it may be, only by the organic law. The Constitution of the state was formed in view of this and like fundamental principles. They permeate its provisions, and all statutory enactments should be interpreted in the light of them, when they apply. It is in the exercise of such power that the Legislature alone can create, directly or indirectly, counties, townships, school districts, road districts and the like subdivisions and invest them and agencies in them, with powers corporate or otherwise in their nature to effectuate the purposes of the government, whether these be local or general, or both. Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the government, and are always under the control of the power that created them, unless the same shall be restricted by some constitutional limitation."

[2] The same principle has been applied and upheld with us in reference to townships. *Jones v. Commissioners of Stokes County*, 143 N. C. 59, 55 S. E. 427; *Jones v. Commissioners of Person County*, 107 N. C. 248, 12 S. E. 69; *Brown v. Commissioners of Hertford County*, 100 N. C. 92, 5 S. E. 178. In *Jones v. Commissioners of Stokes County*, supra, the present Chief Justice, speaking to the subject, said: "The defendants suggest, however, that it infringes upon the provisions of the Constitution establishing counties and requiring them to be maintained in their integrity. But we do not find any such provisions. The Constitution recognizes the existence of counties, townships, cities, and towns as governmental agencies (*White v. Commissioners*, 90 N. C. 437, 47 Am. Rep. 534), but they are all legislative creations and subject to be changed (*Dare v. Currituck*, 95 N. C. 189; *Harriss v. Wright*, 121 N. C. 172, 28 S. E. 269), abolished (*Mills v. Williams*, 33 N. C. 558) or divided (*McCormac v. Commissioners*, 90 N. C. 441) at the will of the General Assembly."

[3] Again, in *Smith v. School Trustees*, 141 N. C. 143, 53 S. E. 524, the Legislature incorporated a school district, confined territorially to portions of two existent townships, authorized the trustees of the district to issue bonds, levy and collect taxes, etc., and the court, after full and careful consideration held that this power of the Legislature over counties, townships, etc., when acting as governmental agencies, was not confined to the ordinary political subdivisions of the state, but that it authorized and extended to creating special public quasi corporations for governmental purposes in designated portions of the state's territory, and that, in the exercise of such power,

county and township lines could both be disregarded if such action was in the judgment and expressed declaration of the Legislature best promotive of the public welfare. And within the proper exercise of this power were included levee, school, drainage, roads, and highways, and other special taxing districts, citing among other authorities: American and English Ency. of Law, p. 906, as follows: "Districts for schools, highways, levee, irrigation, drainage, and other similar purposes may be and often are invested by the state with a corporate character, and may be endowed with the taxing power. These are quasi corporations, mere subdivisions of the state for political purposes." And 1 *Desty on Taxation*, p. 226, to the following: "As distinct from its power of local assessment, the Legislature may create special taxing districts which may include all or mere subdivisions of the state or parts of subdivisions. It is not essential that such districts shall correspond with the territorial limits of such subdivision. So it may create levee, school, swamp land, road, and highway, and other taxing districts"—an extension of the principle affirmed and applied to school districts in *McCormac's Case*, supra, and to drainage districts in *Sanderlin v. Luken*, 152 N. C. 738, 68 S. E. 225, and to highways in townships in *Commissioners v. Webb*, 152 N. C. 710, 68 S. E. 211. In the case of *Smith v. School Trustees*, supra, it was held, also, that, when these special districts were incorporated for governmental purposes, they came within the limitations and restrictions as to the methods, purposes, and powers of taxation contained in article 7, §§ 7, 9, 13; section 7 being the prohibition against contracting debts, loaning credits, or levying taxes except for necessary expenses, unless by a vote of the majority of the qualified voters therein, section 9 requiring that all taxation shall be uniform and ad valorem, section 13 prohibiting the payment of debts contracted in support of the Confederate government. And, with the exception of these sections above noted, there was not only no further restraint on the power of the Legislature contained in the Constitution, but that, under section 14 of the same article, express provision was made for its fullest exercise. And, speaking further to the question, the court said: "The language of section 14 is very broad in its scope and terms, and the Supreme Court, in construing the section, has decided that it is not necessary to effect changes in municipal government that an act for the purpose should be general in its operation, or that it should in terms abrogate one article and substitute another in its stead, but that an act of the General Assembly making such change, and local in its operations, must be given effect under this amendment if otherwise valid. After declaring this as a principle of construction, the court, in *Harriss v. Wright*, 121 N. C. 179, 28 S. E. 269, further holds as follows:

In 1875 a constitutional convention amended article 7 in these words: 'The General Assembly shall have full power by statute to modify, change or abrogate any and all the provisions of this article and substitute others in their place except sections 7, 9, and 13.' Const. art. 7, § 14. Thus was placed at the will and discretion of the Assembly, the political branch of the state government, the election of court officers, the duty of county commissioners, the division of counties into districts, the corporate power of districts and townships, the election of township officers, the assessment of taxable property, the drawing of money from the county or township treasury, the entry of officers on duty, the appointment of justices of the peace, and all charters, ordinances, and provisions relating to municipal corporations. Our Constitution, therefore, so far from restricting the power of the General Assembly on the matter now before us, has conferred upon that body full and ample power to establish any form of municipal government which the public interests and special needs of a given community may require."

[4] And it is no objection to this legislation that the issuing of the bonds and the control and ordering of the road work are given to the local authorities, while the county commissioners are directed to levy and collect the taxes. This is the plan contained in our general statute in reference to school districts, adopted, no doubt, for convenience and to avoid possible friction between different sets of officers and unnecessary harassment of the citizens in the collection of taxes. As declared, however, in *Perry v. School Commissioners*, 148 N. C. 526, 62 S. E. 606: "Whether the collection of this tax was done by specified local agencies or by the general authorities of the county, this was only an immaterial matter, a question of method simply, which was not of the substance, and should in no way affect the result."

[5] The power of the Legislature, then, over these local agencies, when acting in matters governmental, being ample, certainly when given territorial placing, and whether designated as counties, townships, or as special districts, it is well established with us that the construction and maintenance of public roads is a governmental purpose and the cost thereof is a necessary expense to be paid for by current taxation or by issuing bonds, having regard always to the requirements and limitations of the legislation under which these local authorities are acting and for such purpose, and, unless the statute so requires, no election by the people is necessary. Within the range of governmental action, there could not be a more beneficent purpose or a more compelling need, and numerous and repeated decisions of our court are in furtherance of the enlightened policy of which this statute is an expression. *Highway Commissioners v. Webb*, 152 N. C. 710.

68 S. E. 211; *Ellison v. Willanston*, 152 N. C. 147, 87 S. E. 255; *Jones v. New Bern*, 152 N. C. 64, 87 S. E. 173; *Hendersonville v. Jordan*, 150 N. C. 85, 63 S. E. 167; *Commissioners v. Webb*, 148 N. C. 120, 61 S. E. 670; *Crocker v. Moore*, 140 N. C. 429, 53 S. E. 229; *Herring v. Dixon*, 122 N. C. 420, 20 S. E. 368; *Tate v. Commissioners*, 122 N. C. 812, 30 S. E. 352. Speaking to this subject in his learned and able argument, counsel for plaintiff well said: "To-day, when the industrial activities of men have multiplied, when specialization is the order of the hour, and every man is to some extent dependent upon the products and the purse of his fellow man, when the social instinct has become a habit and demands a larger field than the neighborhood, the need for roads has become a necessity, both to the commercial and social life of our people. Without them the state cannot maintain effective order nor administer adequate justice. In equal measure, they are dependent upon the power of the state. They cannot be constructed without the right of eminent domain, nor maintained save by a community of interests made stable by legislative enactment."

[6] The statute in question expressly creates the municipal corporation to be known as the board of trustees of Youngsville township, gives them as such the entire management and control of the public roads of the township, confers upon them power to issue and sell the bonds, and apply the proceeds to the purpose designated. On authority, therefore, we are of opinion that the bonds are valid, and that no good reason is shown why performance of the contract of sale should not be enforced. For the reason stated, the judgment of the lower court must be reversed, and it is so ordered.

Judgment reversed.

(112 Va. 494)

STEELMAN v. LAFFERTY.

(Supreme Court of Appeals of Virginia.
June 8, 1911.)

1. FISH (§ 7*)—OYSTER BEDS—EASEMENTS—DOMINANT TENEMENTS.

Where a plaintiff brought ejectment for oyster beds, claiming them as appurtenant to his land, but failed to prove the location of his land, or that it was adjacent to the oyster beds, a judgment in his favor cannot be supported, for the dominant tenement must first be located, before the existence of the servient tenement can be determined.

[Ed. Note.—For other cases, see *Fish*, Dec. Dig. § 7.*]

2. EJECTMENT (§ 111*)—VERDICT—EFFECT.

As a verdict in ejectment which finds for part only of the lands sued for must designate the boundaries of such property, or refer to some certain standard from which they can be ascertained, a verdict which referred to a declaration which described certain lands, but gave no starting point from which they could be identified, is insufficient to support a judgment.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 327-345; Dec. Dig. § 111.*]

3. EJECTMENT (§ 90*)—EVIDENCE—ADMISSIBILITY.

In an action of ejectment, where oyster beds were claimed as appurtenant to certain upland, evidence of a grant of that same land to one other than the plaintiff is admissible, tending to show an outstanding legal title in some one other than the plaintiff.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 254-277; Dec. Dig. § 90.*]

Error to Circuit Court, Northampton County.

Ejectment by A. B. Lafferty against N. B. Steelman. From a judgment for plaintiff, defendant brings error. Reversed and remanded.

Otho F. Mears, for plaintiff in error.
Gardiner R. Nottingham and Thos. B. Robertson, for defendant in error.

WHITTLE, J. The defendant in error, Lafferty, brought this action of ejectment in the circuit court of Northampton county to recover of the defendant, Steelman, seven parcels of land, described in the declaration as "lying and being in the said county of Northampton and containing an area of seven and two-tenths acres, four and one-fourth acres, one and three-fourths acres, four-tenths acres, fifty-five one-hundredths acres, four and three-fourths acres, two and two-tenths acres, and ten and nine-tenths acres, all of said tracts being situated on the southern side of what is commonly known as Lafferty's or Godwin's Island, and bounded on the north, east, south, and west by the lands of the said A. B. Lafferty."

The jury found the following verdict: "We, the jury, find for the plaintiff, that he recover from the defendant possession of the tracts of land described and specified in the declaration as being situate in the tributaries of Godwin's Island creek, containing two and two-tenths acres, fifty-five one-hundredths acres, four and one-fourth acres, and one and three-tenths acres, and that he is entitled to said parcels of land in fee simple." Upon this verdict the court rendered judgment for the plaintiff.

The defendant's title to the parcels of land held by him is founded upon an assignment, under the oyster laws of the state, from the oyster inspector for district 23A, in Northampton county. He has paid all rents, taxes, and fees, as required by law, and planted a large quantity of oysters on the ground assigned to him. The plaintiff's title is based upon a tax deed from the clerk of the court, bearing date February 11, 1890, whereby, for the consideration of \$2.50, he conveyed to the plaintiff real estate, standing in the name of Jesse Hutcheson and sold for delinquent taxes. The tax deed (after reciting that there was a report of the county surveyor "specifying the metes and bounds" of the real estate, "and the names of the owners of the adjoining tracts or lots, and giving

further description of the land as will identify the same") grants to Lafferty "that tract of land sold by the treasurer of Northampton county as aforesaid, described as Godwin's Island, containing forty-three and three-fourths acres, and mentioned in the said report of the said county surveyor, as surrounded by New Inlet, Wreck Island creek, Ship Shoals inlet, and Godwin's Island creek, for a more particular description of which reference is made to said report."

[1] The report of the surveyor was lost and its contents not proved. The land books of the county show that the only land assessed to the plaintiff in Northampton county is 44 acres, valued at \$50, and buildings at \$100, and that the total tax assessed thereon for the year 1908 was \$2.42; yet the land included in this tax title deed forms the nucleus for a claim by the plaintiff to a boundary of 1,400 or 1,500 acres (or, according to the estimate of one of the oyster inspectors, to from 2,000 to 3,000 acres) of alleged tributary lands, to low-water mark, where the waters ebb bare. But the evidence fails to locate and identify the 40-odd acres of land acquired by the plaintiff at the tax sale, and consequently it does not and cannot appear that the outlying oyster-planting ground assigned to the defendant is in anywise appurtenant to the original tract. Indeed, the consensus of the testimony of witnesses both for the plaintiff and defendant (including that of the county surveyor) is that the lands claimed by the plaintiff cannot be located. Nor was it shown that the lands described in the declaration as "situated on the southern side of what is commonly known as Lafferty's or Godwin's Island" are bounded by the lands of the plaintiff. That averment has for its support the opinion of the plaintiff, whose conclusion is drawn from undisclosed facts. Obviously the dominant estate must first be clearly located, in order to determine the extent of the servient tenement.

[2] Nor is the situation aided by the verdict, which finds four out of the seven parcels of ground sued for, for a description of which the declaration is referred to.

In *Slocum v. Compton*, 93 Va. 374, 25 S. E. 3, the court held: "Where the verdict in an action of ejectment is for a part only of the land sued for, the boundaries of the part recovered should be designated. The verdict must be certain in itself, or must refer to some certain standard by which to ascertain the land found; otherwise, it will be too uncertain to warrant a judgment upon it."

The present case in this aspect is quite similar to the case of *Merritt v. Bunting*, 107 Va. 174, 57 S. E. 567, where Judge Cardwell, speaking for the court, says: "To sustain his contention that, as riparian owner, he also owned the whole of Little Assoteague

Bay, it was necessary for Bunting (plaintiff in the action of ejectment) to establish his ownership of the lands adjacent to the bay on all of the shore sides thereof. * * * In other words, Bunting's claim is that he owned the whole of the bay by virtue of owning the high ground around the bay, that his title as owner of the ground around the bay extended to low-water mark, that the bay ebbed bare, and that he therefore owned the whole of the bay." The court held that "the land conveyed was described as situated on Chingoteague Island and embraced within courses and distances, but no starting point or ending point is given, and hence the location of the land could not have been ascertained, and the deed is inoperative as against a subsequent purchaser for value, even if he had notice of its existence." *Mundy v. Vawter*, 8 Grat. 518; *Florance v. Morien*, 98 Va. 35, 34 S. E. 890; *Reid v. Rhodes*, 106 Va. 701, 56 S. E. 722.

[3] If, therefore, there were no other assignment of error, the failure of the plaintiff to establish his title to the parcels of oyster-planting ground in the possession of the defendant as appurtenant to the 44 acres acquired by him at the tax sale would necessitate a reversal of the judgment. But we are of opinion that the court also erred in excluding from the evidence the grant from the commonwealth to Hutcheson, dated March 18, 1877. That grant conveyed to Hutcheson 855.37 acres of land situated in Northampton county, including Ship Shoal and Godwin's Islands, and was admissible evidence as tending to show an outstanding legal title to at least part of the appurtenant lands claimed by the plaintiff.

As the case must be remanded for a new trial along essentially different lines, we deem it unnecessary to notice objections to the ruling of the court with respect to instructions.

For these reasons, the judgment must be reversed.

Reversed.

(112 Va. 242)

ALLISON v. CITY OF FREDERICKSBURG.

(Supreme Court of Appeals of Virginia.
June 8, 1911.)

1. NEGLIGENCE (§ 58*)—PROXIMATE CAUSE.

To warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 71; Dec. Dig. § 58.*]

2. DAMAGES (§ 185*)—PROXIMATE CAUSE—EVIDENCE.

In an action for injuries from stepping through a hole in a bridge, evidence held to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

show that the injury was not the proximate cause of the loss of plaintiff's leg, but that it was due to sarcoma, which could not have been reasonably anticipated by defendant.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 185.*]

3. DAMAGES (§ 19*)—PROXIMATE CAUSE OF INJURY—QUESTION FOR JURY.

Plaintiff stepped into a hole in the plank-ing over a gutter, but there was no apparent mark of injury. Some months later she developed sarcoma of the bone, for which her leg was amputated. The uncontradicted medical testimony was that no such result could have been anticipated from the accident, though it was agreed by the experts that the dormant sarcoma either was or might have been incited by the injury. *Held*, that the court properly took from the jury the question whether the sarcoma and loss of plaintiff's leg was the natural and probable consequence of stepping through the hole.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 38-53; Dec. Dig. § 19.*]

4. DAMAGES (§ 132*)—INADEQUATE DAMAGES—EVIDENCE.

In an action for injuries from falling into a hole in a bridge, where plaintiff subsequently developed sarcoma, necessitating the amputation of her leg, *held* that, the sarcoma, and not the accident, being the cause of the amputation, \$1,200 was a liberal award for the pain shown by the evidence to have been suffered by the plaintiff as the direct and proximate result of the alleged negligence, and therefore the verdict could not be disturbed on the ground of inadequacy.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

Error to Corporation Court of Fredericksburg.

Action by Maud Allison, by next friend, against the City of Fredericksburg. From a judgment granting insufficient relief, plaintiff brings error. Affirmed.

Wm. W. Butzner and G. B. Wallace, for plaintiff in error. St. George R. Fitzhugh, for defendant in error.

HARRISON, J. This action was brought by Maud Allison, an infant, by her father, as her next friend, to recover damages for an injury alleged to have been caused by the negligence of the defendant city. There was a verdict and judgment for \$1,200 in favor of the plaintiff, which she now asks this court to reverse and set aside upon the ground that the jury was misdirected, the damages allowed inadequate, and the verdict contrary to the law and the evidence.

It is alleged that the defendant negligent-ly allowed a hole to remain in a small plank bridge that it maintained across one of its sidewalks on Main street as the covering to a gutter. The record shows that in February, 1909, the plaintiff, a girl between 10 and 11 years of age, while returning from school, stepped into this hole. There were no appar-ent ill effects from the accident, not even an abrasion of the skin. The plaintiff mention-ed to her friends the fact that she had step-ped into the hole, but made no complaint of

being seriously hurt. In the following April a small lump had developed on her leg, and she was observed to limp. The family phy-sician was consulted several times—the last on the 28th of June. He regarded the mat-ter of no importance, and finally told the father that there was no occasion for him to see the plaintiff again, and that he need feel no concern on her account. No doctor was seen again until about the 9th day of the following November. In the meantime, from February to November, the plaintiff was pur-suing her usual activities, going to school until its close in June, with the exception of one week, and again at school from the time it opened in September until Novem-ber. About the 9th of November the lump on the leg appearing more serious, several specialists were consulted, who diagnosed the plaintiff's trouble as sarcoma of the bone, a malignant cancerous disease, and advised amputation of the limb as the only means of saving her life. The leg was amputated No-vember 14, 1909, and this suit was brought to the following December rules.

The court, among others, gave the jury the following instruction: "There can be no recovery of damages for an alleged injury, unless the negligence charged as causing such injury was the proximate cause of such in-jury, that in order to warrant a finding by the jury that negligence is the proximate cause of an injury, it must appear that the injury complained of was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances; hence, if the jury shall believe from the evidence that the diseased condition of the plaintiff's leg, and the suffering occasioned thereby, was the result of a malignant tumor known as 'sarcoma,' and that the amputation of the plaintiff's leg was rendered necessary by rea-son of such sarcoma, then the court instructs the jury that sarcoma was not the result nat-urally and reasonably to be expected from the injury received by the plaintiff at the bridge, that it was not the natural and prob-able consequence of the alleged negligence of the city, and the jury cannot find any dam-ages for the plaintiff on account of said dis-ease, and its attendant suffering, whether physical or mental, nor for the loss of her leg. The court further instructs the jury, if they shall believe from the evidence that the plaintiff fell through the bridge on upper Main street, by reason of the negligence of the defendant city, and was injured thereby, then she is entitled to recover damages for any physical pain and suffering which the jury may believe from the evidence was the direct and proximate result of the defend-ant's negligence."

The crucial question in this case is raised by the first branch of this instruction, which was given over the protest of the plaintiff.

The objection urged is twofold: First, that the instruction does not correctly state the law touching the doctrine of "proximate cause"; and, second, that the court thereby decides as matter of law that stepping into the hole in the bridge was not the proximate cause of the sarcoma or the loss by the plaintiff of her leg, whereas that question should have been left to the determination of the jury upon the evidence.

[1] In the case of *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070, the plaintiff was injured in a collision of two trains. The declaration alleged injuries to body, brain, spine, and nervous system, which it was further alleged had produced the insanity which ended in the plaintiff's suicide, eight months after the injury was sustained in the railroad collision. There was a demurrer to the declaration, which was sustained; Mr. Justice Miller, speaking for a unanimous court, saying: "To warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

This language of the Supreme Court has been twice adopted by this court as a correct statement of the law, and the principle involved has been stated in other cases. *Connell v. C. & O. Ry. Co.*, 93 Va. 57, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786; *Fowlkes v. Southern R. Co.*, 96 Va. 742, 32 S. E. 464.

In the last-named case, Judge Keith, speaking for this court, quotes the language of Justice Miller with approval, and further says: "It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded; in other words, the law always refers the injury to the proximate, not to the remote, cause. If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. To the proximate cause we may usually trace consequences with some degree of assurance, but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. If the wrong and the resulting damages are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are

not sufficiently conjoined or concatenated as cause and effect to support an action."

In *Va. Iron & Coal Co. v. Kiser*, 105 Va. 704, 54 S. E. 892, Judge Cardwell expresses the principle of the cases cited as follows: "A defendant, in an action to recover damages for a personal injury, cannot be held liable therefor, unless the neglect of some duty he owed the injured party was the proximate cause of the injury. The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury, and the second requisite is that it did produce it."

A casual examination of the instruction under consideration shows that the law is there stated in substantially the language of the controlling decisions we have cited.

[2] The conclusion, from this branch of the instruction, that the sarcoma and the loss of the leg were not naturally and reasonably to be expected from the injury received by the plaintiff at the bridge, and that they were not the natural and probable consequences of the alleged negligence of the city, was inevitable in the light of the evidence. The record shows that three doctors were examined, who concur in the opinion that sarcoma is a malignant cancerous tumor in the system, that is sometimes developed by an injury. One of them says that, in this case, the dormant sarcoma may have been incited to development by the slight injury at the bridge; the other two are of the opinion that the development was incited by that injury. All three, however, concur in the opinion that it would have been impossible for any one to have foreseen or anticipated such a result from such an accident—one of them saying on this point that "no human power could have foreseen the occurrence of a malignant growth as the result of that injury, at that time; therefore, it was not usual. * * * I don't think this was the usual or common result of an injury of that kind, because, as I have testified before, I think 100 children might have fallen through there and had similar injuries, and a cancer not occur in any one of the 100."

Bringing this case to the test of the principles announced, it is clear that the injury sustained by her in stepping into the hole in the bridge was not the proximate cause of the loss of the plaintiff's leg. The sarcoma was not the natural and probable consequence of the plaintiff's foot going through the hole in the bridge, and could not have been foreseen in the light of the circumstances attending the alleged negligence of the city.

[3] The second objection to this branch of the instruction is that the question of proximate cause was not one of law to be determined by the court, but was a question of fact to be submitted to the jury.

This objection cannot be sustained. The

law is well settled to the contrary. When the question is involved in doubt, and the evidence is conflicting, it is a question for the jury; but when there is no doubt, and no conflict in the evidence, as in the case at bar, it is a question to be determined by the court.

In the case of *Scheffer v. Railroad Co.*, supra, the Supreme Court sustained a demurrer to the declaration, holding that there was no proximate cause between the alleged negligence of the railroad and the subsequent death of the plaintiff.

In *Fowlkes v. Southern Ry. Co.*, supra, the law is stated as follows: "It is the province of the court to determine in the first instance whether or not the facts offered in evidence tended to prove an injury to the plaintiff too remote from the defendant's act of negligence to constitute an element of the plaintiff's recovery."

In *Winchester v. Carroll*, 99 Va. 744, 40 S. E. 40, the court says: "The general doctrine is that whether one has been guilty of negligence or not is a mixed question of law and fact, to be determined by the court where the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed or the evidence conflicting."

[4] Under the latter branch of the instruction, the jury found a verdict in favor of the plaintiff for \$1,200. This was a liberal award of damages for the pain shown by the record to have been suffered by the plaintiff as the direct and proximate result of the alleged negligence of the city, and therefore the verdict cannot be disturbed upon the ground of inadequacy.

Upon the whole case we are of opinion that there is no error in the judgment complained of, and it must be affirmed.

Affirmed.

(112 Va. 292)

BACKUS v. NORFOLK & A. TERMINAL CO.

(Supreme Court of Appeals of Virginia.
June 8, 1911.)

1. RAILROADS (§ 421*)—INJURY TO ANIMALS—CONTRIBUTORY NEGLIGENCE.

Where plaintiff's servant drove along parallel to defendant's track for 180 yards, and onto the crossing, without looking in the direction from which he had come, the track being visible for between a quarter and half a mile from the crossing, it was contributory negligence, barring recovery for injury to the team by collision at the crossing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1501-1510; Dec. Dig. § 421.*]

2. RAILROADS (§ 419*)—INJURY TO ANIMALS—CARE REQUIRED OF MOTORMAN.

The motorman of an electric car, who saw a team walking toward a crossing, and with nothing to indicate that the driver was not in full control of the team or was not in full possession of his faculties, was entitled to presume

that he would not drive onto the crossing in front of the car, when in plain sight.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1489-1500; Dec. Dig. § 419.*]

Error to Circuit Court, Norfolk County.

Action by one Backus against the Norfolk & Atlantic Terminal Company. From a judgment for defendant, plaintiff brings error. Affirmed.

Thos. H. Willcox, for plaintiff in error.
Williams & Tunstall, for defendant in error.

WHITTLE, J. This action was brought by the plaintiff in error, Backus, to recover damages for injuries to a pair of mules, wagon, and harness, suffered in a collision with one of the defendant's cars at a road crossing in Norfolk county, between Pine Beach and the city of Norfolk. The judgment under review was rendered for the defendant on a demurrer to the evidence.

[1] At the point of collision the defendant's road (a double track) runs through the plaintiff's farm, and on the day of the accident his negro driver was engaged in hauling hay from the west side of the road over the crossing to his barn and stables on the east side. The plaintiff's residence is located about 180 yards north of the crossing, access to which is afforded by a boulevard running parallel with the defendant's right of way.

When the driver set out from the barn, he looked toward Pine Beach, and, seeing no car approaching, drove to the crossing and upon the track, without looking again in that direction. To quote his own language: "I did not look that way then (after driving on the west track) until my mules got scared. After my mules got scared, I looked up and saw the car."

From the crossing in a northerly direction the view of the track is unobstructed for a distance of a quarter to half a mile, yet the driver before going on the track wholly failed to look in that direction to find out if he could cross in safety. In these circumstances he was plainly guilty of such negligence as would bar a recovery, unless the defendant, after knowing of the danger, or after it should have been discovered by the use of ordinary diligence, failed to exercise ordinary care to avoid the injury.

When the driver got upon the track, one of his mules scared at a hole in the bridge and stopped, and would not go forward. He then for the first time looked up the track and saw the car 75 yards away, approaching at full speed. He held up his hands as a signal to the motorman to stop, but the collision was at that time inevitable.

[2] We have found nothing, after a careful inspection of the evidence, to bring the case within the influence of the doctrine of discovered peril, or the last clear chance. The motorman saw the team coming down

the boulevard at a walk, and had no reason to suspect that the driver would attempt to cross in front of him with his car in plain view. As soon as the danger was discovered, he shut off the current and put on the emergency brake; but it was impossible then to avert the accident. The colliding train consisted of a heavy motor car with a trailer attached, the schedule speed of which was from 30 to 40 miles an hour. The undisputed evidence shows that the motorman could not have stopped the cars under 400 feet.

In the case of *Norfolk & Western Ry. Co. v. Daves*, 108 Va. 514, 518, 519, 62 S. E. 337, 339, the court says: "The engineman on the defendant's train saw the deceased as he was driving along the highway toward the crossing, some 70 or 80 feet from it. The fireman saw him when he was some 50 feet from it. The plaintiff's intestate, when seen by the trainmen, was sitting on the running gears of his wagon, driving very slowly along the highway. * * * There was nothing in the conduct of the plaintiff's intestate to indicate that he was not in the full possession of his faculties, that he did not know that the train was rapidly approaching, that his team was not entirely under his control, or anything to indicate that he intended to cross, or attempt to cross, the railroad track in front of the train, which was in full view. Under these circumstances, the trainmen had a right to presume that he would stop, and not go upon the track." *Southern Railway Company v. Daves*, 108 Va. 378, 61 S. E. 748; *Virginia-Carolina Ry. Co. v. Clawson's Adm'r*, 111 Va. 313, 63 S. E. 1003.

The principles enunciated in these cases and many others are conclusive, when applied to the facts of this case, and the judgment must therefore be affirmed.

Affirmed.

(112 Va. 506)

VAUGHAN v. PLEASONTON et al.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. BROKERS (§ 63*)—COMPENSATION—RIGHT TO—REFUSAL OF PRINCIPAL.

A real estate broker must complete the sale, with a purchaser able, ready, and willing to complete the purchase upon the terms agreed upon, before he is entitled to his commissions; and when he has found such a purchaser, who has entered into a valid contract, his right to compensation cannot be defeated by the seller's misrepresentation, or by his unreasonable refusal to comply with his contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 94-96; Dec. Dig. § 63.*]

2. BROKERS (§ 64*)—COMPENSATION—SERVICES—COMPLETION OF SALE.

Where a broker employed to sell land found a purchaser on the required conditions, but when the parties met to make the sale the purchaser refused to enter into the contract

agreed on, but insisted on one materially different and less advantageous to the vendor, which the vendor refused, the broker was not entitled to commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 97; Dec. Dig. § 64.*]

Error to Circuit Court, Goochland County.

Action by R. F. Vaughan against Alfred Pleasonton and another. From a judgment for defendants, plaintiff brings error. Affirmed.

Rosewell Page, John Rutherford, C. B. Sands, and D. H. & Walter Leake, for plaintiff in error. Smith, Moncure & Gordon, for defendants in error.

HARRISON, J. This action was brought by R. F. Vaughan, a real estate agent, to recover of Alfred and Theresa Pleasonton \$2,000 commissions, alleged to be due the plaintiff on a sale alleged to have been made by him for the defendants of their landed estate in Goochland county, at the price of \$40,000.

There was a verdict and judgment in favor of the defendants, to which this writ of error was awarded.

The essential facts in the case are few and undisputed. It appears that on March 10, 1909, the defendants united in the following letter to the plaintiff: "You are hereby authorized to sell our farms, composed of Bolling Hall, Woodville, and Pocahontas, in Goochland county, Virginia, and containing about 2,000 acres, more or less, for the sum of \$50,000, and we agree to pay you 5 per cent. commission on said price, or on whatever price we accept from your customer, said commissions to be paid out of the first cash payment, if sold through your agency."

In pursuance of this authority the plaintiff, in the following May, submitted to the defendants an offer of \$40,000 for the property, made by Thomas S. Winston, which they agreed to accept, upon certain terms and conditions. In pursuance of this understanding a contract was then prepared between all the parties, including the proposed purchaser, by the plaintiff, Vaughan, the agent, which, "although not signed, was according to the testimony of all sides satisfactory to the Pleasontons and to Winston; the significance of this paper being that it embodied the terms upon which all parties were willing to meet." This statement with respect to the Vaughan contract is taken from the petition for the writ of error, and is fully sustained by the evidence. This contract set forth the property sold, which the parties of the first part covenanted to convey by a good and sufficient deed, and provided that the purchaser should assume a mortgage on the property of \$15,000 and pay the balance of \$25,000 in cash; these terms to be complied with as soon as the attorney for the purchaser should procure all

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indices

necessary papers and releases of deeds and suits from the circuit court of Goochland county, affecting the title to said lands. The purchaser agreed to comply with these terms and to pay \$1,000 in cash, the receipt of which was acknowledged in the contract, to bind the sale, which sum was to be refunded if the title to the property was not good.

At the time this contract was prepared, May 31, 1909, it was understood that all parties should meet in Richmond on the 9th day of the ensuing June and complete the sale by carrying out its terms. In accordance with this understanding, the parties, except the purchaser, met in Richmond. The purchaser, who was absent on other business, designated his attorney, who was present to act for him in carrying into final completion the terms of purchase agreed upon. When the parties met, the attorney for the purchaser presented a contract, prepared by him, for the parties to execute, which was radically different in its terms from the Vaughan contract of May 31st, which all had agreed to. There was pending in the circuit court of Goochland county against the Pleasontons a creditors' suit, in which there had been no decree for sale, and the new contract provided that the sale should be ratified by the court, that a special commissioner should be appointed to unite with the proposed vendors in a deed to the purchaser, that the \$25,000 which it had been agreed should be paid in cash should be paid in bank to the credit of the court, and should not be paid until the attorney had procured all necessary decrees, orders, releases, and other things that he might think necessary to perfect the title, that the vendors should assign to the purchaser all leases now existing between either Alfred Pleasonton or his wife, and that from the date of the contract the vendors should cut no timber on the lands, nor permit any wood or timber not already cut to be removed therefrom. This new contract also omitted the provision of the Vaughan contract, which had been agreed to, that the purchaser should pay \$1,000 down upon its execution to bind the contract, which was to be refunded if the title was not good.

When this contract was presented and insisted upon by the attorney of the purchaser, the proposed vendors protested that it was not the contract agreed upon, and they refused to sign it. Thereupon, the attorney abandoned further conference on the subject, and the defendants treated the proposed sale as off, and on the same day sold the property to one W. E. Harris for \$42,500, Harris paying \$1,000 at once, assuming certain liens on the property, and agreeing to pay the vendors the balance within 30 days, which balance was to be paid in part with a certificate for 100 shares of stock in a coal and coke company, valued at \$14,900.

The essential difference between the Vaughan contract, which embodied the terms

upon which all parties had met and agreed, and the contract insisted upon by the attorney for Thomas S. Winston, was that the latter contract provided that \$25,000 of the purchase money should be paid upon the ratification of the contract by the circuit court of Goochland county, and the execution by its special commissioner and the vendors of a good and sufficient deed, and that such \$25,000 should not be paid into bank to the credit of the court until the attorney of the proposed purchaser should procure all necessary decrees, orders, releases, and other things that he thought necessary to perfect the title. The effect of this provision was that after the attorney had procured all necessary decrees, orders, releases, and other things he might think necessary to perfect the title—after everything had been done that he considered necessary to protect his client—that then the entire \$25,000 should be paid by the purchaser into the bank to the court's credit. This \$25,000 included the equity of redemption of the Pleasontons in the property, which, as shown by the record, amounted to about \$17,000. In other words, after the purchaser was safe, the balance due the Pleasontons was to be deposited to the credit of the court. It cannot be successfully contended that they were either unreasonable or whimsical in refusing to accede to such conditions, so manifestly unjust to them and unnecessary for the protection of the proposed purchaser. Winston, in his testimony, says that he did not "insist on the payment of the money into court, which was done by his attorney without his knowledge." The Vaughan contract, which all parties had agreed to, had no such provisions as these. It only provided for \$25,000 in cash, and assuming to pay a mortgage of \$15,000 when the attorney for the purchaser should procure all necessary papers, releases of deeds and suits from the circuit court of Goochland county affecting the title to said lands. The Vaughan contract acknowledged the receipt of \$1,000 in cash to bind the sale. The Pleasontons attached great importance to this provision of the contract, but it was omitted from the new contract prepared by the attorney for the proposed purchaser. On this point Winston, in his testimony, says that at the time Vaughan offered him the place for \$40,000 he told him that the Pleasontons required him to pay \$1,000 down in order to bind the bargain, and that this provision was part of the contract prepared by Vaughan, and that he did not object to it, but left the whole matter to his attorney.

[1] "A real estate broker, to be entitled to compensation, must complete the sale. He must find a purchaser in a situation ready and willing to complete the purchase upon the terms agreed upon before he is entitled to his commissions. When he has found such a purchaser, who has entered into a valid contract, his right to compensation cannot be defeated by the fault of the seller, by his

misrepresentation, or by his whimsical or unreasonable refusal to comply with his contract." *Crockett v. Grayson*, 98 Va. 354, 36 S. E. 477.

[2] In the case at bar it is clear that there was no completed sale between the Pleasontons and Winston. A sale of real estate involves the adjustment of many matters besides fixing the price, and these are for the determination of the seller. These had been agreed upon in this case by the sellers and the purchaser, and had been reduced to writing by the plaintiff, who was the agent of the defendants. These were the only terms upon which the defendants were willing to sell, or had ever agreed to sell, and they were ready to carry them out. The contract which the attorney for the purchaser sought to substitute contained terms which the defendants had never agreed to, and left out terms which had been agreed upon. It is clear that the contract of sale which the plaintiff attempted to consummate between his principals and Thomas S. Winston was not defeated through any fault of the sellers, who were neither unreasonable nor whimsical in refusing to execute the contract which was insisted upon by the attorney for the purchaser. The sale having failed of completion through no fault of the defendants, they are under no obligation to pay the plaintiff the commissions sought to be recovered in this suit.

As said in *Crockett v. Grayson*, *supra*, we do not deem it necessary to enter into a critical examination of the instructions given and refused upon the trial, for upon the facts presented to the jury they could not with propriety have found any other verdict than that at which they arrived.

The judgment of the circuit court, approving that verdict, must therefore be affirmed. Affirmed.

(112 Va. 343)

FREITAS v. GRIFFITH & BOYD.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

EXECUTION (§ 386*)—SUPPLEMENTARY PROCEEDINGS—EXAMINATION OF THIRD PERSONS—SCOPE OF INQUIRY.

Proceedings on suggestion of an execution creditor, authorized by Code 1904, §§ 3609-3613, against persons indebted to the judgment debtor, or who have property of his in their possession, do not extend to a case of the wife of a debtor, claiming personal property under transfer from the debtor, as the proceeding only contemplates reaching property which the debtor himself could sue for; the proper remedy being by suit by the officer holding the writ, under section 3614.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 386.*]

Error to Circuit Court, Norfolk County.

Action by Griffith & Boyd against M. J. Freitas. From a judgment for plaintiffs, defendant brings error. Reversed and rendered.

J. Edward Cole and E. R. F. Wells, for plaintiff in error. W. H. Sargeant, Jr., for defendants in error.

WHITTLE, J. The defendants in error, Griffith & Boyd, execution creditors of J. D. Freitas, the husband of the plaintiff in error, M. J. Freitas, issued a summons against her under section 3609 of the Code of 1904, in which they suggested that by reason of the lien of their fieri facias there was a liability on her for the amount of either judgment. On the return day of the summons the garnishee answered, denying that she was either indebted to J. D. Freitas or had any effects belonging to him in her possession. Whereupon the plaintiffs suggested that the garnishee had not fully disclosed her liability, and, neither party demanding a jury, the court proceeded to hear the whole matter of law and fact, and being of opinion that certain personal property in the possession of and claimed by the wife as her own, of the estimated value of \$500, had been transferred by the husband to the wife in fraud of the rights of the plaintiffs, rendered judgment against her for that sum, to be applied towards satisfying the plaintiffs' judgment.

Several assignments of error were pressed in argument; but, in our view of the case, the controlling question involves the power of the circuit court, in a summons on suggestion by an execution creditor of a husband, to set aside an alleged fraudulent transfer of personal property from him to the wife.

Proceedings on suggestion are prescribed by sections 3609 to 3613 of the Code, inclusive, and by the terms of these enactments the court can make no order against the party summoned, unless he is found to be either indebted to the execution debtor or to have estate of such debtor in his possession. In the present case, neither of these conditions was shown to exist. It was not pretended that the garnishee was indebted to the execution debtor, or that she had estate of the defendant in her hands. Indeed, the fact was gravely controverted whether the property in question had ever belonged to the husband. On the contrary, the wife asserted absolute title to the property, which she maintained had been in her undisputed possession for years, and used by her on her farm near the city of Norfolk.

Conceding, however, for the purposes of this case, that the property originally belonged to the husband, and was transferred by him to the wife, the transfer, nevertheless, would have been binding upon the husband, and he could not have maintained a suit against the wife for its recovery. The statute does not contemplate or operate upon estate in possession of the garnishee to which he has title, but only estate of the execution debtor for the recovery of which he may maintain an action in his own behalf against

the holder. The law, in one form or another, makes ample provision for the recovery and subjection of all the debtor's personal estate on which the writ of fieri facias is a lien; but this special procedure by suggestion is available only in the two instances mentioned in the statute. It affords no remedy for the enforcement of purely equitable liabilities. Section 3614 provides an efficient remedy, by action at law or suit in equity in the name of the officer, to recover estate, or for the enforcement of any liability in respect to any such estate, on which a fieri facias in his hands, or the judgment on which it issues, is a lien.

In *Swann v. Summers*, 19 W. Va. 115, the West Virginia court, in construing sections of the Code of that state substantially the same as the Virginia statute, held that in a proceeding on suggestion the court could make no order against the garnishee, unless he owes a debt to the defendant in execution or has in his hands personal estate of such defendant, for which debt or estate the defendant could maintain an action at law. Otherwise, suit would have to be brought under a statute corresponding to section 3614 of the Virginia Code.

In addition to the remedy given by section 3614, it was held in *Hoge v. Turner*, 96 Va. 624, 32 S. E. 291, that "creditors, seeking to avoid a conveyance of personal property from a husband to a wife on the ground of fraud, may either sue in equity to avoid the conveyance and subject the property, or they may ignore the conveyance, and, after obtaining judgment, levy an execution on the property and sell it. In the latter case, if the wife claims the property levied on for her husband's debts, and an indemnifying bond is given for her protection, she may assert her claim by a suit on the indemnifying bond"—citing *Harvey v. Fox*, 5 Leigh, 444; *Green, Trustee, v. Spaulding*, 76 Va. 411; 4 Min. Inst. (1st Ed.) 818.

For these reasons, the judgment under review must be reversed, and this court will enter such judgment as the circuit court ought to have rendered, dismissing the proceeding.

Reversed.

(112 Va. 490)

SMILEY v. SMILEY'S ADM'X et al.
(Supreme Court of Appeals of Virginia.
June 8, 1911.)

1. PARTNERSHIP (§ 305*)—SHARING PROFITS AND LOSSES—DIVISION OF CAPITAL.

The general rule, that in the absence of any agreement, express or implied, partners share profits and losses of the business equally, although they have not contributed equally to the partnership capital, does not apply to the division of partnership capital; but partners may by agreement provide for an equal share in the capital, although their contributions thereto are unequal.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 703-705; Dec. Dig. § 305.*]

2. REFERENCE (§ 99*)—FINDINGS OF FACT—CONCLUSIVENESS.

Where the evidence is taken before the commissioner, and is conflicting, and there are circumstances affecting the credibility of some of the witnesses, their bearing on the stand is of importance in determining the weight of their testimony, and findings of fact by the commissioner should not as a rule be disturbed.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. § 153; Dec. Dig. § 99.*]

Appeal from Circuit Court, Henrico County.

Action between W. A. Smiley and Alfred Smiley's administratrix and others. From a judgment sustaining exceptions to the findings of a commissioner, W. A. Smiley appeals. Reversed in part, and remanded.

R. E. Peyton, Jr., and Scott, Buchanan & Cardwell, for appellant. C. W. Throckmorton, for appellees.

BUCHANAN, J. The question to be determined on this appeal is whether or not Alfred Smiley and Warren A. Smiley owned an equal interest or share in the farm, as well as in the stock and other personal property purchased and used in their partnership business of farming and stock raising. It is a conceded fact in the case that Alfred Smiley, the father, in the purchase of the farm, which was conveyed to him and his son, Warren A. Smiley, jointly, paid more of the purchase price thereof than was paid by his son. The claim of the son, the appellant, is that when he and his father removed from the state of Michigan to this state, and purchased the farm for their partnership or joint business, while no written agreement was entered into between them, it was understood and agreed that they would devote their time, property, and combined resources for the purpose of operating the farm and the payment of the purchase price thereof, and that everything should be held and owned by them equally. The contention of the appellees, who are the other heirs and distributees of Alfred Smiley, deceased, and his widow, on the other hand, is that the partners were equally bound for the payment of the deferred purchase price of the land, and that, as the father paid more upon that account than his son, the latter must account to his father's estate for one-half of that excess, and that his half interest in the proceeds of the sale of the farm, which has been sold, is chargeable therewith.

Both the court and the commissioner were of opinion that the father and the son were partners in the land, as well as in the business for which it was used by them. The commissioner, to whom was referred the question of ascertaining what interest the son had in the real estate, was of opinion that the evidence established the claim of the appellant that there was an agreement between him and his father by which, although

the amount contributed by each to the partnership was unequal, yet that they were to be equally interested in the farm, as well as in the business carried on by them, and so reported. This finding was excepted to by the appellees, and the court sustained the exception, being of opinion that each of the partners was bound to contribute one-half the capital thereof, and that the evidence did not show that the father gave to his son any excess which he, the father, put into the partnership over the amount of money contributed by the son.

[1] The general rule seems to be that in the absence of any agreement, express or implied, between partners in respect to their shares in the profits and losses of the business, they are to share equally, although they may not have contributed equally to the partnership capital. Story on Partnership, § 24; 2 Lindley on Partnership, 676-678; 3 Min. Inst. 691, 692; 3 Kent's Com. (s. p.) 28; 30 Cyc. 451. But while this is the general rule as to profits and losses, it is not the rule as to the division of the partnership capital.

In discussing this question, Lindley on Partnership (volume 2, p. 676) says: "When it is said that the shares of partners are prima facie equal, although their capitals are unequal, what is meant [is] that the losses of capital, like other losses, must be shared equally; but it is not meant that on a final settlement of accounts capitals contributed unequally are to be treated as one aggregate fund, which ought to be divided among the partners in equal shares." See, also, Moley v. Brine, 120 Mass. 324; Jackson v. Crapp, 32 Ind. 422; Johnson v. Ballard, 83 Tex. 486, 18 S. W. 686; 30 Cyc. 691, 692. But the partners may by agreement provide for an equal share in the capital, although their input is unequal. See 30 Cyc. 691, 692; 3 Min. Inst. 693, 694.

This proposition we do not understand is controverted by the appellees, but their contention is that the evidence does not establish any such agreement between the partners.

[2] The evidence on this question is conflicting. The witnesses were before the commissioner. There were circumstances in evidence tending to affect the credibility of some of them. Their bearing on the stand was, therefore, an important matter in considering their testimony, especially that of the appellant, who was rendered a competent witness by reason of the other parties in interest having first testified. Code 1904, § 3346; Brock's Adm'r v. Brock, 92 Va. 173, 23 S. E. 224. If he is to be believed, and no witness contradicts him, as to the agreement between him and his father, there can be no question that when he and his father came to this state, and purchased the farm, it was understood and agreed between them, not-

withstanding the fact that the father had more means than the son, that they were to combine their resources in conducting their partnership business and in paying for the farm, and that the son was to have an equal interest with the father in the business and in the ownership of the farm. When the testimony is considered as a whole, without discussing it in detail, we are of opinion that the commissioner was well warranted in reaching the conclusion that he did, and the exceptions to his report ought to have been overruled.

Where, as was said by Judge Whittle in delivering the opinion of the court in Lusk v. Pelter, 101 Va. 790, 798, 45 S. E. 333, 336, "evidence consists of the depositions of witnesses, and they are taken by the commissioner or in his presence, he has the advantage of noting the demeanor of the witnesses, their intelligence and manner of testifying, which is of importance in judging of their credibility and weighing their evidence. The findings of a commissioner upon a question of fact will not as a rule be disturbed when the evidence is conflicting. Shipman v. Fletcher, 91 Va. 479 [22 S. E. 458]; Taylor v. McDonald, 100 Va. 487 [41 S. E. 946]."

The court is of opinion that the decrees appealed from are erroneous, in so far as they are in conflict with the views expressed in this opinion, and to that extent must be reversed and annulled, and the cause remanded to the circuit court for further proceedings, to be had not in conflict with this opinion.

Reversed in part.

(112 Va. 286)

BATCHELDER et al. v. RANDOLPH.†
(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. MORTGAGES (§ 37*)—DEEDS AS MORTGAGES—PAROL EVIDENCE—ADMISSIBILITY.

A deed absolute in form may be shown by parol evidence to be a mortgage, and the evidence is not restricted to cases of fraud, accident, or mistake.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 97-107; Dec. Dig. § 37.*]

2. MORTGAGES (§ 36*)—DEEDS AS MORTGAGES—PRESUMPTIONS—EVIDENCE.

A deed absolute in form is presumptively a deed, and parol evidence to show that it is a mortgage must be clear and convincing.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 95, 96; Dec. Dig. § 36.*]

3. MORTGAGES (§ 32*)—DEEDS AS MORTGAGES.

Whether a deed absolute in form is to be regarded as a mortgage depends on the circumstances under which it was made and the relations and negotiations between the parties.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.*]

4. MORTGAGES (§ 38*)—DEEDS AS MORTGAGES—EVIDENCE—SUFFICIENCY.

Evidence held to support a finding that a deed absolute in form was a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 38.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

†Rehearing denied September 14, 1911.

Appeal from Circuit Court, Norfolk County.

Suit by E. F. Randolph against B. F. Batchelder and others. From a decree for plaintiff, defendants appeal. Affirmed.

Frick & Williams, for appellants. Frank L. Crocker and John W. Hopper, for appellee.

KEITH, P. In this case the court decreed that a certain deed, absolute upon its face, was a mortgage, that it should be reformed, and upon payment of the debt secured appointed commissioners to convey the title in fee simple to the land in the proceedings mentioned to the appellee, who has succeeded to all the rights of the grantors in the original deed.

[1-3] In *Bachrach v. Bachrach*, 68 S. E. 985, it is said: "A deed, although absolute on its face, may be shown by oral evidence to have been intended as a mortgage; and such evidence is not restricted to cases of fraud, accident, or mistake. The presumption, however, is that a deed absolute on its face is what it purports to be, and the oral evidence offered for the purpose of showing that it is a mortgage must be clear and convincing. Whether it is to be regarded as a mortgage depends upon the circumstances under which it was made and the relations and negotiations between the parties."

[4] The facts of the case before us are as follows: James A. Randolph was seised of two tracts of land in the county of Norfolk, one containing 66 acres, and the other 110 acres. His wife owned a tract in that county containing 150 acres. On the 17th of December, 1885, Randolph and his wife executed a deed of trust to B. M. Batchelder, trustee, on the 110-acre tract, to secure a note for \$350. Payments on this loan were made for some years, when, from ill health and other causes, Randolph was unable to keep up the payments. In the meantime the taxes on this property owned by Randolph became delinquent for the years 1892, 1893, 1895, 1896, 1897, 1898, and 1899, and application was made for the purchase of the same from the commonwealth under the statute. Upon being informed of this application, some time in 1900, Mrs. Randolph went to the Norfolk county clerk's office and inquired about it, and B. M. Batchelder, trustee in the deed above mentioned, being present, was informed of the condition of affairs, and agreed to pay the taxes and take up the note for \$350; Mrs. Randolph agreeing to this proposition. On the 12th day of December, 1900, B. M. Batchelder and his attorney, a notary public, came to complainant's home and brought with them a deed, dated the 1st of December, 1900, conveying all of the three tracts of land above mentioned to B. M. Batchelder for the expressed

consideration of \$807.66. A witness present at the time testified that she heard Mrs. Randolph ask Mr. Batchelder if he had the deed of trust for her to sign, to which he replied, "Yes, madam." The notary public, on the contrary, testified that he was present and heard no such conversation, and that, if he had heard it, he would not have certified the acknowledgment without being careful to explain the nature of the transaction to the parties signing the deed.

There is proof that the land, at the time of the sale, was worth not less than \$1,500 or \$2,000, and that it has greatly increased in value, and at the time of the decree was worth from \$10,000 to \$15,000. It appears, too, that the consideration named in the deed is within a few cents of the amount of the debt due under the deed of trust, together with the taxes and interest delinquent upon the land. It further appears that the grantors in the deed have remained in undisturbed possession; that they have exercised all the rights of ownership with respect to it, not only occupying it, but selling timber from it, and offering to sell and negotiating for the sale, with the knowledge of Batchelder, the grantee, of portions of the land. As to one of the three tracts, at the time the deed under consideration was made, Batchelder, the grantee, held the title as trustee, and Randolph, the husband, was shown to have been in very feeble health at the time of the transaction.

The circuit court was of opinion, and so decreed, that the deed from the Randolphs to Batchelder of the 12th of December, 1900, though absolute upon its face, was intended as a mortgage, and we are of opinion that the evidence is sufficient to sustain that conclusion. The decree appealed from is affirmed.

Affirmed.

(112 Va. 413)

NORFOLK FIRE INS. CO. v. TALLEY.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

INSURANCE (§ 326*)—FIRE INSURANCE—PROVISION AGAINST FIREWORKS—GENERAL MERCHANDISE STORE.

In the absence of fraud or mistake, recovery cannot be had on a fire policy, conditioned to "be void if (any use or custom of trade * * * on the contrary notwithstanding) there be * * * on the above-described premises * * * fireworks," where fireworks were kept in stock in the building at the time of the fire, and this, though the building was insured as a "general merchandise" store, and fireworks are generally kept in such a store; the keeping of them not being necessary in such a business, and this, too, though the prohibition is in the printed part, and the description of the business to be conducted on the premises is in writing, the written part not overriding the printed part, except in case of irreconcilable conflict.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 782-791; Dec. Dig. § 326.*]

Error to Circuit Court, Louisa County.

Action by one Talley against the Norfolk Fire Insurance Company. Judgment for plaintiff. Defendant brings error. Reversed and remanded.

Peatross & Savage and Gordon & Gordon, for plaintiff in error. Bibb & Bibb and Jas. L. Shelton, for defendant in error.

HARRISON, J. This suit was brought to recover on a policy of insurance issued by the defendant company, insuring against loss by fire a certain building in the county of Louisa, used at the time as a store for general merchandise purposes. There was a verdict and judgment in favor of the plaintiff, to which this writ of error was awarded.

The first assignment of error, which was to the action of the circuit court in overruling the demurrer to the declaration, was properly abandoned at bar.

A number of defenses were made by the defendant, and a number of assignments of error have been taken to the rulings of the circuit court, and discussed here; but, in our view of the case, there is one defense which conclusively settles the controversy in favor of the defendant, and therefore it will not be necessary to deal with others.

Among other provisions, the policy sued on contains the following condition: "This entire policy shall be void if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises * * * fireworks."

Notwithstanding this express provision forbidding it, fireworks were kept in stock, and were in the building when the fire occurred. Over the objection of the defendant, the circuit court permitted the introduction of evidence tending to show that it was customary for general merchandise stores in Louisa county to carry fireworks as a part of their stock in trade, and instructed the jury that, although they believed from the evidence that fireworks were in the store at the time of the fire, yet if they believed that such goods were kept in general merchandise stores in the course of trade, and this was the custom and habit of such stores in that section, that then the keeping of such fireworks could not be a bar to recovery under the policy sued on.

These rulings of the circuit court were clearly erroneous. Contracts of insurance are subject to the same rules of construction that are applicable to other written contracts. *Home Ins. Co. v. Gwathmey*, 82 Va. 923, 1 S. E. 209; *U. S. Mut. Accident Ass'n v. Newman*, 84 Va. 52, 3 S. E. 805; *Watertown Fire Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. 876; *Insurance Co. v. Devore*, 88 Va. 773, 14 S. E. 532.

There is neither fraud nor mistake alleged in the execution of the policy in question. It is not denied that the plaintiff knew what the policy contained, but it is contended that the provision in question did not affect the

right of the insured to keep and sell fireworks in the insured property, because it was usual in that county for general merchandise stores to keep and sell such goods; that the term "general merchandise" embraces fireworks, and the right to sell is implied, although the prohibition is express. This position cannot be sustained. The fact that fireworks are usually kept in country retail stores does not authorize their being kept and sold by one who has contracted in writing that he will not deal in them, and that the policy shall be void if violated in that particular. The reason for the prohibition may have arisen from the fact of the custom of selling fireworks in country stores; for, if the article was never found in such stocks, its prohibition would be useless.

The keeping of fireworks was a hazard which the premium paid did not cover, and its prohibition was, therefore, a material part of the contract, of the benefit of which the company could not be deprived because others kept fireworks in their stores. *Assurance Co. v. Rector*, 85 Ky. 294, 3 S. W. 415; *Beer v. Insurance Co.*, 39 Ohio St. 109; *Sperry v. Insurance Co. (C. C.)* 26 Fed. 234; *Steinbach v. Insurance Co.*, 13 Wall. 183, 20 L. Ed. 615; *Insurance Company v. Gunther*, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575.

There are cases relied on by the plaintiff, where the policy or its meaning has been interpreted in the light of the circumstances surrounding its execution, as where a building insured was being used for the manufacture of certain articles that required the use of inflammable material, and without which the building and the business in it would have been useless. In such cases it has been held that the right existed to keep and use everything necessary or essential to the manufacture of the articles, although forbidden; consent having been given by the company that the building insured might be used for the purpose of manufacturing the particular article. This line of cases has no application to the case at bar, where the business conducted in the building insured was a general merchandise business. Keeping and selling fireworks is in no sense necessary or essential in such a business. The privilege of keeping fireworks as part of such a stock might, for a cheaper rate of insurance, well be surrendered without impairing the business.

Nor can plaintiff's contention that the printed portion of the policy, containing the prohibition against fireworks, is overridden by the written portion, which describes the property and its uses for general merchandise purposes, avail to enable her to introduce parol evidence as to a custom, because the rule that the written overrides the printed part of a policy only applies where the conflict between the written and printed parts is irreconcilable. The written and printed parts of a policy must, if possible, be construed together so as to give effect to

both, and the written part of a policy never overrides the printed part, except when the two are inconsistent, and not capable of a reasonable interpretation when read together. One clause of a policy should never be segregated, and an effect given to it inconsistent with the apparent intention of the parties as gathered from the whole instrument. *Merchants' Ins. Co. v. Edmond*, 17 Grat. 138.

In the case at bar there is no conflict between the written and the printed parts of the policy. The intention of the parties is apparent, and each part is clear and easily understood. Both can stand together without the slightest difficulty in reconciling them.

The meaning of the clause of the policy in question is plain. The plaintiff expressly undertook, by accepting the policy, not to claim the benefit of any custom contrary to the terms of the policy, and in accepting the policy at the premium named she surrendered the right to carry in stock such articles customarily carried in such stores as are expressly prohibited by the terms of the policy.

In *Ostrander on Fire Insurance* (2d Ed.) § 329, the author says: "But it will be otherwise if the policy distinctly prohibits the using or keeping of dangerous articles particularly specified. Custom and ordinary use will create a presumptive right only when the contract is silent or its meaning uncertain. The insurer has unquestionably the privilege to decline acceptance of a risk, except on conditions which he may impose; and as to whether such conditions are reasonable he has the power of ultimate decision. The parties do not come together by compulsion. There is an absolute freedom of choice. They may agree on terms, advantageous or otherwise, or they may refuse to agree altogether; but when the minds of insurer and insured have met, and the terms of their agreement are distinctly set forth in the policy, there is nothing for the courts to construe, and it is not for them to say that particular things cannot be prohibited because of their customary use in connection with the business to which the insurance relates. In consideration of the insurer's promise of indemnity at a rate of premium named, the insured surrenders somewhat of the uses and privileges that he has ordinarily enjoyed in the occupation of his premises, or in the management of his business. Whether he has acted wisely or not is immaterial. He has exercised his natural and his constitutional right to make his own contract, and that is an end of the matter."

To enforce the payment of this policy in the face of the plain and unwarranted violation of the written agreement of the parties that fireworks should not be kept on the insured premises would be to remove all safe-

guards embodied in the contract of insurance for the protection of the insurance company.

As said by Judge Keith in *Westchester Fire Ins. Co. v. Ocean View Co.*, 106 Va. 633, 56 S. E. 584, referring to a clause like that under consideration: "It was a lawful condition and recklessly violated; and, if it be not sufficient to protect the insurance company against loss, it would seem to be an idle task to write conditions into a policy."

For the reasons given, the defendant company was plainly entitled to a judgment. Therefore the judgment of the circuit court in favor of the plaintiff must be reversed, the verdict set aside, and the cause remanded for further trial, if the plaintiff shall be so advised, not in conflict with the views herein expressed.

Reversed.

(112 Va. 326)

EDMONSON et al. v. THOMASSON et al.
(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. SET-OFF AND COUNTERCLAIM (§ 44*)—
PARTNERSHIP AND INDIVIDUAL DEMANDS.

Partnership demands and demands due to individual partners cannot be set off against each other.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. §§ 82-99; Dec. Dig. § 44.*]

2. SET-OFF AND COUNTERCLAIM (§ 44*)—
PARTNERSHIP AND INDIVIDUAL DEMANDS.

A partner, indorsing a firm note discounted by a bank, placing the proceeds to the credit of the firm, is, on the insolvency of the bank and firm, entitled to set off his deposit in the bank as against his liability as indorser on the receiver, resorting to him because of the inability of the firm to pay; but where the partner, as indorser, can indemnify himself by resort to the assets of the firm, if solvent, or to the extent of any dividends to which he is entitled on a distribution of the firm's assets, he is not entitled to such set-off.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. §§ 82-99; Dec. Dig. § 44.*]

Appeal from Circuit Court, Mecklenburg County.

Petition by R. L. Thomasson and others against J. W. Edmonson and another, receivers of the Bank of Mecklenburg, to establish a right to set-off. From a decree granting the relief prayed for, the receivers appeal. Reversed and remanded.

E. P. Buford, C. T. Baskerville, Abner G. Goode, W. E. Homes, and Chas. J. Faulkner, Jr., for appellants. R. Turnbull & Son, for appellees.

KEITH, P. Certain stockholders of the Bank of Mecklenburg filed their bill, setting up the insolvency of the bank, and asking that receivers be appointed to wind up its affairs. The court appointed the appellants, and directed them to take charge of the assets of

the bank, collect them, and distribute the proceeds under its direction.

R. L. Thomasson filed his petition in this suit, in which he states that he is a member of the mercantile firm of Thomasson & Stembridge; that at the time the receivers were appointed the bank held, among other assets, two notes made by Thomasson & Stembridge, one for \$1,000, dated February 14, 1908, payable 90 days after date, on which certain payments had been made, and the other for \$1,041.60, dated February 18, 1908, payable 90 days after date, no part of which had been paid; that both of these notes had been made payable to the order of R. L. Thomasson and R. L. Stembridge, were regularly indorsed by the payees and discounted by the bank, and the proceeds thereof placed to the credit of the firm of Thomasson & Stembridge; that at the time of the appointment of the receivers Thomasson had on deposit in the bank to his individual credit \$1,341.67; that he, as indorser of the two notes, was entitled to have the said amount so due to him individually by the bank set off against the amount due on the two notes made by the firm of Thomasson & Stembridge and indorsed by the individual members of the firm, and prayed that this set-off be allowed.

The receivers resisted this petition, and filed their answer, denying the right of Thomasson to the set-off claimed, and alleging that the firm of Thomasson & Stembridge was solvent, and had sufficient assets fully to discharge the balances due on the two notes, and that to allow such set-off would be creating a preference in favor of Thomasson over the other creditors of the Bank of Mecklenburg.

Depositions were taken by Thomasson to support the allegations of his petition, and the cause coming on to be heard on the petition, the demurrer and answer thereto, and the depositions, the court entered a decree granting the prayer of the petition and allowing the set-off prayed for. From that decree an appeal was allowed by this court.

[1] It appears that the notes were made by the partnership for partnership purposes, and that the proceeds were placed to the credit of and used by the partnership. Thomasson indorsed the notes as additional security, the bank requiring all notes to have two good indorsers. Thomasson, it is true, was a member of the partnership; but partnership demands and demands due to individual partners cannot be set off against each other—a proposition too well established to need authority in support of it.

The sole question is whether an indorser of

notes held by the receivers of an insolvent bank is entitled to set off against such notes the amount of an individual deposit due him by the bank, when the maker of the notes is solvent and the receivers can collect them in full from the maker?

This question was before the chancery court of New York in the case of *Middle District Bank, 9 Cow. 414*, note, and Chancellor Walworth said: "If the real debtor is unable to pay, and the receiver is compelled to resort to the indorser, who is eventually to be the loser, he has the same equitable claim to set off bills which he had at the time the bank stopped payment. But no such effect should be allowed to an indorser when he is indemnified by the real debtor, or when the latter can be compelled to pay."

Davis v. Industrial Manufacturing Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322, is very similar to the case in judgment. The opinion refers to the case just cited as follows: "The rule thus stated by the learned chancellor seems to us eminently just and equitable. It was applied by him to the settlement of the affairs of a bank of issue. The Bank of New Hanover was not a bank of issue, but of deposit and discount; but we know of no reason why it should not effect an equitable result as well when the indebtedness of the insolvent bank consists of accounts and certificates of deposit as where its liabilities were represented by bills."

[2] The partnership of Thomasson & Stembridge was the principal debtor. If Thomasson, as indorser, pays the debt in any way whatever by the application of the set-off in accordance with his petition or otherwise, he can indemnify himself by resort to the assets of the firm, if it be solvent, or to the extent, at least, of any dividends to which he might be entitled upon a distribution of its assets. He would then be precisely within the terms of the principle stated by Chancellor Walworth. If, however, the partnership, which is the real debtor, be unable to pay, and the receivers are compelled to resort to the indorser, who individually would be the loser, he will be plainly entitled to set off his claim against the bank in satisfaction of any demand made by the receivers upon him as indorser.

For these reasons, we are of opinion that the decree of the circuit court should be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

(113 Va. 371)

HARRISON et al. v. CLEMENS, Road Com'r, et al.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. MANDAMUS (§ 169*)—VOLUNTARY NONSUIT—CONDITION OF CAUSE.

The right to take a nonsuit, recognized by Code 1904, § 3387, providing that the right to a nonsuit must be exercised before the jury retires from the bar, exists until the case is submitted for decision to the jury, or to the court when sitting without a jury; so that a relator in mandamus, who before the conclusion of the argument before the court trying the case asks leave to take a nonsuit, is entitled thereto as a matter of right, in the absence of rights of defendant which would be prejudiced by a dismissal of the action.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 375; Dec. Dig. § 169.*]

2. APPEAL AND ERROR (§ 1175*)—DISPOSITION OF CASE ON APPEAL—RENDITION OF PROPER JUDGMENT.

Where the trial court erroneously denied a nonsuit and dismissed the action, the Supreme Court of Appeals on writ of error will reverse the judgment of dismissal, and enter judgment permitting a nonsuit, with costs on the writ of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4573-4581; Dec. Dig. § 1175.*]

Error to Circuit Court, Loudoun County.

Mandamus by Henry Harrison and others against William H. Clemens, Commissioner of Roads in Leesburg District, in Loudoun County, and another. There was a judgment dismissing the petition, and adjudging that relators pay costs, and they bring error. Reversed.

J. W. Foster, for plaintiffs in error. E. E. Garrett, for defendants in error.

CARDWELL, J. Henry Harrison, Anne L. Harrison, and John F. Lee, at the October term of the circuit court of Loudoun county, filed their petition praying a peremptory writ of mandamus, directed to Wm. H. Clemens, commissioner of roads for Leesburg district, in Loudoun county, commanding and compelling him to open a certain road described in said petition, and which the relators claim is a public road. Clemens, as road commissioner, answered the said petition at the December term of the circuit court, setting forth his readiness to perform any duty his office devolved upon him, or that the court might impose upon him in this proceeding; and at the same term of court Harry T. Harrison appeared by counsel, and on his motion was admitted as a party defendant to the cause, and leave given him to file his answer, in which he sets forth at length the reasons why the mandamus prayed by the relators should not be awarded.

It appears that there was some agreement of counsel as to the facts on which the

court, without the intervention of a jury, was to hear and determine the issue involved, and during the argument of the cause, and while counsel for the relators was addressing the court, he was asked a question by the court, and there ensued a colloquy between counsel for the relators and counsel for the respondents, which developed that there was a misunderstanding as to the agreement upon which the case was being heard; counsel for the respondent Harry T. Harrison insisting that the statements in the latter's answer were to be treated as facts proved, while counsel for the relators insisted that the agreement was that the statements should only be taken for what they were worth when stated upon Harry T. Harrison's own knowledge and uncontradicted by the records or deeds, or conclusions drawn therefrom.

Upon these conditions arising, and before the conclusion of the argument of the case, and therefore before it was submitted for decision, counsel for the relators moved the court for leave to withdraw their petition and suffer a nonsuit. This motion was overruled by the court, to which ruling the relators duly excepted, and counsel was compelled to go on with the case. Upon the conclusion of the argument, the case was continued to the February term, 1910, at which term the court entered the order to which this writ of error was awarded, dismissing the petition of relators, and adjudging that they pay to Harry T. Harrison his costs expended in this litigation.

In the opinion of the learned judge, made a part of the judgment of the court, the facts as to the time and the circumstances in which the relators asked permission to dismiss their petition and suffer a nonsuit were set forth as above stated; but the court, sustaining the objection made by counsel for Harry T. Harrison, upon the ground that the motion to dismiss was too late and the case should be disposed of on its merits, refused to allow relators to suffer a nonsuit.

[I] We are of opinion that this was error. To enter a nonsuit has been recognized as a matter of right under the law and practice in Virginia from a very early date down to the present time. The statute (section 3387) recognizes this right, and only fixes the stage at which a plaintiff is precluded from taking a nonsuit to wit, when the case has been submitted to the jury and they have retired from the courtroom.

The rule seems to be the same in other jurisdictions, and applies, whether the case is to be tried by a jury, or by the court without the intervention of a jury. When the case goes to the jury, it is considered to be submitted for decision; and when the case is to be tried before the court, clearly the right to take a nonsuit continues until

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the case is finally concluded and submitted to the court for its decision. 14 Cyc. 402.

In 4 Minor's Inst. (2d Ed.) *783, 867, the author says: "The nonsuit is resorted to in our practice when the plaintiff finds himself unprepared * * * or for any other reason."

In Cahoon v. McCullough, 92 Va. 180, 23 S. E. 226, it is said in the opinion by Riely, J., that "the nonsuit is resorted to when the plaintiff finds himself unprepared with evidence to maintain his cause, either in consequence of his being ruled into a trial when not ready, or when surprised by the testimony of a witness or some ruling of the court, or other similar reason."

To the same effect is the opinion in Mallory v. Taylor, 90 Va. 348, 18 S. E. 438.

In Duffy v. Glucose Sugar Refining Company (C. C.) 141 Fed. 206, the court, in construing the Iowa statute, which is exactly the same as our statute, except that it goes further and makes the rule apply whether the case is being tried by the jury or by the court, reviews the authorities, and the opinion clearly sustains the view that, whether the case is before a jury for trial or before the court, the plaintiff has the right, before it is finally submitted for decision either to the jury or to the court, to take a nonsuit if he so desires.

In Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108, the opinion holds that, in order to authorize a denial of the plaintiff's motion to discontinue a suit, there must be some plain legal prejudice to the defendant, other than the mere prospect of future litigation rendered possible by the discontinuance.

In reviewing the statute of South Dakota, similar to our statute, Cooke v. McQuaters, 19 S. D. 361, 103 N. W. 385, maintains the right of the plaintiff to suffer a nonsuit at any time before the case is decided. In that, as in other cases, an exception to the general rule is recognized, as where a counterclaim has been interposed, or the rights of the defendant would be necessarily prejudiced by dismissal of the action. But no such conditions exist in the case here. Our statute specifies only the time when a nonsuit may not be suffered, to wit, after the jury retire from the bar; and it follows necessarily that a nonsuit is to be allowed at any time before the jury retire, or, as in this case, before the case is submitted to the court hearing it as a common-law case.

[2] For the foregoing reasons, the judgment of the circuit court, denying the motion of plaintiffs in error to be allowed to take a nonsuit and withdraw their petition, must be reversed and annulled, and this court will enter the judgment the circuit court should have entered, permitting the plaintiffs in error to withdraw their petition

and suffer a nonsuit, and recover costs against the defendants in error here, other than William H. Clemens, road commissioner.

Having taken the foregoing view of the case, it becomes unnecessary to consider the other assignments of error presented in the petition and argued before this court.

Reversed.

(119 Va. 515)

WASHINGTON SOUTHERN RY. CO. v. COMMONWEALTH ex rel. STATE CORPORATION COMMISSION.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. COMMERCE (§ 62*) — ESTABLISHMENT OF RATES—OBJECTIONS.

Where a carrier, in the unrestrained course of business, adopted a lower schedule of charges for intrastate and interstate passenger service than the rate allowed by the State Corporation Commission for intrastate business, it cannot object to the rates fixed by the commission as substantially burdening interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 81; Dec. Dig. § 62.*]

2. CARRIERS (§ 12*) — REASONABLENESS OF RATES.

The rule that the reasonableness of railroad rates prescribed by state authority for passenger traffic wholly within its limits must ordinarily be determined by the intrastate business, and that the value of the property employed, cost of maintenance, operating expenses, and the like, must be considered in fixing fair rates, is applicable to railroads doing a substantial intrastate business, but not to a railroad built and operated essentially for interstate purposes, and where the intrastate business is merely incidental and too inconsiderable to make it feasible to fix a reasonable maximum rate on the basis of comparative values.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

3. CARRIERS (§ 18*) — ESTABLISHMENT OF RATES—DECISION OF STATE CORPORATION COMMISSION—APPEAL—PRESUMPTIONS.

Under Const. 1902, §§ 156d, 156f (Code 1904, pp. ccliv, cclv), authorizing appeals from orders of the State Corporation Commission establishing rates which will be regarded as prima facie reasonable, the burden of showing the unreasonableness of rates fixed by the commission rests on the carrier, appealing from the order of the commission; and, unless it does so, the determination of the commission will be affirmed.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

Keith, P., and Cardwell, J., dissenting.

Appeal from State Corporation Commission.

Proceedings on the relation of the State Corporation Commission for the establishment of a maximum intrastate passenger rate for the Washington Southern Railway Company. From an order of the commission, the railway company appeals. Affirmed.

Hill Carter, for appellant. The Attorney General, for appellee.

WHITTLE, J. This appeal is from an order of the State Corporation Commission of June 23, 1910, establishing a maximum intrastate passenger rate for the Washington Southern Railway Company of 2½ cents, instead of 3 cents, per mile for each passenger.

The contention of the company in its petition to the commission was that the former rate of 2 cents per mile was confiscatory.

The litigation between the State Corporation Commission and some of the more important railroads in the state touching the subject of intrastate passenger rates is a matter of public knowledge and germane to the present inquiry. Prior to April 27, 1907, no restriction by state authority had been placed upon the right of railroads to fix their own schedule of rates for carrying passengers, and the uniform rate established by them in Virginia was 3 cents per mile. At that date, the commission fixed the general maximum intrastate rate at 2 cents per mile. Whereupon, several of the principal railroads obtained injunctions from the judge of the Circuit Court of the United States for the Eastern District of Virginia, restraining the commission from the enforcement of the rate prescribed, upon the allegation that such rate was confiscatory. The state strenuously denied the jurisdiction of a federal judge to enjoin the action of the commission, insisting that these rate orders were the orders of a state court of competent jurisdiction, and that by express provision of section 720 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 581) the United States courts are forbidden "to stay proceedings in any court of the state."

* * * On appeal, the Supreme Court of the United States (November 30, 1908), by divided court, reversed the decree of the Circuit Court. See *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150. The decision of the majority, however, was considered inconclusive and unsatisfactory by both parties to the litigation, and the suit in the Circuit Court of the United States was not further prosecuted. It seems that, before the opinion of the Supreme Court was announced, a compact had been entered into between the litigating railroad companies and counsel for the state that, whatever the result might be, a rehearing of the matter of rates on the merits would be allowed the railroads by the commission. The rehearing thus agreed upon was accordingly had, and the commission settled upon a general maximum intrastate passenger rate of 2½ cents per mile. Their action in that regard has been acquiesced in by all of the leading railroads in the state, and the injunction proceedings in the Circuit Court of the United States dismissed.

The Washington Southern Railway Company extends from Quantico (the northern

terminus of the Richmond, Fredericksburg & Potomac Railroad), a distance of 36 miles, to the southern end of the bridge across the Potomac river at Washington. The company was originally formed by the consolidation of the Alexandria & Fredericksburg Railroad with the Washington Railroad. The old road has been practically relocated, rebuilt, and double-tracked. As one of the witnesses describes the situation, the present road bears the same relation to the old road as the two straight lines of the dollar mark to the letter "S." Hence the road practically carries double capitalization, and the expense of rebuilding it was materially increased by reason of the nature of the route selected for relocation and the high grade of construction. The road is located between the Potomac river, on one side, and a range of bluffs, on the other, and, beyond the immediate vicinity of the northern terminus, passes through an extremely sparsely settled territory. It was rebuilt almost exclusively for the accommodation of interstate traffic, which composes 95 per cent. of its entire business.

The road is controlled (through stock ownership) by the Baltimore & Ohio, the Chesapeake & Ohio, the Atlantic Coast Line, the Seaboard Air Line, the Southern, and the Richmond, Fredericksburg & Potomac Railroads, and forms the link between the Northern and Southern connections of these great systems. The intrastate traffic is a mere incident to the substantial business of the company, and is so inconsiderable and comparatively of such minor importance as to render the ordinary methods of distribution of burdens and benefits between the two classes of business impracticable.

In dealing with this aspect of the case, Prentis, Chairman (in an excellent opinion), observes: "It would not have been constructed and could not be maintained for intrastate business alone. Its strictly intrastate passenger business is only an incident to its general business and almost a negligible consideration."

It plainly appears, from data furnished by the appellant itself, that if the cost of construction, maintenance, and operation of the road were apportioned on the basis of the volume of interstate and intrastate business, respectively, and 5 per cent. of the joint business allotted to intrastate traffic, it would represent an utterly insufficient capital to build, upon the cheapest possible plan, or even to maintain, any sort of a railroad between the termini of the Washington Southern. Moreover, it was admitted by counsel in argument that a maximum rate of 5 cents per mile on intrastate travel alone would not yield a fair return on the capital invested upon any apportionment of values submitted to the commission. This admission of itself shows the impracticability, in the circumstances of this case, of making a res-

sonable return on the capital invested from intrastate traffic *solely* the basis for the establishment of a maximum passenger rate.

Since this case was submitted, our attention has been called to the decision of Judge Sanborn in the "Minnesota Rate Case," *Shepard v. Northern Pac. Ry. Co.* (U. S. Circuit Court) 184 Fed. 765, decided April 11, 1911. It is cited as authority for the proposition that it is beyond the competency of the state to establish a different and lesser maximum passenger rate for intrastate travel than the maximum rate allowed for interstate travel, where the effect of such action will necessarily amount to or operate as a regulation of or substantial burden upon interstate commerce. In that case it was the finding of the master (which the court confirmed) that the necessary effect of the reductions in rates in Minnesota below the basis of its lawful interstate rates deprived the company of its power to transact interstate business outside the state, and that the necessary operation and effect of the installation of the reduced rates was to materially burden interstate business and to regulate interstate commerce.

[1] No such results can be predicated of the action of the commission under the facts of this case. There is no contention on the part of the appellant that its earnings from its general operations, even at a lesser rate than the maximum rate fixed by the commission, are not ample to meet all lawful demands upon it and to make a fair return on the capital invested and for services rendered to the public. Indeed, the record shows that in the unrestrained course of business the company adopted a lower schedule of charges, both for intrastate and interstate passenger service, than the rate allowed by the commission. This fact alone would seem to afford a conclusive answer to appellant's pretension.

In this connection we again quote from the opinion of Judge Prentiss: "The company has been perfectly free to fix its interstate rates, except so far as it may have been controlled by competition and trade conditions. Notwithstanding this freedom with reference to interstate business, it has been doing its entire passenger business at an average of 2.47 cents per mile, and its entire passenger business in Virginia, both state and interstate, at 2.35 cents per mile. As the total revenues from its strictly intrastate passenger traffic does not exceed 6 per cent. of its total passenger traffic, the enforcement of the 2-cent passenger rate for its strictly intrastate passenger business cannot very seriously affect these average rates per mile. Taking a general view of the situation, and taking notice of the fact that the standard rate upon the chief lines of railway in Virginia is a maximum of 2½ cents per mile, * * * we think the Washington Southern, as a part of a great railway line between

the North and the South on the Atlantic coast, should be placed in the same class with the railways which have been named."

[2] We are not unmindful of the general rules enunciated by the Supreme Court of the United States in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. R. A. 819, and that line of decisions, namely, that the reasonableness or unreasonableness of rates prescribed by state authority for transportation of persons over a road wholly within its limits must ordinarily be determined by the intrastate business, and, besides, that the value of the property employed, the cost of maintenance, operating expenses, and the like, are proper constituents to be considered in fixing a rate which will pay a fair return to the company on its investment and for its services to the public. Under ordinary conditions these principles are eminently wise and just, and admit of practical application, and should be controlling. Take, for example, the Norfolk & Western, or the Southern (whose lines extend across the state), or, indeed, any other railroad company doing a substantial intrastate business. To such railways the foregoing rules are appropriate, and may well be applied. But they can in no sense be regarded as dominating factors, where, as in this case, the road is built, maintained, and operated essentially for interstate purposes, and where the intrastate business is incidental merely and confessedly too inconsiderable to render feasible the fixing of a reasonable maximum passenger rate on the basis of comparative values.

[3] By article 12, § 156d, of the Constitution of Virginia of 1902 (Code 1904, p. ccliv), an appeal of right lies to this court from the order of the commission.

Section 156f (page cclv) prescribes that "the appellate court shall have jurisdiction to consider and determine the reasonableness and justness of the action of the commission appealed from, as well as any other matter arising under such appeal: Provided, however, that the action of the commission appealed from shall be regarded as *prima facie* just, reasonable and correct."

The same rule of decision has been established by the decisions of the Supreme Court of the United States. *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 871; *Willcox v. Consol. Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

In conclusion, we are of opinion that the appellant has failed to sustain the burden cast upon it by the foregoing rule of decision, and that the order of the commission is just, reasonable, and correct, and ought to be affirmed.

Affirmed.

KEITH, P., and CARDWELL, J., dissenting.

(112 Va. 456)

SCHWAB v. WASHINGTON LUNA PARK CO., Inc.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. MASTER AND SERVANT (§§ 101, 102*)—DUTY OF MASTER—MACHINERY AND APPLIANCES.

It is the master's duty to use ordinary care to provide reasonably safe machinery for use of his servants, failing to do which he is liable for a resulting injury to a servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 180-184; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 234*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES—PROMISE TO REMEDY.

Where a servant notifies the master of a defect in an appliance, and the master promises to remedy it, and the servant, relying on the promise, continues to use the appliance, and is shortly thereafter injured, the master is liable, unless the danger is so manifest that no reasonably prudent person would incur the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686; Dec. Dig. § 234.*]

3. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES—CONTRIBUTORY NEGLIGENCE.

While a so-called "Ariel swing," operated by electricity, was being run at night, the trolleys, by which it was lighted, and which were worn and likely to come off, came off; and, a passenger being frightened and threatening to jump, the operator, in accordance with instructions, as there was evidence, for such circumstances, not only turned off the power, but, before the machinery stopped, attempted to rearrange the trolleys, necessitating his working over uncovered cogwheels, in doing which he slipped, and was caught therein. *Held*, that whether he was guilty of contributory negligence, in having continued to use the defective trolleys, relying on the master's promise to substitute new trolleys, which had been gotten a week before, was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

Error to Circuit Court, Alexandria County.

Action by Frederick Schwab against the Washington Luna Park Company, Incorporated. Judgment for defendant. Plaintiff brings error. Reversed and rendered.

J. K. M. Norton, for plaintiff in error. Moore, Barbour & Keith, for defendant in error.

HARRISON, J. Frederick Schwab brought this action to recover damages for personal injuries, resulting, as alleged, from the negligence of the defendant company. The plaintiff was the only witness in the case, and a demurrer to his evidence was filed by the defendant. Thereupon the jury ascertained the damages, and the court gave judgment upon the demurrer to the evidence in favor of the defendant. To that judgment this writ of error was awarded.

The testimony of the plaintiff shows that

he was employed by the defendant at its pleasure park to run a machine known as an "Ariel swing." The swing was composed of a center shaft, to which was attached six swings, each holding eight passengers. There were large uncovered cogwheels at the foot of the shaft. The machine was run by electricity, and when the power was applied the swings circled out from the center until they reached a height of some 30 feet from the ground. The machine was operated both in the day and at night, and was chiefly patronized by women and children. At night, the light for its operation, and for the protection of the passengers, was supplied by three small trolleys running on wires attached to the shaft. If all three of these trolleys slipped from the wires, the passengers, the large uncovered cogwheels and the operator were left in darkness. When this would happen, the women and children, swinging high in the air, would sometimes become terrified and attempt to jump out. In such cases it was the duty of the operator to shut off the power and endeavor to get the trolleys back in place. To do this it was necessary to get near the shaft and lean over the uncovered cogwheels, and with a hook on the end of a stick pull the trolleys into place. The plaintiff, who was the operator, was instructed as to this means of getting the trolleys back into place, and had repeatedly performed the duty. When there was no danger to passengers, if all three trolleys slipped off, he would send for, or go himself and hunt up, the electrician, and bring him to readjust the trolleys; but his general and chief instructions were to look out at all times for the safety of the passengers, and to exercise his best judgment for their protection. For some time before the injury complained of, the trolleys which furnished the light had become so badly worn that they were constantly slipping off and leaving the passengers high in the air in darkness. The plaintiff brought this condition of the trolley wheels to the attention of the superintendent, who was in entire charge of the grounds, and urged the importance of substituting new wheels for the old ones, and was repeatedly promised by the superintendent that he would have the trolleys fixed. In pursuance of the instructions of the superintendent, the plaintiff took the trolleys to a machinist to have new ones made by them. The old ones were, however, again put on by the electrician for use while the new ones were being made. Finally the new trolleys were made and delivered to the electrician, whose duty it was to put them on. Not being put on, the plaintiff reported the fact to the superintendent several times, who promised him that he would have them put on, and told the plaintiff to tell the electrician to put them on. This the plaintiff did, saying, "Some time these things are going to fly off and hurt

somebody," to which the electrician replied, "I am going to fix them for you; don't you let that alarm you." The new trolleys were under the control of the electrician for at least one week prior to the accident, but were not put on; the plaintiff being left to run the machine with the old trolleys, which were, on account of their badly worn condition, frequently slipping off the wires and leaving the apparatus in darkness.

On the night of the accident, between 10 and 11 o'clock, all three of the old trolleys slipped off while a number of passengers were in the swings, high in the air, and a woman with a child in her arms became frightened and began hollering, "This thing is going to break down; I am going to jump out." The plaintiff hollered up to her, "For God's sake, don't jump; I will try and get you some lights," and immediately shut off the current and attempted to get the trolleys back in place, so that there might be light and the woman prevented from jumping out. In doing this he had to lean over the cog-wheels in the darkness, and reach over with his hooked stick and pull the trolleys back into place. While in this position, in some way not explained, he slipped, and one foot was caught in the cogs and crushed off with part of his leg above the ankle.

It is insisted by the defendant company that the testimony of the plaintiff shows that when all three of the trolleys slipped his instructions were not merely to shut the power off, but to wait until the machine stopped before attempting to readjust the trolleys, and that if he had done this he would not have been injured.

It is clear that the plaintiff is an ignorant man, and that under a rigid cross-examination he had difficulty in making himself understood, and several times made statements that, taken alone, would seem to sustain the defendant's contention as to his instructions; but, when his evidence is read as a whole, it shows very satisfactorily that his understanding of his instructions was that he was, in the existing emergency, to cut off the current and proceed at once to readjust the trolleys, and especially that his instructions made it his duty in such a situation to use his best judgment to protect the passengers and save them from injury. This interpretation of his evidence is strengthened by the fact that if the contention of the defendant, that he was to wait until the machine stopped before restoring the trolleys, was sound, the swings would have then reached the ground, and there would have been no occasion to do anything to protect the passengers or allay their alarm.

The case is before us upon a demurrer to the evidence. The jury might reasonably have concluded from the testimony of the plaintiff, taken as a whole, that the plaintiff, in the course he pursued, acted in accordance with the instructions of his master, which did not contemplate his waiting until the machinery had entirely ceased its motion before proceeding to act.

[1-3] It is the duty of the master to use ordinary care to provide reasonably safe machinery and appliances for the use of his servants, and the master will be held liable for any injury to the servant which results from omission to exercise such care. If the servant, knowing of defects in machinery, or unsuitableness of an appliance, notifies the master thereof, and the master promises to remedy the defect, and the servant, in reliance upon such promise, continues to use the appliance, and is shortly thereafter injured, the master is liable, unless the danger is so manifest that no reasonably prudent person would incur the risk. It was for the jury to say whether the plaintiff was in the exercise of due care in relying upon the master's promise, and in using the defective trolleys after knowledge of their condition. *Virginia & N. C. Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991; *Truckers' Co. v. White*, 108 Va. 147, 60 S. E. 630; *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 25 L. Ed. 612.

In the case at bar the jury might well have concluded that the failure of the defendant to substitute the new trolleys in the place of the old was the proximate and efficient cause of the plaintiff's injury, and that the plaintiff was not guilty of contributory negligence in relying upon the defendant's promise to repair, and in continuing to use the old trolleys for a reasonable time until the new trolleys were substituted. This being so, under the demurrer to the evidence, we must so find.

In the brief the defendant, under rule 8, assigns as cross-error the action of the circuit court in overruling its demurrer to the plaintiff's declaration. This assignment of error was not mentioned in the oral argument of the case, and it is sufficient to say that the objection is not tenable. The declaration stated a good cause of action, and the demurrer was properly overruled.

For these reasons, the judgment complained of must be reversed, and this court will, upon the demurrer to the evidence, enter such judgment as the circuit court ought to have entered, in favor of the plaintiff for the amount of damages ascertained by the verdict of the jury.

Reversed.

(112 Va. 330)

EDMUNDS v. BARROW.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. DEEDS (§ 112*)—DESCRIPTION BY REFERENCE—SUFFICIENCY.

A report of a survey and a plat, referred to in a partition deed to fix the metes and bounds of land conveyed, are as much a part of the deed as if copied therein.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 323, 324; Dec. Dig. § 112.*]

2. EVIDENCE (§ 460*)—EXTRANEOUS EVIDENCE—ADMISSIBILITY.

Extraneous evidence is admissible to remove doubt as to the correct location of a survey, or as to the application of a grant to its proper subject-matter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2120; Dec. Dig. § 460.*]

3. EVIDENCE (§ 230*)—ADMISSION BY FORMER OWNER OF LAND—ADMISSIBILITY.

In ejectment, involving the true location of a boundary line, defendant was properly permitted to show that one of plaintiff's predecessors admitted that defendant's fence was located along the line claimed by defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 845; Dec. Dig. § 230.*]

4. BOUNDARIES (§ 41*)—INSTRUCTIONS—APPLICABILITY.

Instructions in ejectment, involving the location of a boundary line, held to have fairly submitted the issues.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 205-207; Dec. Dig. § 41.*]

5. BOUNDARIES (§ 37*)—EVIDENCE—SUFFICIENCY.

In ejectment, involving the location of a boundary line, evidence held to sustain judgment for plaintiff.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 37.*]

Error to Circuit Court, Prince Edward County.

Ejectment by T. V. Edmunds against H. C. Barrow. Judgment for defendant, and plaintiff brings error. Affirmed.

A. B. Dickinson, for plaintiff in error. Watkins, Brock & Epes, for defendant in error.

BUCHANAN, J. The question in controversy in this case, which is an action of ejectment, is the true location of the southern boundary line of an 86-acre parcel of land, designated as lot No. 2 in the partition of a large tract of land known as the "Hurd land," lying in Prince Edward county, and near, but outside the limits of, the town of Farmville.

In the plat and survey of the county surveyor, who ran the lines by which the partition was made, and which are made a part of the deed of partition, the 86-acre tract is described as follows: "Lot north of house lot contains 86 acres. Line commencing at rock on corner of Ely and Ninth streets, or better known as street south of race track, due west along street to Little Buffalo river."

The conveyances under which the plaintiff in error, who was the plaintiff in the trial court, claims all refer to the deed of partition

for a further description of the land conveyed. The contention of the plaintiff is and was that "Ninth street" as projected, and not the street "better known as the street south of race track," was the correct line. Neither of the streets in question had been opened.

To sustain his contention the defendant introduced as a witness the county surveyor, who testified over the objection of the plaintiff that he made the survey and plat which were attached to and made a part of the deed of partition; "that in making the said survey and plat he surveyed and ran the line along Eighth street, which by mistake he called Ninth street on said plat, but that he was not sure of the name of the street, but to make sure what street he did mean he added in his notes attached to said plat that it was the street better known as the street south of the race track, which is the street along which the defendant's fence now runs; that that was where he was instructed to run said line; that that was where he did run said line, and that is where the line runs to-day; that he made no survey of the race track at that time, but that he stepped off the distance from said street to the race track, and it was between 30 and 40 yards; that the distance from Eighth street to Ninth street was about 300 feet. * * *"

The objection made to this evidence is that it was inadmissible because it tended to vary or contradict the recorded plat, and because if by mistake the plat called for Eighth street, instead of Ninth street, the parties to the deed had no notice of the mistake, or of the surveyor's intention to make Eighth street, instead of Ninth street, the line.

[1] The report of the survey was a part of the plat, and both were referred to in the partition deed for the purpose of fixing the metes and bounds of the several parcels of land conveyed. The report of survey and plat were therefore as much a part of the deed of partition as if they had been copied into the deed. *State Sav. Bk. v. Stewart*, 93 Va. 447, 25 S. E. 543. The conveyances to the plaintiff refer to the partition deed for a more particular description of the land conveyed. One of them refers to the land as "particularly described in a deed of partition between parties of the first part and Lydia A. Hurd et al., duly recorded in the clerk's office of the county of Prince Edward, in the state of Virginia, together with the survey and plat to said lands made by J. W. Overton, county surveyor (see Deed Book 44, pages 270-274), to which said deed and survey reference is to be had for a more particular description." The reference to the partition deed was not, as insisted by the plaintiff's counsel, for the purpose of showing merely the source from which title was derived, but for a fuller description of the land conveyed.

There were two descriptions of the line

between lots numbered 1 and 2, equally explicit, but repugnant. In locating that line, that repugnancy did appear. Ninth street and the street better known as the street south of the race track were not the same. The question then was upon which of those streets the line was originally located, if run.

[2] Where there is doubt as to the correct location of a survey, or as to the application of a grant to its proper subject-matter, evidence aliunde is always admissible. It is not a question of construction, but of location. It is a question of fact, to be determined by the jury by the aid of extrinsic evidence, under proper instructions from the court. See 1 Greenleaf on Ev. § 288; *Reusens v. Lawson*, 91 Va. 226, 235, 21 S. E. 847.

The evidence was properly admitted.

[3] The next error assigned is that the court permitted evidence to be introduced tending to show that E. S. Hurd, one of the parties under whom the plaintiff claims the land, whilst one of the joint owners thereof, admitted that the defendant's fence was located along Eighth street, the boundary line as claimed by the latter.

The evidence was clearly admissible, not as an estoppel, as plaintiff's counsel seems to think, but merely as evidence tending to show that the true boundary line was where defendant claimed it to be. *Reusens v. Lawson*, 91 Va. 226, 238, 21 S. E. 847; *Fry v. Stowers*, 92 Va. 18, 16, 22 S. E. 500.

[4] The plaintiff asked the court to instruct the jury "that the deeds in this case convey the land to Ninth street, and the sole question for the jury to determine is what is the location of Ninth street, and if they shall believe from the evidence that the fence of the defendant runs west along Eighth street to Buffalo river, then they must find for the plaintiff." The court refused to so instruct the jury, but told them, in lieu thereof, "that if they believed from the evidence that the true northern line of lot No. 2 in the partition of the Hurd lands was a projected line from the southern boundary of Ninth street to Buffalo river, as shown on the map of the Farmville Coal & Iron Company's land, they must find for the plaintiff; but if the jury believe from the evidence that the true line of said lot No. 2 was the southern boundary of the first street south of the race track, then they must find for the defendant." This action of the court is assigned as error.

The court, as we have seen, properly admitted evidence tending to show where the line between lots Nos. 1 and 2 in the partition of the Hurd farm had actually been located or run. The calls in the title papers for that line were ambiguous. Either call was sufficient; but one was false, and the other correct. Which was the false, and which the true line, was to be determined by the jury from all the evidence in the case.

If the line had been actually run along Ninth street, then the plaintiff was entitled to recover although it was not the street "better known as the street south of the race track." If, on the other hand, the line was actually run along the street immediately south of the race track, and not along Ninth street, then the plaintiff was not entitled to recover. The instruction given fairly submitted those questions to the jury.

[5] The remaining assignment of error is to the action of the court in refusing to set aside the verdict of the jury as contrary to the law and the evidence.

The evidence shows that the line between lots Nos. 1 and 2 was actually located on the ground as claimed and held by the defendant, and was the true partition line between those lots as found by the jury; and, there being no error of law in submitting the case to the jury, the judgment of the circuit court must be affirmed.

Affirmed.

HARRISON and WHITTLE, JJ., absent.

(113 Va. 335)

FRASER v. STOKES et al.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. DOWER (§ 58*)—ELECTION.

A husband, desiring to make provision for his wife and his children, executed a deed whereby he covenanted to stand seised of described real estate in trust for his wife and children, without making any reference to dower. A subsequent deed designated a new trustee, and recited that he covenanted on behalf of the wife that she would relinquish her dower in any real estate which the husband owned or should subsequently acquire, other than the real estate described in the deed. *Held*, that the provision for the wife was not in lieu of dower in the lands of the husband, and she was not required to elect whether to retain the benefits of the deeds or renounce them and claim dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 129; Dec. Dig. § 58.*]

2. DOWER (§ 37*) — MANNER OF BARRING DOWER.

A widow is not deprived of dower, unless she is barred by the statutory requirements for that purpose.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 37.*]

3. DOWER (§ 44*) — MANNER OF BARRING DOWER.

A husband executed a deed whereby he covenanted to stand seised of described real estate in trust for his wife and children, without making any reference to dower. A subsequent deed designated a new trustee, and recited that he covenanted on behalf of the wife to relinquish her dower rights in real estate other than that named in the original deed. *Held*, that the deeds did not bar the wife of dower in such real estate.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 130-143; Dec. Dig. § 44.*]

4. TRUSTS (§ 13*) — CONSIDERATION — SUFFICIENCY.

A deed by a husband, whereby he conveys land in trust to his wife and children, in con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 71 S.E.—35

sideration of the wife accepting the benefits on condition that she shall subsequently support herself and the children. is supported by a sufficient consideration, because releasing him from an obligation.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 11; Dec. Dig. § 13.*]

Appeal from Circuit Court, Goochland County.

Suit by Salley B. Fraser against Willie A. Stokes and another. From a decree denying relief in part, complainant appeals. Affirmed.

D. H. & Walter Leake, for appellant. Smith, Moncure & Gordon and Wise & Chichester, for appellees.

CARDWELL, J. This is an appeal from a decree of the circuit court of Goochland county, and the case arises out of the following facts: George S. Stokes was, on April 22, 1887, seised and possessed of three several contiguous tracts of land, situated in Goochland county, commonly known and spoken of as "Bolling Island," and on that date he, by deed duly executed and recorded, covenanted to stand seised and possessed of said lands for the joint use, benefit, support, and maintenance of his wife, Willie A. Stokes, and their children, Margaret Pickett Stokes and Sally B. Stokes. This deed contains the following recital: "And whereas, the said George S. Stokes desires to make some provisions for his wife, Willie A. Stokes, and his children by her now born and that may hereafter be born, so as to secure to them a support and maintenance and livelihood and to the children a proper education, and to these purposes desires and has determined to devote the said lands: * * * Now, therefore, in consideration of the premises, and for and in consideration of the natural love and affection which the said George S. Stokes bears to his wife and children, he, the said George S. Stokes, doth hereby make, create, and declare the trusts hereinafter set forth, and doth charge and impose the same upon himself and upon the said lands which are also hereinafter more fully described," etc. Immediately following is a description of the property of which George S. Stokes covenanted that he would stand seised and possessed upon the declared trusts, and the second clause of the deed is as follows:

"At the death of him, the said George S. Stokes, if the said Willie A. Stokes be then living and surviving him, and there be then also living and surviving heirs, any child or children of him, the said George S. Stokes, and his said wife, or any issue of any such child or children who may have died, the whole of said lands shall pass, and the said George S. Stokes does hereby grant and convey the same as follows; that is to say: One undivided moiety thereof to the said Willie A. Stokes for the term of her natural life;

and the other undivided moiety thereof to go with the remainder after the death of the said Willie A. Stokes in the undivided moiety above granted and conveyed to her for life, to the child or children of him the said George S. Stokes and his said wife living at his death and the then living issue of any child who may then be dead, such issue taking per stirpes."

At the date of the aforesaid deed, Stokes and his wife knew no differences one with the other, but between that date and 1894—at what time does not appear—differences were engendered from which the utmost discord resulted, destroying harmony between the husband and the wife, and finally resulting in a separation; but before the separation occurred Stokes executed and had duly recorded another deed, dated September 8, 1894, substituting for himself as trustee in the deed of April 22, 1887, the brother of his wife, and the opening recitals of the second deed, made just prior to what proved to be the husband's final separation from his wife, are as follows:

"Whereas, heretofore, to wit, on the 22d day of April, in the year 1887, the said George S. Stokes made a deed of settlement, which is of record in the office of the county court of the said county of Goochland, by which deed he created certain uses and trusts which he imposed on himself and certain lands in the said deed mentioned for the benefit of himself, his wife, Willie A. Stokes, and their children between them begotten, together with other trusts and limitations in said deed, to which deed reference is here made;

"And whereas, differences of opinion and incompatibility of temperaments unhappily exist between the said George S. Stokes and Willie A. Stokes, his wife, and they have mutually agreed to live separate and apart; and whereas, the said George S. Stokes now desires to make more effectual the provisions of said deed for the benefit of his said wife and their children between them begotten:

"Now, therefore, this deed witnesseth that the said George S. Stokes, in consideration of the premises and of the natural love and affection which he bears to his said wife and their children, * * * hath constituted and appointed, and by these presents do constitute and appoint, the said Orris A. Browne a trustee to carry into effect the provisions of the said deed dated the 22d day of April, 1887," etc.

"* * * And the said Orris A. Browne, for and on behalf of the said Willie A. Stokes, covenants with the said George S. Stokes that the said Willie A. Stokes shall and will maintain herself without any cost, charge, or expense to the said George S. Stokes. And the said Orris A. Browne, for and on behalf of the said Willie A. Stokes, covenants that she will support and maintain

their children between them begotten until they shall marry, without any cost, charge, or expense to the said George S. Stokes. And the said Orris A. Browne for and on behalf of the said Willie A. Stokes covenants with the said George S. Stokes that in consideration of the settlement and provisions for her benefit by this deed that she will relinquish her dower and all rights of dower in any real estate which the said George S. Stokes now owns or shall hereafter acquire, other than the real estate named in this deed and in the deed of April 22, 1887."

George S. Stokes departed from Bolling Island in 1895, and to the date of his death in 1909 he lived entirely apart from his wife and daughters, and at various times, in accordance with the terms of the deed of September 8, 1894, his wife released her dower right in his property *other than* the real estate named in the two deeds. Her elder daughter, Margaret Pickett Stokes, has continued to live with her mother at Bolling Island, receiving support and enjoying the fruits of her mother's labor, and the other daughter, Sally B., received support from and enjoyed the fruits of her mother's labor until her marriage with one Fraser, from which time she lived apart from her mother and sister, and soon after her father's death, which occurred in 1909, she filed the bill in this cause, praying that partition be made of the lands mentioned in the deeds of 1887 and 1894, her interest in which she claimed to be one-fourth in fee and the remainder in another undivided fourth interest in said lands after the death of her mother, Willie A. Stokes, and that the share to which she was entitled thereunder be set apart to her, etc.

To this bill the widow, Willie A. Stokes, filed her answer, claiming dower in the portions of said lands going to the daughters upon the death of their father, George S. Stokes, and admitting that the lands could be divided in kind, subject to her dower. The unmarried daughter, Margaret Pickett Stokes, filed her separate answer, in which she united in the prayer of and adopted as her own the answer of her mother, Willie A. Stokes.

Upon a hearing of the cause upon the pleadings and the evidence taken for both the complainant and the defendants, the circuit court held that Willie A. Stokes was entitled to dower in the moiety of the lands in question which came to the complainant, Sally B. Fraser, and Margaret Pickett Stokes upon the death of their father, George S. Stokes; and the sole question, therefore, for our decision, is whether or not the court erred in its decree.

[1] It is insisted on behalf of the appellant that the deeds in question created in the defendant Willie A. Stokes a jointure in the lands they conveyed, and that she was thereby put to an election as to whether she would retain the benefits of the deeds or re-

nounce the same and claim dower in lieu thereof.

We do not think this contention at all tenable, as the deed of September 8, 1894, makes no reference whatever to dower, except in that part of it in which it is declared, pursuant to a covenant made by her trustee on her behalf, that "she will relinquish her dower and all rights of dower in any real estate which the said George S. Stokes now owns or shall hereafter acquire, other than the real estate named in this deed and in the deed of April 22, 1887." After the departure of George S. Stokes from Bolling Island in 1895 to the time of his death, he lived apart from his wife and daughters, and at various times, in accordance with the deed of 1894, his wife released her dower rights in his property other than the real estate named in the two deeds. It therefore plainly appears that the provision made for the wife, Willie B. Stokes, by the deeds, was not intended as in lieu of dower in the lands of the grantor, George S. Stokes.

[2] It is a general maxim that the law favors dower, and as we have held in *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978, 68 L. R. A. 867, 106 Am. St. Rep. 903, a widow will not be deprived of her dower as a rule, unless it is barred by the statutory requirements for that purpose—in other words, that nothing short of the statutory requirements for that purpose will deprive a widow of her right of dower in the lands of her husband of which he was seised and possessed during coverture. See, also, 1 Minor, Real Prop. § 295.

[3] This is a rule so well recognized that a further citation of authority is deemed unnecessary; indeed, we think that the provisions of the deeds in question themselves plainly show that it was never intended to deprive Willie A. Stokes, the widow of George S. Stokes, of her dower rights, inchoate at the execution of said deeds, but consummated upon the death of George S. Stokes, in the lands known as Bolling Island. To repeat, in the deed of 1887 no reference whatever is made to the dower rights of Willie A. Stokes; but in the subsequent deed of 1894 the following appears: "And the said Orris A. Browne, for and on behalf of the said Willie A. Stokes, covenants with the said George S. Stokes that in consideration of the settlement and provisions for her benefit by this deed, that she will relinquish her dower and all rights of dower in any real estate which the said George S. Stokes now owns or shall hereafter acquire, *other than* the real estate named in this deed and in the deed of April 22, 1887." Language could not be plainer to convey the meaning that the covenant made by the trustee on behalf of the wife provided for the relinquishment of the dower rights of the wife in all the real estate then owned by the husband or thereafter acquired by him, except Bolling Island, and that the

sideration of the wife accepting the benefits on condition that she shall subsequently support herself and the children, is supported by a sufficient consideration, because releasing him from an obligation.

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D. H. & Walter Leake, for appellant. Smith, Moncure & Gordon and Wise & Chichester, for appellees.

CARDWELL, J. This is an appeal from a decree of the circuit court of Goochland county, and the case arises out of the following facts: George S. Stokes was, on April 22, 1887, seised and possessed of three several contiguous tracts of land, situated in Goochland county, commonly known and spoken of as "Bolling Island," and on that date he, by deed duly executed and recorded, covenanted to stand seised and possessed of said lands for the joint use, benefit, support, and maintenance of his wife, Willie A. Stokes, and their children, Margaret Pickett Stokes and Sally B. Stokes. This deed contains the following recital: "And whereas, the said George S. Stokes desires to make some provisions for his wife, Willie A. Stokes, and his children by her now born and that may hereafter be born, so as to secure to them a support and maintenance and livelihood and to the children a proper education, and to these purposes desires and has determined to devote the said lands: * * * Now, therefore, in consideration of the premises, and for and in consideration of the natural love and affection which the said George S. Stokes bears to his wife and children, he, the said George S. Stokes, doth hereby make, create, and declare the trusts hereinafter set forth, and doth charge and impose the same upon himself and upon the said lands which are also hereinafter more fully described," etc. Immediately following is a description of the property of which George S. Stokes covenanted that he would stand seised and possessed upon the declared trusts, and the second clause of the deed is as follows:

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and the other undivided moiety thereof to go with the remainder after the death of the said Willie A. Stokes in the undivided moiety above granted and conveyed to her for life, to the child or children of him the said George S. Stokes and his said wife living at his death and the then living issue of any child who may then be dead, such issue taking per stirpes."

At the date of the aforesaid deed, Stokes and his wife knew no differences one with the other, but between that date and 1894—at what time does not appear—differences were engendered from which the utmost discord resulted, destroying harmony between the husband and the wife, and finally resulting in a separation; but before the separation occurred Stokes executed and had duly recorded another deed, dated September 8, 1894, substituting for himself as trustee in the deed of April 22, 1887, the brother of his wife, and the opening recitals of the second deed, made just prior to what proved to be the husband's final separation from his wife, are as follows:

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To this bill the widow, Willie A. Stokes, filed her answer, claiming dower in the portions of said lands going to the daughters upon the death of their father, George S. Stokes, and admitting that the lands could be divided in kind, subject to her dower. The unmarried daughter, Margaret Pickett Stokes, filed her separate answer, in which she united in the prayer of and adopted as her own the answer of her mother, Willie A. Stokes.

Upon a hearing of the cause upon the pleadings and the evidence taken for both the complainant and the defendants, the circuit court held that Willie A. Stokes was entitled to dower in the moiety of the lands in question which came to the complainant, Sally B. Fraser, and Margaret Pickett Stokes upon the death of their father, George S. Stokes; and the sole question, therefore, for our decision, is whether or not the court erred in its decree.

[1] It is insisted on behalf of the appellant that the deeds in question created in the defendant Willie A. Stokes a jointure in the lands they conveyed, and that she was thereby put to an election as to whether she would retain the benefits of the deeds or re-

nounce the same and claim dower in lieu thereof.

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[2] It is a general maxim that the law favors dower, and as we have held in *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978, 68 L. R. A. 867, 106 Am. St. Rep. 903, a widow will not be deprived of her dower as a rule, unless it is barred by the statutory requirements for that purpose—in other words, that nothing short of the statutory requirements for that purpose will deprive a widow of her right of dower in the lands of her husband of which he was seised and possessed during coverture. See, also, 1 Minor, Real Prop. § 295.

[3] This is a rule so well recognized that a further citation of authority is deemed unnecessary; indeed, we think that the provisions of the deeds in question themselves plainly show that it was never intended to deprive Willie A. Stokes, the widow of George S. Stokes, of her dower rights, inchoate at the execution of said deeds, but consummated upon the death of George S. Stokes, in the lands known as Bolling Island. To repeat, in the deed of 1887 no reference whatever is made to the dower rights of Willie A. Stokes; but in the subsequent deed of 1894 the following appears: "And the said Orris A. Browne, for and on behalf of the said Willie A. Stokes, covenants with the said George S. Stokes that in consideration of the settlement and provisions for her benefit by this deed, that she will relinquish her dower and all rights of dower in any real estate which the said George S. Stokes now owns or shall hereafter acquire, *other than* the real estate named in this deed and in the deed of April 22, 1887." Language could not be plainer to convey the meaning that the covenant made by the trustee on behalf of the wife provided for the relinquishment of the dower rights of the wife in all the real estate then owned by the husband or thereafter acquired by him, except Bolling Island, and that the

to. Wherefore, if the said committee were in any sense liable to Sweeney, which they, of course, deny, he could sue them at law for the amount of his claim as specifically set out in the amended bill.

[2] Moreover, upon the face of the amended bill, the complainant had no cause of action, and could maintain no action whatever against Foster, Simcoe, and Cobb arising out of the transactions set out in the amended bill, until he had obtained a reassignment of his alleged contract with them, which he had assigned to Zell and Van Dyke, and with which assignment Foster, Simcoe, and Cobb were never at any time concerned, and Zell and Van Dyke are not before the court in this cause.

Section 2415a of the Code, relied on by appellant, has no application to the case. The provision of that section is that when the legal title to any claim or chose in action, for the enforcement of the collection of which a court of equity has jurisdiction, is in one person, and the beneficial equitable title is in another, the latter may either maintain a suit in the name of the holder of the legal title, for his use and benefit, or in his own name, to enforce collection of the same, and in either case the beneficial equitable owner shall be deemed the real plaintiff, and shall be alone liable for costs. Now, in this case, not only the legal title to the contract upon which appellant brings this suit has been transferred, but also the equitable title, to Zell and Van Dyke, who have never appeared in this cause, or had legal process served upon them to appear; and as the holders of said contract, as plainly appears upon the face of appellant's bill, they have refused to reassign to the appellant. Wherefore the respective rights of the present and the former holders of the contract are necessarily involved in this litigation, and must necessarily be determined; but, before there can be any adjudication of the liability of the appellees, Foster, Simcoe, and Cobb, the rights of Zell and Van Dyke under the contract in question have first to be determined, and they are not before the court or within its jurisdiction. There is nothing in the bill to connect the appellees with the transactions that resulted in the assignment by the appellant to Zell and Van Dyke, and therefore it is not averred that these two groups of defendants have acted in concert; in other words, appellees have no interest in a litigation to compel Zell and Van Dyke to reassign the contract in question to the appellant, nor have Zell and Van Dyke any interest in the litigation in which the appellant seeks to recover damages from the appellees, sustained, as he alleges, by reason of their transaction with Smith & Co.

[3. 4] The case, therefore, comes plainly within the control of the decision of this court in *Bonsal v. Camp*, 111 Va. 595, 69 S. E. 978, where it appears from the opinion of Keith, P., that Camp filed his bill in the

circuit court of the city of Norfolk against Bonsal, in which he prayed the rescission of a deed made by Bonsal to him for a tract of land in the state of North Carolina, upon the ground that he was deceived into making the purchase by fraudulent misrepresentations upon the part of Bonsal and his agent, one Brewer; that Bonsal, the sole defendant, demurred to the bill because Brewer was not made a party defendant, and also answered the bill. The bill further sets out the grounds upon which the complainant sought the relief he asked; but it was made to appear that Brewer became, under the contract of sale, entitled to one-twentieth part of the price of the land sold by Bonsal to Camp. Brewer was not made a party defendant to the bill, and therefore never appeared in the cause. Camp was a resident of Florida, Brewer a resident of Tennessee, Bonsal a resident of Virginia, and the subject-matter of controversy was situated in the state of North Carolina. In disposing of the demurrer of Bonsal to the bill, the opinion by Mr. Justice Miller, in *Barney v. Baltimore City*, 6 Wall. 284, 18 L. Ed. 825, is quoted with approval as follows: "There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such that, if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case; but, if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction." It was held that the case made by Camp's bill fell within the third class of cases mentioned in the opinion of Mr. Justice Miller—in other words, that Brewer was a necessary party to the litigation and that, as he was not before the court, the relief sought could not be decreed. In that case several authorities are also cited, which sustain the general proposition that all persons interested in the subject-matter of a suit and to be affected by its results are necessary parties. The rule was there also laid down, with respect to the rescission of contracts, that in seeking a remedy which calls for the highest and most drastic exercise of the power of a court of chancery—to annul and set at naught the solemn contracts of parties—there must be first a sufficient averment of facts showing

the plaintiff entitled in equity to the relief which he seeks, and satisfactory proof of these facts, to justify the interposition of a court; and the opinion then proceeds: "And, in addition to all this, the court must be able substantially to restore the parties to the position which they occupied before they entered into the contract."

[5] In the case here, the title of Zell and Van Dyke in and to the alleged contract between the appellant and the appellees was obtained in a legal, businesslike way, and appellant received compensation therefor. His assignment of the contract was absolute, and carried with it all right, title, and interest he had in and to any benefits under the contract, and he acknowledges the receipt of an adequate legal consideration for the assignment. It further appears from the amended bill and the exhibits therewith that the appellant subsequently recognized and ratified his former assignment of the contract to Zell and Van Dyke, so that there could be no question that the contract passed from the appellant absolutely and became vested in Zell and Van Dyke. Clearly, therefore, the case made is not one in which the court could even substantially restore the parties to the position which they occupied before the assignment of the contract by the appellant to Zell and Van Dyke. No decree that the court could have entered in this case against Zell and Van Dyke in favor of appellant would relieve the appellees from liability to be again sued by Zell and Van Dyke upon the same contract and the same cause of action. Wherefore Zell and Van Dyke are necessary parties to this litigation, without whose presence complete justice cannot be done the appellees; and it necessarily follows that the decree of the court of law and chancery upon the demurrer should be affirmed.

Affirmed.

(112 Va. 362)

HARRIS v. CARY et al.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. RELEASE (§ 18*)—VALIDITY—DURESS.

A contract to relinquish an interest in property, made as a result of unlawful demands or threats, is voidable on the ground of duress.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 33; Dec. Dig. § 18.*]

2. CONTRACTS (§ 95*)—"DURESS"—ELEMENTS.

To constitute "duress," it is sufficient if the will be constrained by the unlawful presentation of a choice between comparative evil, as inconvenience and loss by the detention of property, loss of property altogether, or compliance with an unconscionable demand.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 431-440; Dec. Dig. § 95.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2268-2278; vol. 8, p. 7645.]

3. CONTRACTS (§ 95*)—VALIDITY—COMPULSION.

When concessions are exacted through one's necessity, to save his property, illegally withheld by another, from destruction or irreparable injury, the transaction may be avoided on the ground of compulsion, though not amounting to technical duress.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 431-440; Dec. Dig. § 95.*]

4. PLEADING (§ 214*)—ADMISSION BY DEMURDER.

Allegations of a bill are admitted as true on demurrer thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

5. CORPORATIONS (§ 127*)—STOCK—SURRENDER—DURESS.

Equity will relieve a minority stockholder against agreements under which he has surrendered stock to one controlling the corporate affairs, under pecuniary necessities and unconscionable demands made by the latter, accompanied by threats to destroy the value of the former's holding.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 127.*]

Appeal from Chancery Court of Richmond. Bill by J. W. Harris against W. M. Cary and others. Decree dismissing the suit, and plaintiff appeals. Reversed and remanded.

G. A. Hanson and P. W. Hardin, for appellant. Bev. T. Crump and Lucius F. Cary, for appellees.

HARRISON, J. A demurrer to the original bill filed in this cause was sustained by the chancery court of the city of Richmond, and thereupon the complainant, J. W. Harris, by leave of court, filed an amended and supplemental bill, making the original bill part thereof, to which amended bill a separate demurrer was filed by the defendant W. M. Cary, which was also sustained. From the decree sustaining the demurrer to these bills and dismissing the same, this appeal was allowed. The original bill being in totidem verbis made a part of the amended and supplemental bill, the two will be treated and considered as one bill.

The more important allegations are that in January, 1904, J. Samuel McCue and Caroline H. Harris entered into a contract between themselves and the complainant that the parties, other than the complainant, would furnish a sum of money sufficient to option, open up, purchase, and sell lands and mineral rights in Buchanan county, Va., and that the complainant should share equally with them in the net proceeds, after the money advanced, with interest and expenses, had been paid, in consideration of his time and services in developing, opening, and selling the lands and mineral rights so optioned or purchased. It is further alleged that on May 23, 1904, the parties, together with the defendant W. M. Cary, entered into another contract, enlarging the first and agreeing to advance a larger amount of money for the purchase of additional lands, and further agree-

ing to organize a corporation, to be known as the Buchanan Coal & Coke Company, to which the properties bought should be conveyed. It was further agreed that all moneys advanced and to be advanced should be represented by the preferred stock of the company in proportion to the amount advanced by each; that the common stock was to be likewise apportioned, except that the rights of the complainant were provided for in these words: "And J. W. Harris, in lieu of his services rendered in securing said property and to be rendered until said preferred stock is redeemed, is to receive one-third of the common stock of said corporation, issued for said property." It is further alleged that subsequently the defendant W. M. Cary and W. E. Harris visited Buchanan county and inspected the lands then under option, and other lands adjacent and in that section, and while there the defendant W. M. Cary, though well satisfied with complainant's work and much elated over the value of the lands, insisted that as they were buying more lands than originally contemplated, and as he was advancing and paying out so much money to secure the lands, complainant should be willing to surrender one-ninth of his interest in the common stock; that for the sake of harmony he had agreed to this, and on September 3, 1904, had united with the defendant Cary and W. E. Harris in a written contract, under which he was to receive, in consideration of his services, two-ninths of the common stock of the company, instead of one-third thereof, as provided in the previous contracts. It is further alleged that under this agreement of September 3, 1904, complainant continued his work and services, as he had under the former agreements, faithfully and assiduously doing and performing his work under the direction of the defendant Cary, president of the company, from whom he received approximately 150 letters, instructing and directing him in regard to taking more options, renewing others, dropping some, and buying and paying for certain lands, having the surveys made and opening the coal—in fact, everything in detail pertaining to the lands and interests of the company; that under these directions certain lands embraced in the options to McCue were dropped, and other lands, in their stead, bought for the company, the complainant being directed not to stop taking options and buying lands until from 22,000 to 30,000 acres were secured.

In the meantime Cary, the defendant, had become the purchaser of all of the interests in the company of J. Samuel McCue, under the contract of May 23, 1904, and had thereby become the owner of three-fourths of the holdings of the company, and was under obligation to advance three-fourths of the money necessary to pay for all the lands bought and the costs incident to their purchase; and, holding the majority interest in the company,

he was elected president, and his two sons directors, one of them being secretary and treasurer, thereby having complete control of the affairs of the company.

Complainant further alleges that from September 3, 1904, the date of his agreement to take two-ninths of the common stock for his share in the profits, instead of three-ninths, as formerly agreed, to July 19, 1907, there had been no dispute or question raised, or even intimated, as to the meaning of the agreement of September 3, 1904, fixing his interest at two-ninths of the common stock of the Buchanan Coal & Coke Company; that on July 19, 1907, the defendant Cary, while acting as president of the company, and as such a trustee for complainant, for the purpose of forcing complainant to surrender and sacrifice his interests in the company to him (Cary), wrote a letter to complainant, saying that he had had the two contracts of May and September, 1904, submitted to competent men, and that their finding was, and his interpretation always had been, that complainant's interest in the common stock was limited to such lands as were optioned to J. Samuel McCue, when the defendant Cary knew at the time that complainant had worked for three years, without notice of such construction of the contracts, under his direction, and that at his instance a large part of the lands optioned to McCue had been rejected, and many thousands of acres of other lands taken in their stead by the company; that other letters of like import were sent to complainant by the defendant, in one of which he was told that his interest in the common stock was based upon less than 7,000 acres of the land owned by the company.

It is further alleged that from the time the letter of July, 1907, was written, until March, 1908, the defendant Cary continuously demanded and insisted that complainant should surrender to him one-half of his two-ninths interest in the common stock, and by every conceivable device tried to persuade, induce, and force him to do so, finally threatening complainant that, if he did not surrender to him the stock demanded, he would let the whole thing go, and the company be sold out, and that complainant would then get nothing.

It is further alleged that, at the time of these importunities and threats, complainant had faithfully performed and fully completed his obligations under the contracts between the parties, and that the defendant Cary had wholly failed to perform his part of the contracts by advancing the money to pay for the lands that had been bought; that the defendant Cary then owed about \$50,000 that he had agreed to advance, but instead of paying the same he permitted suits to be brought against the company on the obligations due for land, for the sole purpose of carrying out his threats to have the land sold, and thereby to destroy the entire interest of complainant in the common stock of

the company, refusing at the same time to issue to complainant any part of the common stock until he should yield and comply with his demand that part of complainant's interest be given to him. Complainant further alleges that, at the time this force and coercion was being exerted over him by the defendant Cary, he had no business experience, except that had with the Buchanan Coal & Coke Company, and other work of like character; that all of his life, since leaving school, had been spent in the mountains getting options upon coal and timber lands, prospecting and making openings in and otherwise developing such lands; that on March 6, 1908, he had no property except his interest in this company; that he was practically without money, having only about \$25, and without any immediate prospect of getting employment; that he had a family to support, and owed nearly \$1,000 which he had borrowed to sustain himself and family while working for the Buchanan Coal & Coke Company; that he was in financial and mental distress, brought about by the actions of the defendant Cary; that in this distress, so brought about, he was unable to resist the threat of the defendant to let the debts go unpaid, and thereby force a sale of the property, which would result in the total loss of complainant's entire interest in the stock; that complainant was, and had been for some time prior to March 6, 1908, in constant fear that all of his stock would be made worthless by the fraudulent course of the defendant Cary; and that while in this state of fear and financial and mental distress, much against his will, he was forced to and did, for the purpose of having the debts paid and thereby saving himself from financial ruin, make and execute two agreements, dated, respectively, March 6, 1908, and March 18, 1908, which provided that he should only receive three-eighteenths, instead of two-ninths, of the common stock, which two-ninths, under the contract in writing of September 3, 1904, represented his interest, not only for his time and labor for the three years he was at work subsequent to September 3, 1904, but also for one year of work rendered prior thereto under the contract known as the "McCue contract."

Complainant charges that the defendant Cary took advantage of the fact that he was helpless and in his power, and of his own delinquency in failing to comply with his part of the contract by paying the outstanding debts, and of his power as president of the company, chief owner of its assets, in control of its board of directors, and sole manager of its interests, to compel him to surrender, without consideration, one-fourth of his stock to the sole use and benefit of said Cary; that the stock he was thus required to give the defendant Cary was 166% shares, which at its par value amounted to \$16,666.66%. Complainant further charges

that the agreements of March 6, 1908, and March 18, 1908, were obtained from him by force, fraud, intimidation, and duress; that they are wholly without consideration, equity, or right; and that, if there was any basis or reason for his being required to give up any part of his stock, which he denies, the portion taken from him should go to the company, and the defendant Cary not be allowed to appropriate the same, as he has done, as his individual property.

The prayer of the bill is that the agreements of March 6 and March 18, 1908, by which complainant was forced to surrender to the defendant Cary one-fourth of his two-ninths interest in the common stock of the company, be set aside as null and void, so far as they affect the interest of complainant; that pending the further order of the court the defendant Cary be enjoined and restrained from selling or otherwise disposing of the stock acquired by said agreements, or either of them, or, if said Cary has parted with any part thereof, that he may be compelled to keep in his possession and under his control and ownership, subject to the future order of the court, an equal number of shares of like stock of the company to that obtained from complainant; that the said Cary or the Buchanan Coal & Coke Company be required to transfer or issue to complainant an equal number of shares of the company to that taken from him under the agreements aforesaid; and for general relief according to equity and good conscience, as may be deemed proper by the court.

[1, 2] The doctrine appears to be well established that where one party has possession or control of the property of another, and refuses to surrender it to the control and use of the owner, except upon compliance with an unlawful demand, a contract made by the owner under such circumstances to emancipate the property is to be regarded as made under compulsion and duress. Nor can it be doubted that a contract procured by threats, inducing fear of the destruction of one's property, may be avoided on the ground of duress, there being nothing in such a case but the form of a contract, wholly lacking the voluntary assent of the party to be bound by it. To constitute duress, it is sufficient if the will be constrained by the unlawful presentation of a choice between comparative evils, as inconvenience and loss by the detention of property, loss of property altogether, or compliance with an unconscionable demand.

[3] In civil cases, the rule as to duress has a broader application at the present day than that it formerly had. So when concessions are exacted through the necessity of a person, in order to save his property, illegally withheld by another, from destruction or irreparable injury, such a transaction may be avoided on the ground of compulsion, though not amounting to technical duress. Ritzger-

ald v. Construction Co., 44 Neb. 463, 62 N. W. 899; Vyne v. Glenn, 41 Mich. 112, 1 N. W. 997; Brueggstradt v. Ludwig, 184 Ill. 24, 56 N. E. 419; Alston v. Durant, 2 Strob. (S. C.) 257, 49 Am. Dec. 596, and note; Adams v. Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; Lonergan v. Buford, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. Ed. 569.

In the case last mentioned, citing Radich v. Hutchins, 95 U. S. 210, 24 L. Ed. 409, it is said that: "To constitute coercion or duress which will be regarded as sufficient to make the payment involuntary, there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment."

In Harmony v. Bingham, 12 N. Y. 99-117, 62 Am. Dec. 142, cited by Mr. Justice Brewer in 148 U. S. 581, 13 Sup. Ct. 684, 37 L. Ed. 569, supra, it is said: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and the latter in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion."

[4, 5] In the case at bar, the allegations of the bill, which are admitted to be true by the demurrer, state a case clearly calling for the interposition of a court of equity to afford relief. The helpless situation and the extreme necessities of the complainant were taken advantage of to compel him to surrender to the defendant one-fourth of his property, which was under the latter's control, and to which, as alleged, he had no lawful right, in order to save such property from sacrifice; the choice offered the complainant being financial ruin or immediate compliance with the alleged fraudulent, oppressive, and unconscionable demands of the defendant.

It is clear, both upon reason and authority, that the bill states a good cause of action, entitling the complainant to relief, if the facts alleged are established by the evidence to be adduced.

The decree complained of, sustaining the demurrer to the bill, must therefore be set aside, and this court will enter such decree as the chancery court ought to have entered, overruling the demurrer. And the cause will be remanded to the chancery court, which will, in accordance with the prayer of the bill, enjoin and restrain the defendant W. M. Cary from disposing of the stock in controversy until the further order of that court, and for further proceedings to be had therein not in conflict with the views expressed in this opinion.

Reversed.

(112 Va. 307)

CARTER v. KEETON & COLEMAN et al.
(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. MECHANICS' LIENS (§ 58*)—CONSENT OF OWNER—AUTHORITY TO CONTRACT—TENANT.

A tenant in possession has no authority to make repairs or cause improvements on the leased premises which will subject the owner's interest to a mechanic's lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 72, 73; Dec. Dig. § 58.*]

2. MECHANICS' LIENS (§ 58*)—CONSENT OF OWNER—NECESSITY FOR CONSENT OF OWNER—IMPROVEMENTS BY TENANT.

Under Code 1904, § 2475, which provides that for repairs only no lien shall attach unless ordered by the owner or his agent, and section 2483, which provides that, where a person causing a building to be erected or repaired owns less than a fee-simple estate in the land, his interest alone shall be subjected to a mechanic's lien, the landlord's reversion is not subject to a mechanic's lien for improvements and repairs made under a contract with the tenant in his individual capacity, unless the repairs were ordered by the tenant as agent for the landlord, and the landlord ratified the act of the tenant.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 72, 73; Dec. Dig. § 58.*]

3. MECHANICS' LIENS (§ 72*)—OPERATION AND EFFECT—INTERESTS AFFECTED—LANDLORD'S REVERSION.

Labor and materials were furnished by plaintiffs in repairs and improvements on premises in possession of defendant's tenant under a contract with the tenant, with constructive notice to plaintiffs of the landlord's reversionary interests, and on the tenant's assurance that he, the tenant, would pay them. The landlord had no notice that the work was being performed, and did nothing to mislead plaintiffs as to the ownership of the land. Held, that under Code 1904, § 2483, which provides that, where a person causing a building to be erected or repaired owns less than the fee simple, his interest alone shall be subjected to such lien, the landlord's reversion was not subject to a lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 86; Dec. Dig. § 72.*]

4. MECHANICS' LIENS (§ 309*)—REVIEW—DIRECTING JUDGMENT—PERSONAL JUDGMENT.

A suit to enforce a mechanic's lien being in equity, the court may, on reversing a decree against a landlord, direct a personal decree against the tenant for the amount ascertained to be due plaintiffs for labor and materials furnished under contract with the tenant individually, as ascertained by the report of a commissioner.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 309.*]

Appeal from Circuit Court, Pittsylvania County.

Action by Keeton & Coleman and others against Mollie A. Carter. Judgment for plaintiffs, and defendant appeals. Reversed.

Geo. T. Rison, for appellant. Wm. Leigh and B. H. Custer, for appellees.

BUCHANAN, J. The question involved in this case is whether or not the claims asserted in the bill and proceedings are liens upon the lands of Mrs. Carter, the appellant, under the provisions of sections 2475 and 2483 of the Code of 1904. These claims

are for labor done and materials furnished in making repairs and erecting outhouses upon the lands of the appellant under a contract entered into between her tenant and the contractors, Keeton & Coleman.

By section 2475 of the Code it is provided that, where the claim is for repairs only, no lien shall attach to the property unless the repairs were ordered by the owner or his agent.

Section 2483 provides that, if the person who shall cause the building or structure to be erected or repaired owns less than a fee-simple estate in the land, only his interest therein shall be subjected to such liens.

The appellant, who was the owner of the land in fee, testifies that at the time the repairs and improvements were made, and for some years prior thereto, she resided with her two sons, Z. V. Carter and Wade H. Carter, one of whom lived in Tazewell and the other in Giles county, and that she had not been in Pittsylvania county where the lands were situated for four or five years; that she did not authorize her son, W. D. Carter, who was her tenant from year to year and in possession of the land, or any other person, to erect any improvements or buildings, or make any repairs upon the buildings on the land; that she did not know that any repairs or improvements were being made or had been made on the premises until she was served with process in this suit. These statements of Mrs. Carter are not contradicted by any witness, neither is there any evidence tending to show that she had any communication, directly or indirectly, with the lien claimants. But it is insisted that inasmuch as W. D. Carter, with whom the contract for repairs and improvements was made, was her son and tenant in possession of the land, and her son Z. V. Carter, with whom she resided in Tazewell county a portion of the time, was upon the leased premises during the time the repairs and improvements were being made, and saw the work going on, she must be presumed to have known that the work was being done and consented to it, and thus be held to have authorized the repairs and caused the improvements to be made, within the meaning of sections 2475 and 2483 of the Code.

[1] These circumstances do not show that W. D. Carter was her agent to make, or that she caused the repairs and improvements to be made. Neither do they show, even if Mrs. Carter knew what her tenant was doing (which she denies), that she consented to having the work done. The tenant in possession of land, whether he be the son of the owner or be a stranger, has no authority by reason of those relations merely to make repairs or cause improvements to be made on the leased premises which will bind the owner's interest in the land for their payment. Phillips on Mechanics' Liens, § 79; Baxter v.

Hutchings, 49 Ill. 116; Leismann v. Lovely, 45 Wis. 420.

[2] In order to bind her interest in the land, it must appear that the tenant making the repairs was her agent for that purpose (Code, § 2475), or that she caused the repairs or improvements to be made (Code, § 2483; Atlas Portland Cement Co. v. Main Line Realty Corp., 70 S. E. 536, decided at March term, 1911, of the court), or that she ratified what the tenant had done.

Mrs. Carter was the fee-simple owner of the land. The deed evidencing her title was of record. She did nothing to mislead the contractors, or to induce them to believe that her son was the owner of the land, or that he was authorized to have the repairs or improvements made. They contracted with the tenant, not as her agent, but in his individual capacity. When the repairs and improvements were about half completed, they stopped work because W. D. Carter, with whom they had made their contract, failed to pay them in accordance with its terms. About that time they had actual knowledge (having had constructive notice all the time) that Mrs. Carter was the owner of the property; yet they returned to work upon the assurance of W. D. Carter that he would pay them, and completed the repairs and improvements without informing Mrs. Carter of what they were doing, or that they were or would look to her or her property for the payment of the labor they were performing and the materials they were furnishing.

Whatever moral obligation Mrs. Carter may be under to pay them for what their labor and materials have added to the value of her property, it is clear, under the facts disclosed by this record, that neither she nor her property is under any legal liability therefor.

[4] The decree of the circuit court must therefore be reversed, as to Mrs. M. A. Carter, W. H. Carter, and Z. V. Carter, and the cause remanded to the circuit court, with direction, if asked so to do by the lien claimants, to render a personal decree (Johnson v. Bunn, 108 Va. 490, 493, 62 S. E. 341, 19 L. R. A. [N. S.] 1084) against W. D. Carter for the amount ascertained to be due them by the report of Commissioner Clement.

Reversed.

(112 Va. 352)

GREEN'S ADM'R et al. v. MARYE, Auditor.
(Supreme Court of Appeals of Virginia. June 8, 1911.)

STATES (§ 61*)—COMPENSATION OF AGENTS—
PERFORMANCE OF CONTRACT.

The state, having claims against the federal government, appointed agents to prosecute and settle them for a percentage of the sum recovered by them. One of the agents reported to the Governor unsuccessful efforts to collect the claims, and stated that the federal government would not recognize their validity until bonds issued by the state and held by the federal gov-

ernment were satisfied. Subsequently the state, through the efforts of others, obtained an adjustment of the claims without any assistance from the agents. *Held*, that the agents were not entitled to the compensation agreed on, under the rule that, where an agent assumes to do a specified act, no compensation is earned until performance.

[Ed. Note.—For other cases, see States, Dec. Dig. § 61.*]

Error to Circuit Court of City of Richmond.

Petition by the administrators of Bernard P. Green and John A. Parker against Morton Marye, Auditor of Public Accounts, to establish a claim against the Commonwealth. There was a judgment for the Commonwealth, and petitioners bring error. Affirmed.

E. Beverly Slater, H. R. Pollard, Hardcastle & Wynn, and Munford, Hunton, Williams & Anderson, for plaintiffs in error. The Attorney General, for defendant in error.

CARDWELL, J. George B. Stone, administrator of Bernard P. Green, deceased, and Frank D. Wynn, administrator of John A. Parker, deceased, filed their petition in the circuit court of the city of Richmond, pursuant to sections 746 and 747 of the Code of 1904, against Morton Marye, Auditor of Public Accounts, in which it is claimed that the commonwealth of Virginia is indebted to the petitioners' intestates in the sum of \$172,358.26, with interest thereon from the — day of April, 1903, being 10 per cent. of \$1,723,582.63, which it is alleged was collected by the commonwealth of Virginia on account of advances made by Virginia to the United States government for aid in carrying on the war with Great Britain, beginning in the year 1812.

The cause was heard before the circuit court upon said petition, the demurrer and answer of the Auditor of Public Accounts thereto, and the evidence. Whereupon the judgment to which this writ of error was awarded was entered, denying the relief asked by the petitioners, and dismissing their petition, with costs to the commonwealth.

In the view that we take of the case, it is immaterial whether the proceeding is to be regarded as one at law or in equity, or whether the evidence has been incorporated into the record by a proper bill of exceptions or not, or whether the alleged agency of petitioners' intestates was joint or several, or whether the alleged contract upon which this action is brought should be construed to be a contract for procuring legislation, and, therefore, void as contra bonos mores.

Coming to the consideration of the case upon its merits, it appears that during the war with Great Britain, beginning, as above mentioned, in 1812, Virginia and other states of the Union advanced to the United States

government certain moneys for military purposes, which the United States regarded and treated as advances spent for the benefit of the United States government, and therefore a debt payable by the latter, with interest. The rule adopted by the government by which the interest upon these advances was to be calculated or computed brought forth a formal protest from the states which had made these advances, and delay in their settlement followed. Pursuant to an act of Congress theretofore passed, the Secretary of the Treasury, on the 8th of January, 1859, reported that upon a readjustment of the account and a proper computation of interest Virginia would be entitled to \$339,312, with interest from 1833, whereby the amount due the state of Virginia was fixed and determined by the Secretary of the Treasury as of the said date. On February 14, 1859, the Governor of Virginia Hon. Henry A. Wise, received a communication from John A. Parker, Esq., stating that a large balance seemed to be due the state from the United States, whereupon Gov. Wise authorized Parker to examine and report upon this claim, and on February 10, 1860, the General Assembly of Virginia passed a joint resolution continuing Thomas Green (who had been appointed by the General Assembly in 1850 to prosecute said claim) and John A. Parker as agents to recover of the United States government the said claim, and directing that, upon recovery being made, "It shall be the duty of said agents to obtain payment of the same by draft from the United States government; * * * but, if paid in United States stock or bonds, the same shall be transmitted to the Auditor, and the Auditor is hereby directed to pay to the said agents 3 per cent. commission on such amount as may be by them recovered."

Prior to the adoption of the resolution of February 10, 1860, supra, to wit, in 1858, the commonwealth of Virginia became indebted to the United States government upon certain bonds or certificates of indebtedness of Virginia, obtained by the United States by purchase on account of certain Indian trust funds, and amounting to \$531,000, with interest. Upon this sum Virginia paid interest up to 1861, when default was made, and, of course, it was thereafter claimed on behalf of the United States government that said indebtedness of Virginia was to be credited upon the indebtedness of the United States government to Virginia; i. e., that the one was to be set off against the other as a matter of accounting.

Thomas Green died about the year 1877, and on March 12, 1884, an act of the General Assembly was passed (Acts 1883-84, c. 399), which provided: "That Bernard P. Green is hereby appointed in the place of the said Thomas Green (his father), deceased, to prosecute, in association with the said John A.

Parker, to settlement, the said claims of the state of Virginia against the United States, upon the terms and conditions specified by the act or acts creating the said Thomas Green and John A. Parker agents as aforesaid, except so far as the said terms are in conflict with this act."

(2) "That the Treasurer of the State is hereby authorized and directed to pay to Bernard P. Green and John A. Parker, jointly, and upon their receipts, ten per centum of any sum or sums appropriated by the Congress of the United States for the payment of said claims, and paid to the state for amount due from the United States."

John A. Parker died in 1895, and Bernard P. Green in September, 1902.

On the 14th of November, 1899, Green made a report to the Governor of Virginia, in which he gave a statement of the efforts that had been made by him and his associate, Parker, to recover the several amounts claimed as due from the United States to Virginia, and said: "Our claim, of course, as it now stands, is not recognized by the treasury; and, therefore, if the United States should ever owe Virginia for anything, past or future, nothing will be paid her until these bonds are satisfied. The United States statute forbids it. I therefore respectfully submit, as the efforts of Virginia to secure a settlement of this account for two-thirds of a century have brought no relief from Congress, it is now expedient that the accounts between the state of Virginia and the United States be referred to the Supreme Court of the United States for a speedy and final adjustment."

Whatever may have been the reasons for the change in the amount of commissions to be allowed on any sum or sums recovered by Green and Parker from 3 per cent., which had been originally provided, to 10 per cent., as fixed by the act of March 12, 1884, it was bound to have been understood by all concerned, and especially by Green and Parker, who were conversant with the situation, that in any settlement made of the claims of Virginia against the United States the latter would be entitled to have taken into account the indebtedness of Virginia to the United States upon the bonds referred to in the report of Green in 1899, supra. It is very true that when the act of March 12, 1884, was passed the bonds of the state of Virginia held by the United States, upon their face, did not become due till 1894, but the interest thereon was payable annually, and had not been paid since 1861. Certainly nothing had been accomplished by Green and Parker when said bonds became payable in 1894, nor by Green after Parker's death in 1895, for the latter's report to the Governor in 1899 admits of no other construction than that all his efforts had proven fruitless, and that nothing had been accomplished by any agency or efforts that had been put forth by himself, or by his father, or by Parker, who

had from time to time been representing the state; indeed, the long and earnest efforts of our representatives in Congress to secure by act of Congress a settlement of the claims of Virginia against the United States had at that time been of no avail.

The bonds, etc., of the state, held by the United States, having matured in 1894, suit for the enforcement of their payment was threatened by the United States, as authorized and directed by the Fifty-Fifth Congress. Whereupon Virginia's Senators in that body arranged with the Attorney General of the United States for a postponement of the bringing of the said suit in order that they might have opportunity to get Congress to pass such legislation as was necessary to effect a settlement of the respective claims of Virginia and the United States, and to do justice with respect thereto without litigation in the courts; and subsequently a successful effort was made in the senate to have incorporated in the "Omnibus Claims Bill" an amendment, which was retained in the bill when it was finally passed by the House of Representatives, providing for a settlement of the claim of Virginia by an offset against the claim of the bonds of Virginia held by the United States government as of the dates, respectively, at which the accounts would be completely or most nearly balanced; and the balance found due on such date, after deducting the principal and interest on said bonds or other evidences of debt to such date, should be paid to or by the state of Virginia. Said statute applied alike to claims held by the city of Baltimore and other states of the Union similar to the claim asserted by Virginia. After the said statute became effective, the settlement contemplated and provided for with respect to the claim of Virginia against the United States was taken up by our Senators, the then Governor and the Second Auditor of Virginia, and in April, 1903, a final settlement was reached whereby the sum of \$5.50 was found to be the balance due Virginia, which balance was paid into the treasury of the state by the United States.

The proof in the record is conclusive that the plan for the settlement of this controversy, authorized by the said act of Congress, was conceived and the final settlement effected pursuant to the statute without any aid or suggestion from Bernard P. Green (Parker being then dead); and there is proof, also, that he did not and could not have aided in the efforts made by our representatives in Congress to secure the passage of said act, but that any activity on his part or on the part of any other paid agent of the state in that connection would probably have been more hurtful than helpful.

As we have seen, this action is founded upon an alleged contract between the commonwealth of Virginia and Bernard P. Green and John A. Parker, arising out of the act of the General Assembly approved March 12, 1884,

whereby it is claimed that Green and Parker became entitled to 10 per cent. commissions on the full amount of the claim that Virginia was asserting against the United States government, without deducting therefrom the amount of the bonds and interest owing by the state which were then held by the United States; and such is the claim asserted in this action by plaintiffs in error, notwithstanding it was, as has been observed, known of all parties interested, including plaintiffs in error's intestates, when said act of March 12, 1884, was passed, that the United States held the said bonds against the state of Virginia. And it must of necessity have been also known by all parties interested that Virginia was relying upon the cancellation of these bonds as a payment pro tanto of the claims she held against the United States.

Aside, however, from this view of the case, let us see what, if anything, was done by Green and Parker pursuant to the said act of March 12, 1884, which entitled plaintiffs in error to a recovery upon the claim they are here asserting. Certainly nothing was done by Green and Parker up to the death of the latter in 1895, and nothing by Green up to the date of his report to the Governor of Virginia in November, 1899; for he distinctly says that "the efforts of Virginia, continued for two-thirds of a century, to secure a settlement of Virginia's claim against the United States had brought no relief from Congress," and suggested a course of action to be taken by the state entirely foreign to the line of action contemplated by whatever agency was conferred upon him and his associate, Parker, by the act of March 12, 1884. In other words, Green plainly, in his said report to the Governor abandoned all hope of beneficial results to Virginia from the efforts that he and Parker had made, or that he could thereafter himself make, and the record in this case does not disclose a single act or suggestion on his part after the date of his report in furtherance of the aim and purpose of Virginia to have her claim against the United States adjusted and finally settled.

We are unable to appreciate the force of the argument of the learned counsel for plaintiffs in error that, if Green and Parker were diligent in trying to effect a settlement of Virginia's claim, they were entitled to their commissions thereon, whether or not their efforts brought about a settlement of the claim, or it was accomplished by some other agency; nor do we (for the reasons already given) recognize any force in the argument that when Virginia admitted the validity of her obligation held by the United States, and agreed that it should be treated as an offset against the claim which she had contracted with Green and Parker to prosecute, and thereby put it beyond the power of said agents to effect a settlement upon any other basis, said agents were nev-

ertheless entitled to their commissions on the aggregate amount for which Virginia was given credit in the settlement of her claim under Act Cong. May 27, 1902, c. 887, 32 Stat. 235.

It may be, as counsel contend, that "if one contracting party can show that the other prevented his performance, it is to be taken as prima facie true that he would have accomplished it, if he had not been thus stopped"; but that is by no means the case here. There is no foundation whatever for the contention that the state of Virginia in any way prevented Green and Parker, or the first-named after the latter's death, from accomplishing the purpose they undertook pursuant to the contract with them set out in the said act of the General Assembly approved March 12, 1884. No such claim was made by Green or Parker in their lifetime or could have been made. The fact is they undertook, pursuant to said act, to prosecute to a settlement the claims of the state of Virginia against the United States upon certain terms and conditions specified in an act or acts theretofore creating Thomas Green and John A. Parker agents for the same purpose, and were to receive as their compensation "ten per centum of any sum or sums appropriated by the Congress of the United States for the payment of said claims and paid to the state for amount due from the United States." This action, as we have seen, is founded on said statute of March 12, 1884, and the complaining parties, plaintiffs in error, have utterly failed in their proof to fix upon the state of Virginia any liability to their intestates under that act.

The principle of law with respect to the right of an agent to compensation for his services, applicable here, is the same as that which applies to agencies of like character, generally, viz., that where the agent assumes to do a specified act, until the specified act is performed or substantially performed (except in exceptional circumstances, none of which apply here), no right to compensation arises to the agent. The agency must be fully completed. *Mechem on Agency*, §§ 610, 635, 682; *Crockett v. Grayson*, 98 Va. 354, 86 S. E. 477; *Parker v. Building & Loan Ass'n*, 55 W. Va. 135, 46 S. E. 811; 1 A. & E. Ency. of L., 1101, 1111, and cases cited.

We do not intend by anything said in this opinion to disparage the diligent and intelligent efforts of both Green and Parker, or those of Green after Parker's death, in trying to bring about the desired settlement of Virginia's claim against the United States; but the fact is, as Green frankly stated in his report of 1899, that all of their efforts were without avail, and we know of no principle of law which denies the right of the state thereafter to effect a settlement of her claim through the efforts of her representatives in Congress, without subjecting herself to liability to plaintiffs in error's intestates.

for commissions on the amount of her claim, set off by the United States in the settlement finally made under the act of Congress, the passage of which was procured by the unaided efforts of the state's representatives in that body.

There is no error in the judgment of the circuit court complained of and therefore it is affirmed.

Affirmed.

KEITH, P., and HARRISON, J., absent.

(112 Va. 300)

CARPENTER v. CAMP MFG. CO. et al.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—DEEDS—RIGHTS ACQUIRED.

A deed to standing timber and the right to cut and remove the same within a fixed period, and within such additional time as the purchaser may desire on paying interest on the price annually, gives the purchaser, after the expiration of the fixed period, a reasonable time in which to cut and remove the timber, and an additional reasonable time in which to remove the buildings, railroads, and tramways erected on the land as permitted by the deed.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3.*]

2. LOGS AND LOGGING (§ 3*)—CONVEYANCE OF TIMBER—RESERVATION—CONSTRUCTION.

An owner conveyed standing timber, with a right to cut and remove the timber within a specified time, and such additional time as the purchaser might desire on paying interest on the price annually. Subsequently he conveyed the land to a third person, but reserved to himself all the timber on the land previously conveyed, and all rights to the timber, whether of reversion of the timber or payments to be made by the purchaser thereof. *Held*, that the rights reserved must be exercised within a reasonable time after the expiration of the period fixed for the cutting and removal of the timber by the purchaser thereof.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3.*]

3. DEEDS (§ 90*)—CONSTRUCTION.

The court, in construing a deed, must give effect, if possible, to all of its terms.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 237; Dec. Dig. § 90.*]

4. DEEDS (§ 90*)—CONSTRUCTION AGAINST GRANTOR.

The language of a deed must be construed most strongly against the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 235; Dec. Dig. § 90.*]

5. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—DEEDS—CONSTRUCTION.

A covenant in a deed to standing timber, which gives to the purchaser the right to build and operate railroads on the land to remove the timber, or anything else which he may wish to carry over the railroads, gives to the purchaser the right, not only to build railroads to remove the timber acquired by that deed, but to transport anything else which he may wish to carry over the railroads; and his right thereto may continue for an indefinite period, subject to such control by the courts as will prevent the rights from being exercised inequitably to the owner.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3.*]

Appeal from Circuit Court, Brunswick County.

Suit by W. R. Carpenter against the Camp Manufacturing Company and others. From a decree for defendants, plaintiff appeals. Reversed in part, and remanded.

See, also, 70 S. E. 496.

Marvin Smithey and R. B. Davis, for appellant. E. R. Turnbull, Jr., and E. P. Buford, for appellees.

KEITH, P. The Camp Manufacturing Company is the successor in title to the Brunswick Lumber Company, which purchased from John W. Harrison and wife all of the timber, pine and poplar, 10 inches in diameter across the stump and larger at the time of cutting, upon a certain tract of land, together with the privilege of erecting buildings and operating railroads, tramways, and boggy roads across the land, as set out in the deeds.

Each of the two deeds conveying the timber above referred to contains this provision: "The said party of the second part, its assigns or successors, shall have five years from the date of this deed in which to remove the timber herein conveyed from the said land; and, if they shall fail to remove said timber in the said time, they may have such further time in which to remove the same as they may desire: Provided, however, that they pay interest to the said parties of the first part, or their assigns, at the rate of 6 per cent. per annum on the amount of the purchase price above mentioned, from the expiration of the said five years until they remove the said timber."

These deeds were duly recorded in the clerk's office of Brunswick county. By a subsequent deed John W. Harrison conveyed this land to George O. Dromgoole, in which he reserved certain rights, as follows: " * * * But there is reserved to the parties of the first part all the timber on said land heretofore conveyed to the Brunswick Lumber Company, and all rights under the contracts of sale to said lumber company, whether of reversion of said timber or payments to be made by said company for any cause, and all other rights whatever."

The rights of the Brunswick Lumber Company under its deeds have passed to and are now vested in the Camp Manufacturing Company, and those of the grantor, John W. Harrison, have passed to and are now vested in the appellant, W. R. Carpenter, subject to the above reservation. John W. Harrison is since deceased, and Daisy R. Harrison is his devisee and personal representative.

Carpenter, the appellant, filed his bill, making the Camp Manufacturing Company, the Safe Deposit & Trust Company of Baltimore, trustee in a deed of trust executed by the Camp Manufacturing Company, and Daisy R. Harrison, in her own right and as per-

sonal representative of John W. Harrison, deceased, parties defendant. His contention is that all the rights of the Camp Manufacturing Company and of Daisy R. Harrison under the deeds herein referred to have ceased, and he prays the court so to declare, as, being claimed under deeds of record, they constitute a cloud upon appellant's title, and he prays, also, for an injunction against the Camp Manufacturing Company, its agents, attorneys, and employes, to prohibit it from constructing or attempting to construct any spur tracks or branch lines of railway leading from or connecting with the line of lumber railway first constructed by said company across the Harrison plantation, and to enjoin and restrain the said company, its agents, etc., from hauling, transporting, or carrying lumber or any substance whatsoever over the said Harrison farm, except on and by means of the lumber railway first constructed and located by the said company across the said farm, except for the purpose of cutting and removing the timber now standing on the John W. Harrison plantation.

The case was regularly brought on to be heard upon the bill and exhibits, the demurrer and answer of the defendant the Camp Manufacturing Company, and exhibits filed therewith, and upon the depositions of witnesses, in consideration of which the court decreed that the deeds from Harrison and wife to the Brunswick Lumber Company vested in the Brunswick Lumber Company a present absolute title to all of the timber mentioned and described in said deeds that was on the tract of land in the bill and proceedings mentioned, at the date of said deeds, which was then 10 inches in diameter across the tree stump and larger, or which would grow to said size at the time the said timber shall be reached in the process of cutting, which title is defeasible as to such of said timber as shall not be removed from the said land within the time limited by said deeds, to wit, five years from the said 18th day of May, 1890, and five years from the said 27th day of May, 1899, respectively, and within such further time after the expiration of said period of five years as said Brunswick Lumber Company, its assigns or successors, and the said John W. Harrison and wife, the parties to the contracts embodied in said deeds, may agree upon, or, in the event of their failure or inability to agree, within such further time as the said Brunswick Lumber Company, its assigns or successors, upon the payment or tender of the interest provided for in said deeds, shall be entitled to demand upon a fair construction of the said deeds.

"That the said defendant Camp Manufacturing Company, as the assignee of the said Brunswick Lumber Company, is, by virtue of the deed executed to the said Camp Manufacturing Company by the said Brunswick Lumber Company on the 1st day of Novem-

ber, 1902, in the bill and proceedings mentioned, entitled to and is vested with all of the rights and titles in and to the said timber, and is entitled to exercise all of the rights and privileges so granted to and vested in the said Brunswick Lumber Company by the deeds aforesaid, as set forth in the first paragraph of this decree.

"That by virtue of the deeds so executed by the said John W. Harrison and wife to the said Brunswick Lumber Company, and the deed so executed by the said Brunswick Lumber Company to the said Camp Manufacturing Company, the said Camp Manufacturing Company is entitled to and has the right to erect such buildings on said land as it may see fit, and to build, use, and operate railroads, tramways, or bogy roads across the said land for the purpose of removing said timber, or anything else which it may now or hereafter wish to carry over said railroads and tramways in the conduct of its business, and the right to use such material from said lands along said railroads and tramways as may be necessary or convenient to build and maintain the same, which said rights, mentioned in this the third clause of this decree, may be exercised by the said Camp Manufacturing Company during such time as it shall be entitled to remove the said timber under the first and second clauses of this decree, and to remove said buildings, railroads, and tramways from said land within one year after ceasing to operate, use, or occupy the same."

[1] With respect to the timber conveyed in the deeds to the Brunswick Lumber Company, and the right to cut and remove it, and to extend the time for its removal, if not removed within the stipulated period, and all rights incident to the cutting and removing of the timber upon the 892-acre tract of land, such as the right to erect buildings and the right to build, use, and operate railroads, tramways, and bogy roads, as the covenants and reservations with respect to these matters in this case, are identical with those passed upon in the cases of *Wright v. Camp Manufacturing Company* and *Young v. Camp Manufacturing Company*, reported in 110 Va. at page 678, 68 S. E. at page 843, we shall content ourselves with the reasoning and conclusions contained in the opinions then rendered. It was there stated that the question of what is a reasonable time is one of fact, depending upon the circumstances of each case; and in this case we are of opinion that one year from the time the decree is certified to the circuit court of Brunswick will be a reasonable time within which the Camp Manufacturing Company shall exercise its rights of removing the timber, and the incidental right of cutting timber for the construction of roads, erection of houses, etc., and that it should have leave, within two years, to remove said buildings, railroads, and tramways from said land.

[2] We think the same principles apply to-

the rights reserved to John W. Harrison and wife under their deed to Dromgoole, and should be exercised and enjoyed by the successor in title of John W. Harrison, his devisee, and personal representative, within the same period prescribed to the Camp Manufacturing Company.

[3-5] What we have said is not intended to apply to the right of the Camp Manufacturing Company to the use and enjoyment of the railroad across the 892¼-acre tract. In construing the covenant between John W. Harrison and the Brunswick Lumber Company, effect must be given, if possible, to all of its terms and to its every word. The covenant provides that the Brunswick Lumber Company, its assigns and successors, shall have the right to erect such buildings on the land as they see fit, "and to build, use, and operate railroads, tramways, or bogy roads across the lands of the said parties of the first part, for the purpose of removing said timber or anything else which they now or may hereafter wish to carry over said railroads," etc. The manifest intent of the grantor (and the language is to be construed most strongly against him) was to clothe the Brunswick Lumber Company with the right, not only to build railroads, tramways, and bogy roads for the purpose of removing the timber acquired by that deed, but for the transportation of "anything else which they now or may hereafter wish to carry over said railroads" across the lands of the grantor. Now, with respect to every right contained in that covenant we have dealt in the foregoing part of this opinion, and have held that they must cease within one year from the time the decree is certified, with an additional year for the exercise of the right of removal of such buildings, railroads, and tramways as the Camp Manufacturing Company may desire to remove; but with respect to the right of transit over the road built across the lands in question we are of opinion that the limitation imposed upon the exercise of other rights would not be just, under the circumstances of this case, to the Camp Manufacturing Company, and with respect to it we are of opinion that it should be continued for an indefinite period, but that the court should reserve such control as will prevent the right from being exercised oppressively or inequitably, and, to that end, that leave should be reserved at the foot of the decree for either party to apply for and obtain such relief as may in the future appear to be proper, so that the court may be able to see that the Camp Manufacturing Company shall not arbitrarily and oppressively exercise its rights, and that Carpenter shall not interfere with the just exercise of those rights, and, when the proper time arrives, that the court may make such final adjudication upon the subject as to equity may seem meet.

The decree will therefore be reversed, and

the cause remanded to the circuit court for further proceedings to be had therein not inconsistent with the foregoing opinion.

Reversed in part.

(112 Va. 398)

MORTON'S EX'R v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia.

June 8, 1911.)

1. RAILROADS (§ 320*)—PRECAUTIONS AS TO PERSONS AT CROSSING.

It is not the duty of an engineer to stop when he sees a person approaching the track at a crossing as he has the right to assume, in the absence of anything showing the contrary, that such a person will take reasonable precaution for his own safety, and not rush in front of a rapidly moving train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1014-1016; Dec. Dig. § 320.*]

2. RAILROADS (§ 338*)—PERSONS AT CROSSING—LAST CLEAR CHANCE.

Where there is nothing to show that an engineer knew, or could have known, in time to have stopped his train, that one on the track at a crossing would be unable to cross before the train struck him, the doctrine of the last clear chance has no application.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1086-1089; Dec. Dig. § 338.*]

3. RAILROADS (§ 351*)—PERSONS AT CROSSING—INSTRUCTIONS—SUFFICIENCY.

In an action by the executor of one killed by a railroad train at a crossing, the instructions held to be sufficient, and to have fully and fairly submitted the case upon the evidence to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1215; Dec. Dig. § 351.*]

Error to Circuit Court, Campbell County.

Action by Charles S. Morton's executor against the Southern Railway Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

The following instructions were given by the court:

"(1) The court instructs the jury that the track of a railway company is of itself a proclamation of danger to a traveler, and that he must not only use his eyes and ears, looking and listening in both directions, but he must, when about to cross a track, look and listen, so as to make these acts reasonably effective. If such looking and listening does or would warn him of the near approach of a train, then it is his duty to keep off the track until the train has passed, and to go on the track under such circumstances is negligence, and he cannot recover.

"(2) The court instructs the jury that if they believe from the evidence that the engineer was guilty of negligence in failing to see Dr. Morton, or warn him of the approach of the train, or in failing to endeavor to stop or reduce the speed of the train after the engineer could by the exercise of due care have seen Dr. Morton's danger, and if they further believe from the evidence that Dr. Morton by the exercise of due care on his part would or should have discovered the

negligent omission of the engineer in time to have saved himself, the jury must find for the defendant.

"(3) The court instructs the jury that Dr. Morton, the plaintiff's testator, in going upon the tracks in front of the approaching train, was guilty of negligence, and in the absence of evidence that he could not have gotten off the track sooner, his negligence continued as long as he remained on the track, and until the train collided with him. Therefore, notwithstanding the engineer, also, may have been guilty of negligence in not seeing Dr. Morton, or in not sounding the whistle, or in not endeavoring to stop or reduce the speed of the train, the jury must nevertheless find for the defendant.

"(4) The court instructs the jury that if they believe from the evidence that the decedent, Charles S. Morton, could have stepped from the track and avoided collision with the train after the train had reached a point at which no effort on the part of the engineer could have prevented the collision, then the jury must find for the defendant, even though they believe from the evidence that the engineer might, by the previous exercise of due care, have discovered, in time to have prevented the collision, the said Morton's intention to cross the track in front of the train.

"(5) The court instructs the jury that if the engineer failed to see and warn Dr. Morton, and failed to endeavor to stop or reduce the speed of the train when by the exercise of due care he could or should have done so, and that Dr. Morton failed to see the approaching train when by the exercise of due care he could have done so, and prevented the collision, then the jury must find for the defendant.

"(6) The court instructs the jury that if Dr. Morton's death was due to the concurring negligence of himself and the defendant's servants in charge of the train, that is, to the negligence of both parties, Dr. Morton and the company, operating and in effect at the same time, they must find for the defendant.

"(7) The court instructs the jury that the duty of Dr. Morton to look out for his own safety was as great as the duty of the defendant to look out for him, and the court instructs the jury that the negligence of the defendant, if it was negligent, did not excuse Dr. Morton from the reciprocal duties he owed to care for his own safety, and that no negligence of the defendant would entitle the plaintiff to recover, unless it was the sole, proximate cause of the death of Dr. Morton."

The following instructions were requested by plaintiff, and refused:

"(A) The court instructs the jury that, although they may believe from the evidence that the defendant's engineer sounded the crossing signal at the proper point as he approached the crossing in question, this would

not relieve the defendant of the duty of exercising ordinary care in keeping a reasonable lookout as its engine approached said crossing (should the jury believe from the evidence that it was a public highway crossing) in order to avoid injuring persons traveling thereon, and such failure on its part to exercise such care in keeping such lookout would be negligence.

"(B) The court instructs the jury that the law imposes upon a railway company and its agents in charge of its locomotive engines the duty of exercising ordinary care in keeping a reasonable lookout when such engine is approaching a public highway crossing, in order to avoid injury to persons passing across its tracks at such crossing, and a failure to exercise such care constitutes negligence.

"(C) The court instructs the jury that if they believe from the evidence that the plaintiff's testator went dangerously near to or upon the defendant's north-bound track under the conditions disclosed by the evidence in the case, thereby placing himself in a position of peril from defendant's engine and train approaching along said track from the south, he was guilty of negligence in so doing, and the plaintiff cannot recover in this action, unless the jury further believe from the evidence that the point at which the plaintiff's testator was crossing said track was a public highway crossing, and that, after he has so placed himself in a position of peril, the defendant's engineer in charge of said approaching engine could and would, by the exercise of ordinary care in keeping a reasonable lookout as the engine approached said crossing, have discovered plaintiff's testator's peril in time to have avoided striking him, and that the said engineer failed to exercise such care, and by reason of such failure ran upon and killed him, in which event the defendant would, notwithstanding the said negligence of plaintiff's testator, be liable for his death."

Lee & Kemp, for plaintiff in error. Coleman, Easley & Coleman, for defendant in error.

CARDWELL, J. Charles S. Morton's executor brought this action against the Southern Railway Company to recover damages for the death of his testator, caused, it is alleged, by the negligence of the defendant company, and at the trial of the cause there was a verdict and judgment for the defendant company, to which judgment the plaintiff obtained this writ of error.

The deceased was killed on the 28th day of July, 1909, by a freight train at the crossing of defendant in error's track over a public highway at Lawyer's Station, in Campbell county, Va., in broad daylight, about 6 o'clock in the afternoon. While deceased was 77 years of age, according to the testimony of his son, the plaintiff in error, he had led "an

extremely active life," and his general health and mind were very good—"in rather splendid condition"—at the time of the accident, though "his limbs were very feeble and he moved very slowly in his walking."

The defendant in error, at the point of this accident, maintained a double track, which crosses the public highway practically at right angles; the station at Lawyer's being on the right-hand side going north. From this highway crossing south the railway track is perfectly straight for at least a mile, so that a person at the crossing could see an approaching train, and could in turn be seen by the engineer in charge of the engine while the engine was traveling that distance. The rumbling of the train could be and was heard before it "came over the hill," more than a mile, and it was not a train scheduled to stop at that station. Deceased had bought a farm some miles from Lawyer's, and on the day of his death rode over to the farm with a man named Withers. He walked from the depot to Withers' house, a distance of three-fourths of a mile, and Withers drove him in a buggy to the farm and back to the station. Withers, testifying in this case, states that he saw nothing the matter with deceased; that his hearing was "as good as anybody's"; that his eyesight was as good "as anybody's"—"unusually good"; and that "he was all right mentally." When deceased returned to the depot, he visited a store on the side of the tracks opposite the station to secure an envelope and paper upon which to write a letter, and with the envelope and paper in his hand came on along the public highway towards the railway tracks in the direction of the station. When he reached the right of way of defendant in error, according to the statement of Marshal Payne, colored, the only eyewitness as to what took place, his figure was bent, his head bowed, and his eyes fixed upon the ground, coming slowly and feebly up to and across defendant in error's south-bound track, and into the space between the south-bound and the north-bound track. Payne was on the "towpath" about 110 yards north of the crossing, and was going south towards the crossing; the "towpath" being on the right-hand side (going south) of all the tracks, thus putting the witness out of line with the north-bound track upon which the train was running. The witness Payne undertakes to fix the point at which he was and where the train was when he first saw deceased approaching the crossing by certain objects on the side of the railroad track, or freight cars standing on one of the tracks south of the crossing; but, as clearly appears from his statement, he did not consider deceased in any danger until the latter had actually stepped upon the north-bound track on which the train that struck him was running. To a question as to when he commenced hollering at deceased, the witness answered: "He had started across the north-bound track, just made one step, when

I hollered to him to come back before the train come. I hollered to him for him not to go over there, because I saw danger coming." The witness further says: "After he (deceased) aimed to go, to make it across the north-bound track, it (the train) was right there at the side of them box cars." And according to measurements furnished by plaintiff in error, the distance the train was then from the crossing was 105 yards (315 feet) and traveling at the rate of from 30 to 35 miles an hour, and the rumbling of which was distinctly heard by plaintiff in error's witness Wheeler (66 years old) a mile off, "before it come over the hill," so that, without entering upon a calculation in figures of the time and the distance made by the train therein, the conclusion is irresistible that, had the engineer seen the deceased the instant he stepped on the north-bound track, he must have thought, and he had the right to think, that there was ample time for deceased to clear the track before the engine reached the crossing, and that, had he seen deceased approaching the track in front of the rapidly approaching train, he (the engineer) expected, as he had the right to expect, that deceased would keep off the track until the train passed. The engineer, an experienced employé, testifies that he neither saw the deceased nor knew that he had been struck and killed till the train reached the next station. He was sitting on the right-hand side of the engine, the opposite side from that which the deceased was approaching the track; and the witness Harvey, for plaintiff in error, says that, standing about midway between the north-bound and south-bound tracks at the crossing (the distance between them being 8 feet), he could see an engineer on his seat in an engine coming north from Danville until the engine got about five rails from the crossing, which would be 170 feet, but after getting within the 170 feet the engineer would be obscured from the witness' view, and the witness from the engineer's view, by the boiler and the smokestack of the engine.

There are but two bills of exceptions made a part of the record—the one to the giving and refusing of instructions, and the other to the ruling of the court upon the motion of plaintiff in error to set aside the verdict of the jury and grant a new trial; and these exceptions are relied on here for a reversal of the judgment of the trial court.

The contention of plaintiff in error is (1) that it was the duty of defendant in error's engineer in charge of its engine to exercise ordinary care in keeping a reasonable lookout as the engine approached the public highway crossing, in order to avoid injury to persons crossing its tracks at such crossing, and that a failure to exercise such care would constitute negligence; (2) that, although it should appear from the evidence that the engineer had sounded the crossing signal at the proper point upon approaching the crossing, that fact would not relieve him

from the duty of keeping a reasonable lookout as the engine approached the highway crossing; (3) that, under the facts of this particular case, the doctrine of *last clear chance* might properly have been applied by the jury, and that question should have been submitted to them under proper instructions.

On the other hand, defendant in error contends that the facts of the case bring it solely within the doctrine of *concurring negligence*, and there could be no recovery.

[1] The rule as to the degree of care imposed upon a railroad company in keeping a lookout to avoid inflicting injury at a crossing is stated in 33 Cyc. p. 923, to be "such as a prudent person would exercise under the circumstances at the particular time and crossing in endeavoring to perform his duty"; and the rule so stated has been repeatedly sanctioned by this court, one of its latest expressions being in *Southern Railway Company v. Hansbrough*, 107 Va. 733, 60 S. E. 58, cited in Cyc., supra. This court has also repeatedly sanctioned the rule, approved by practically all courts, that trainmen have a right to assume that a traveler will, in the discharge of his duty, take reasonable precautions for his own safety, that he will look and listen before undertaking to cross a railroad track, and that it is only after it comes to the knowledge of the trainmen (or by the exercise of ordinary diligence upon their part should come to their knowledge) that the traveler, disregarding his duty has placed himself in peril of which he was unconscious, that any duty devolves upon the trainmen to undertake to stop the train; and this rule has been applied even in a case of a child eight years of age, as well as in the case of an adult. *Southern Ry. Co. v. Daves*, 108 Va. 378, 61 S. E. 748. See, also, *Johnson v. C. & O. Ry. Co.*, 91 Va. 171, 21 S. E. 238; *C. & O. Ry. Co. v. Hall*, 109 Va. 296, 63 S. E. 1007.

Assuming for argument's sake that the engineer in this case saw, or ought to have seen, plaintiff in error's decedent before or even after he had stepped over the west rail of the track, the rules to which we have just adverted apply, since there was no evidence tending to show that there was something in the appearance of the deceased to suggest to the engineer that he did not intend to remain in a place of safety until the train passed, or would be unable to clear the track after he had stepped over its west rail, before the engine reached the crossing, and to do this the decedent would have had to travel but a distance of less than $4\frac{1}{2}$ feet. According to plaintiff in error's own evidence this freight train, traveling 30 or 35 miles an hour, was 105 yards south of the crossing when the decedent stepped across the first rail of the track upon which the train was approaching. The distance the train would have made and the distance the de-

ceased should have traveled in the time it would have taken the engine to reach the crossing warranted the engineer in assuming that there was ample time for decedent to clear the track before being struck by the engine, there being nothing in his appearance to indicate that he was physically unable to do so or was unaware of his peril.

[2] Plaintiff in error's instructions A, B and C were properly refused. The latter told the jury that if they believed from the evidence that, after decedent had placed himself in a position of peril, the engineer could and would, by the exercise of ordinary care in keeping a reasonable lookout as the engine approached the crossing, have discovered the decedent in peril in time to have avoided striking him, defendant in error would be liable, notwithstanding decedent's negligence. In other words, the instruction sought to have applied to this case the doctrine of the last clear chance, when there was no evidence upon which it could be based, and therefore the doctrine invoked had no application whatever to the case. *N. & W. Ry. Co. v. Davis*, 108 Va. 514, 62 S. E. 337; *C. & O. Ry. Co. v. Hall*, supra; *Southern Ry. Co. v. Bailey*, 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379.

It may be that if the engineer knew, or could have known by the exercise of reasonable care, that the decedent could not clear the track before the engine struck him, the engineer might have sufficiently reduced the speed of the train, so as to have avoided the collision; but there is no evidence whatever to support such a theory.

[3] The seven instructions given by the court fully and fairly submitted the case upon the evidence to the jury, and the objections made thereto are without merit.

The evidence has been sufficiently adverted to, in the statement of the case and in considering the instructions refused at the trial, to clearly show that this court would not be warranted in disturbing the verdict of the jury, approved by the circuit court, and therefore said judgment is affirmed.

Affirmed.

(112 Va. 384)

MANSON & SHELL v. RAWLINGS' EX'X
et al.

(Supreme Court of Appeals of Virginia.)

June 8, 1911.)

1. JUDGMENT (§ 64*)—BY CONFESSION—ENTRY BY CLERK—STATUTE.

Code 1904, § 3283, providing that in any suit a defendant may in vacation, whether the suit be on docket or not, confess judgment in the clerk's office, and that the same shall be entered of record by the clerk in the order or minute book, and be as valid as if entered in court on the day of such confession, and that the clerk shall enter upon the margin of such book, opposite where the decree is entered, the date when it was confessed, is merely declaratory of the common law, and a substantial com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pliance is sufficient; and hence a judgment by confession is valid, though the only memorandum be a note in the fee book of the clerk of the circuit court referring to the confession, a certificate by him to the clerk of the county court, and a memorandum by the clerk of the circuit court showing that execution was delivered to the sheriff, for a judgment is not invalid because there was no suit actually pending, or for the lack of a declaration, or for failure of the clerk to make an entry in the order book.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 64.*]

2. LIMITATION OF ACTIONS (§ 172*)—EFFECT OF BAR—JOINT JUDGMENT.

Where a joint judgment returned against two defendants was barred against the estate of one, because not enforced against the personal representative of that decedent within five years, it is not barred against the estate of the other.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 172.*]

3. PRINCIPAL AND SURETY (§ 188*)—LIABILITY OF SURETY—NATURE.

The liability of a surety is the same as that of the principal; the creditor being under no obligation to look to the principal before resorting to the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 387; Dec. Dig. § 188.*]

4. LIMITATION OF ACTIONS (§ 167*)—EFFECT OF BAR—LIABILITY OF SURETY.

A surety is primarily liable for the debt of his principal, save that under the direct provisions of Code 1904, §§ 2890, 2891, he may require the creditor to sue, and a failure on the part of the creditor to reduce his claim to judgment will absolve the surety, but where a judgment has been recovered against both the principal and the surety the judgment must be barred against the surety to release him; for Code 1904, § 3395, provides that in an action founded on contract, though plaintiff be barred against some of the defendants, he may have judgment against any of the others against whom he would have been entitled to recover if he had sued them only, and hence a surety is not released because a joint judgment is barred as to the principal.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 651; Dec. Dig. § 167.*]

Appeal from Circuit Court, Brunswick County.

Action by R. W. Manson and J. R. Shell, copartners doing business under the name of Manson & Shell, against W. P. Rawlings' executrix and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded, with directions.

E. R. Turnbull, Jr., for appellants. R. B. Davis and E. P. Buford, for appellees.

WHITTLE, J. The following are the material facts bearing upon the questions involved in this appeal: The appellants, Manson and Shell, filed their petition in a creditors' suit, pending in the circuit court of Brunswick county against the executrix and devisees of W. P. Rawlings, deceased, to subject the assets of the estate to the payment of debts, setting up a judgment in their favor against J. R. Rawlings and W. P. Rawlings, alleged to have been confessed in the clerk's office of Brunswick circuit court on March 19, 1895.

J. R. Rawlings was principal and W. P. Rawlings surety in the debt on which the judgment was founded.

By the decree under review the circuit court disallowed the judgment, holding: (1) That the evidence was not sufficient to establish it; and (2) that, if the judgment had been proved, more than five years having elapsed from the qualification of the personal representative of J. R. Rawlings, the principal debtor, before the institution of any proceedings for its enforcement, it was barred by section 3577 of the Code of 1904, and, being barred as to the estate of the principal debtor, it was likewise barred, by the same statute, as to the estate of the surety.

[1] It is admitted that appellants' petition to enforce the judgment was filed in the creditors' suit within five years from the qualification of the personal representative of W. P. Rawlings, deceased.

The following memoranda from the records of the circuit and county courts of Brunswick county were relied on to sustain the judgment:

(1) A memorandum taken from the fee book of R. P. Buford, clerk of the circuit court, dated March 19, 1895, admitted to be in his handwriting, as follows:

W. P. Rawlings and J. R. Rawlings, to judgment confessed ads Manson & Shell	\$1 79
To writ tax.....	1 00
Total	\$2 79

(2) A certificate from R. P. Buford, clerk of the circuit court, to Geo. R. Mallory, clerk of the county court, as follows:

"Brunswick Circuit Court, March 19th, 1895.
"Manson & Shell, Pltff. J. R. & W. P. Rawlings, Deft. In Debt.

"Judgment against defendant for \$300.00 with interest from the 23d Feby., 1891, subject to credit for \$50.00 paid Jan'y 10, 1893, till paid.

"Extract Tests:

"Ro. P. Buford, Clerk.
"Entered on Judgment Docket 19th day of March, 1895. G. R. Mallory, Clerk."

(3) A memorandum on the execution docket, made by R. P. Buford, clerk of the circuit court, showing the entry of an execution on the judgment in question, with the indorsement: "Fl. Fa. held up by order of plaintiff's attorney. R. P. Buford, Clerk."

(4) A memorandum made by the clerk of the circuit court on the execution book, on October 20, 1897, of an execution on the judgment, returnable to first January rules, 1898, and the indorsement opposite the entry of the execution: "Delivered to sheriff."

Though section 3283 of the Code of 1904 prescribes how a judgment by confession may be entered by the clerk in his office in vacation with particularity, the statute has been held for the most part to be declaratory

merely of the common law, and that such judgment or decree will be valid when there has been substantial compliance with the statute. Thus the statute declares that in any suit the defendant may confess judgment. Nevertheless it has been repeatedly held that such judgment is not invalid because there was no suit actually pending, and no previous process. *Brockenbrough's Ex'r v. Brockenbrough's Adm'r*, 31 Grat. 580, 599; *Shadrack's Adm'r v. Woolfolk*, 32 Grat. 707; *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450.

So, also, in *Pickett v. Claiborne*, 4 Call, 99, the court held that the filing of a declaration was not essential to the validity of a judgment by confession. *Pendleton, P.*, in delivering the opinion of the court, observes: "Upon the whole the court are unanimously of opinion that, as a declaration in this case would have served no other purpose than to swell fees and papers, the judgment of the general court ought to be reversed, and that of the county court affirmed."

In *Shadrack's Adm'r v. Woolfolk* and *Saunders v. Lipscomb*, supra, it was held that the provision in the statute that the judgment should be "entered of record by the clerk in the order or minute book" was only directory, and the omission of the clerk to comply with that requirement, or, indeed, his failure to enter the confession on any other book in his office, would not vitiate the judgment. In the former case there was an unsigned memorandum indorsed by the clerk on the declaration; yet the court sustained the judgment, and said the clerk could make the entry at any time on the order book, and if he failed to do so the court might direct such entry to be made.

We are of opinion that these decisions are conclusive of the validity of the judgment.

[2] Upon the second assignment of error, there can be no doubt that, as the petition for the enforcement of the judgment was filed within five years from the qualification of the personal representative of *W. P. Rawlings*, deceased, it was not barred as to the estate of that decedent. It is a joint judgment against *J. R. Rawlings* and *W. P. Rawlings*, and, even if barred as to the estate of the former (upon which question we express no opinion), it would not for that reason merely be barred as to the estate of the latter. And that is true, though the relation of principal and surety may have existed between them.

[3, 4] In general, the liability of the surety to the creditor is the same as that of the principal. The responsibility of both is primary; and, at law, the creditor rests under no obligation to look to the principal or to his property, or to exhaust his remedies against him before resorting to the surety. He may collect his debt out of either. *Penn v. Ingles*, 82 Va. 68; *Southall v. Farish*, 85

Va. 409, 7 S. E. 534, 1 L. R. A. 641; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577; *Piedmont Guano & Mfg. Co. v. Morris*, 86 Va. 941, 945, 11 S. E. 883. The surety, it is true, by statute (sections 2890, 2891, Code 1904), may require the creditor to sue, and if he neglects to do so within a reasonable time the surety is absolved from all liability on account of his suretyship; but where judgment has been recovered against principal and surety, no length of time short of the period prescribed by the act of limitations will bar the right of the creditor to enforce his judgment against the surety or his estate. The judgment must be barred as to the surety himself to produce that result. Va. Code 1904, § 3395, provides that: "In an action, founded on contract, against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover if he had sued them only."

For these reasons, the decree of the circuit court must be reversed, and the case remanded for further proceedings in accordance with the views expressed in this opinion.

Reversed.

(69 W. Va. 456)

MULLEN v. COOK et al.

(Supreme Court of Appeals of West Virginia.
May 19, 1911.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 351*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

For a breach of contract to convey land, the vendor acting in good faith, the rule in Virginia and in West Virginia is that the vendee can recover only the amount which he has paid and interest thereon; and, if he has paid nothing, he can recover only nominal damages. But if the vendor has, since sale to vendee, voluntarily put it beyond his power to comply with his contract, or if, having good title, he refuses to convey, he will be held liable in substantial damages; and in such case the measure is the market value of the land at the time of the breach, less the unpaid purchase money, and interest may be allowed on such sum from that time.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 351.*]

2. VENDOR AND PURCHASER (§ 349*)—BREACH OF CONTRACT—ACTION—PLEADING—SUFFICIENCY OF DECLARATION.

A declaration by a vendee, averring a breach of contract to convey land, and alleging substantial and direct, or general, damages, is not demurrable because it states a method of measuring damages which may or may not be applicable on the trial.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 349.*]

Error to Circuit Court, Cabell County.

Action by *W. C. Mullen* against *M. J. Cook* and another. Judgment of dismissal, and plaintiff brings error. Reversed and remanded.

Isbell & Perry and Geo. J. McComas, for plaintiff in error. Vinson & Thompson, for defendants in error.

WILLIAMS, P. W. C. Mullen brought suit in the circuit court of Cabell county against M. J. Cook and C. C. Cook, to recover alleged damages for breach of a contract for the sale of real estate. A demurrer to the declaration was sustained, and, plaintiff declining to amend, the court dismissed his suit, and he obtained this writ of error.

The price to be paid for the land was \$3,600, and the conveyance was to be executed and delivered in 30 days from date of sale. No money was paid, but a 30-day note for \$100 was executed, payable on condition of the delivery of deed conveying good title. Plaintiff avers, as the measure of damages, that at the time he should have received his deed the land "was then and there worth, and could have been sold by this plaintiff for the sum of, \$4,850." He also avers generally that, by reason of defendants' breach of the contract, he has suffered damages to the amount of \$1,200. That sum is the difference between the contract price, and the alleged value of the land at the time of the breach.

[1] What is the correct measure of damages for the breach of contract to convey land? The rule is not uniform. The Supreme Court of the United States and the courts of most of the states have adopted as the rule for measuring the damages in such case the difference between the market value of the land at the time of the breach, with interest, less the purchase price unpaid, without regard to the reason for the failure to convey. 29 A. & E. E. L. 724, 725, and 2 Sutherland on Damages, 579. But that is not the rule in England, nor the rule adopted in Virginia before the formation of this state. In Virginia, a purchaser is not entitled to recover for the loss of his bargain. The value of the land at the date of the sale, and not its value at the time of the breach, is to be considered; and, if a price has been agreed to, then it is to be taken as the best evidence of value. Consequently, in Virginia, if the purchaser has paid nothing, the general rule is that his damages are only nominal. Of course, the purchaser is always entitled to recover the money paid, together with interest. 2 Min. 865; Stout v. Jackson, 2 Rand. (Va.) 132; Threlkeld's Adm'r v. Fitzhugh's Ex'r, 2 Leigh (Va.) 451; Thompson's Ex'r v. Guthrie's Adm'r, 9 Leigh (Va.) 101, 33 Am. Dec. 225; Stuart v. Pennis, 100 Va. 612, 42 S. E. 667; Wilson v. Spencer, 11 Leigh (Va.) 261.

The above is the general rule in Virginia, and, therefore, the law of this state, because those early Virginia decisions are binding

authority on us. This general rule, however, is subject to exceptions. It does not apply, if after the sale the vendor has voluntarily put it out of his power to comply with his contract, as, for instance, by making sale to another, or if he has good title and willfully refuses to convey. In such case he will be held liable for the enhanced value of the land; in other words, he will then be held liable to the vendee for his loss of bargain. Wilson v. Spencer, 11 Leigh (Va.) 261. See, also, opinion of Judge Snyder in Butcher v. Peterson, 26 W. Va. at page 454, 53 Am. Rep. 89.

[2] In view of the general rule of law which prevails in Virginia and in this state, the question presented by the writ of error is: Did the court err in sustaining the demurrer and dismissing the action? We think it did. The declaration alleges the contract, and avers its breach, and claims \$1,200 damages. It states a good cause of action. Whether plaintiff can prove a case entitling him to substantial damages depends, not alone upon the mere breach of contract, but also upon proof that the vendor has, since sale to the vendee, voluntarily disabled himself from making conveyance, or that he is able to make good conveyance and willfully refuses to do so. This is a matter of evidence, not of pleading; and hence it cannot be inquired into on demurrer. The fact that plaintiff avers a method or manner of measuring his damages, which may not turn out to be the correct one upon the development of the facts, is not material. Thomson-Houston Electric Co. v. D. L. I. Co., 144 N. Y. 34, 39 N. E. 7; 1 Joyce on Damages, § 79.

If defendants have acted in good faith, and are unable, from good cause, to comply with their contract, then plaintiff can recover only nominal damages; but if they have voluntarily incapacitated themselves to perform, as by conveying to another since their sale to plaintiff, or if they have good title and willfully refuse to convey to plaintiff, they are liable in substantial damages. "Breach of contract gives a right of action, whether special damages be alleged or not, and therefore, extruding from the declaration all averments of special damages, will not warrant the court in dismissing the action." Kenny v. Collier, 79 Ga. 743, 8 S. E. 58. See, also, Sutton v. Sou. Ry. Co., 101 Ga. 776, 29 S. E. 53; Roberts v. Glass, 112 Ga. 456, 37 S. E. 704; Thomson-Houston Electric Co. v. D. L. I. Co., 144 N. Y. 34, 39 N. E. 7.

The court erred in sustaining the demurrer to the declaration, and we will reverse the judgment of the circuit court, and will enter a judgment here overruling the demurrer and reinstating and remanding the cause, with leave to defendants to plead, and for further proceedings according to law.

(69 W. Va. 436)

HEARN et al. v. McDONALD.
(Supreme Court of Appeals of West Virginia.
May 16, 1911.)

(Syllabus by the Court.)

DAMAGES (§ 111*)—DESTRUCTION OF ROOF.

In an action for destruction of a roof of a house, the measure of damages is the value of the roof; that is, what it would cost to replace it new, less an allowance for depreciation from use, age, or like cause.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 274-278; Dec. Dig. § 111.*]

Appeal from Circuit Court, Mercer County.

Action by L. L. Hearn and others against D. J. McDonald. Judgment for plaintiffs, and defendant appeals. Affirmed.

Woods & Martin and Ritz & Ritz, for appellant. Hale & Pendleton, for appellees.

BRANNON, J. Hearn and Massie owned two houses, and McDonald was a contractor, building a section of the Virginian or Deep-water Railroad. The line of the road was on a hillside above the houses, and in blasting rock some of the rock were cast upon the metal roofs of these houses, and did great damage to them, and Hearn and Massie brought suit against McDonald, and recovered the sum of \$110.25, \$5.25 of it being interest, and McDonald has appealed to this court.

The only point involved in the case is this: The plaintiffs gave evidence showing what a new roof for the houses would cost, and gave no evidence to show what amount should be allowed for wear and tear of the roofs during the three or four years of their life, and claimed that a recovery of the cost of new roofs, without abatement for use and wear, is erroneous. The argument is that the recovery could be only for the value of the roofs at the time of their destruction; that it should have been shown what was the depreciation from the cost of new roofs owing to wear and tear; that from the cost of new roofs there should have been proven a specific sum for such wear and tear, and that deducted from the cost of new roofs; and on this basis the claim is there was no measure of damages fixed.

We do not deny the legal proposition that, where a building is destroyed, the value is to be ascertained by taking into account the original cost and the cost of replacing it, and making an allowance for depreciation from use, age, and other like causes as the condition in which it was required. Sutherland on Damages, 2967; Wall v. Platt, 169 Mass. 398, 48 N. E. 270. But upon the evidence in this case we find that the roofs were as good as new, practically, that they had been on but a short time, and had been well preserved by being kept painted, and were practically as good as new. Under the evidence such deduction would be small or nominal. It

seems a small matter upon which to reverse a decree and protract litigation. Nothing else is involved.

Therefore we affirm the decree, as substantial justice has been done.

(69 W. Va. 407)

McDONALD COLLIERY CO. v. CROTTY.
(Supreme Court of Appeals of West Virginia.
May 16, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 51*)—JURISDICTION—AMOUNT.

A defendant cannot acquire a right of appeal by filing a counterclaim which is manifestly specious and not provable.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 51.*]

2. JUSTICES OF THE PEACE (§ 145*)—AMOUNT IN CONTROVERSY—RIGHT TO APPEAL.

The amount in controversy before a justice of the peace cannot be increased by a fictitious counterclaim, so as to entitle the defendant to an appeal, or to a writ of error in case an appeal is denied him by the justice and the circuit court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 479-489; Dec. Dig. § 145.*]

3. RIGHT TO APPEAL FROM JUSTICE.

Quere: Does a defendant in a case before a justice of the peace acquire the right to appeal by filing even a bona fide counterclaim of appellate amount, if he offers no evidence on the trial before the justice in support thereof?

Brannon, J., dissenting.

Error to Circuit Court, Fayette County.

Action by the McDonald Colliery Company against G. E. Crotty. Judgment for plaintiff, and defendant brings error. Dismissed.

M. Van Pelt, for plaintiff in error. Dillon & Nuckolls, for defendant in error.

ROBINSON, J. Plaintiff and defendant had some controversy as to the possession of a mule and plaintiff obtained possession of the animal from defendant by paying him twelve dollars. Thereafter, plaintiff, before a justice of the peace, sued defendant for the sum so paid. Defendant filed an answer to the suit, which is indefinite and uncertain as to the basis of the counterclaims which it undertakes to interpose. It demands one hundred dollars for the mule and twenty dollars for curing the mule's sore shoulder. By this answer, the defendant in effect says to the plaintiff: "I did let you have the mule for twelve dollars, but since you sue me for the return of that amount, I charge you one hundred dollars for the mule and also twenty dollars for doctoring the mule while it was yet mine." The record does not disclose on what ground plaintiff sought judgment for the twelve dollars.

At the trial before the justice, defendant offered not a word of evidence to support his alleged counterclaims. Plaintiff recovered

judgment for the twelve dollars, and defendant filed bond for an appeal. The justice refused an appeal; and, upon petition to the circuit court in the premises, that court also denied defendant an appeal. To this action of the circuit court, defendant obtained a writ of error.

[1] Defendant says that as to him the case involves an amount within the right to appeal from the judgment of the justice and also within the right to prosecute the writ of error. If his counterclaims could be considered bona fide, he might have the right to appeal from the judgment of the justice, or to prosecute the writ of error to correct the action of the circuit court in denying him an appeal. But the case is too pregnant with the fact that his counterclaims are merely filed to raise the jurisdictional amount so that he can further contest the real amount at issue, that is, the sum of twelve dollars. By the counterclaim route, defendant proposes to avoid the statute which prescribes that a controversy about the sum of twelve dollars can go no further than a justice of the peace. It would not be consistent with the foundation and dignity of this court to assist him in the procedure which he has undertaken.

The answer setting up the alleged counterclaims shows that, when defendant allowed plaintiff to take possession of the mule from him, he considered that it was only of the value of twelve dollars to him. That negotiation is clear proof of the mule's value to defendant. We are not told in the record what rights defendant then claimed as to the animal, nor what rights plaintiff claimed as to it. The answer alleging the counterclaim does not directly aver that defendant ever owned the mule. His charge for curing its shoulder would indicate that it belonged to plaintiff when he had it in his possession. At any rate, we do not understand how defendant can be in good faith in charging one hundred dollars for that which he admits in his answer he agreed to deliver for twelve dollars; nor how he can consistently charge twenty dollars for curing the mule's sore shoulder if the mule belonged to him so that he could demand one hundred dollars or even twelve dollars for it. The two items of counterclaim are totally inconsistent, the one to the other. And again, twenty dollars seems an outrageous price for curing the sore shoulder of a twelve dollar mule. The latter price was all defendant demanded and received for the mule before this suit began.

All too plainly does it appear from the very nature of the alleged counterclaims that they are merely specious, and that they are filed only for the purpose of procuring the jurisdiction which defendant seeks in the circuit court. Another indication of the specious character of the counterclaims is that defendant offered no evidence to sup-

port them at the trial before the justice. If he was in good faith as to them, it is strange that he did not use them to defeat the action against him before the justice and to secure a judgment in his favor there. If the counterclaims are bona fide and provable, he could thus have avoided the demand for the appeal which he is seeking. Shall he be entitled to an appeal when he might have avoided the necessity for it by proving before the justice that which he desires to prove on appeal? Shall we thus allow him to deny the justice's jurisdiction to pass on his claims, notwithstanding the statute plainly contemplates that they shall be adjudicated there? His sole aim seems to be to get around the jurisdiction of the justice. Shall we uphold defendant in totally ousting the justice of jurisdiction for the adjudication of these counterclaims, and give him the right to have them adjudicated on appeal in the circuit court? And, by so upholding him, shall we permit him to go to the circuit court where again he may offer no substantial proof of the counterclaims, thinking only, as it certainly appears he does, there to reverse the finding of the twelve dollars against him?

[2] Indeed it may be questioned seriously whether defendant could demand any appeal on his counterclaims, even if they appeared ever so bona fide, since he offered no proof in support of them before the justice. But since the counterclaims from their very relation to the case bear evidence of sham, and indicate that they were filed solely for the purpose of demanding an appeal, we need not carry this phase of the case to a decision. Can a defendant appeal on even a bona fide counterclaim of appellate amount, which he has not put in controversy on the trial before the justice by introducing evidence in support of it? The following citations may assist in answering the question. Code 1906, c. 50, §§ 55, 163; *Dickey v. Smith*, 42 W. Va. 806, 26 S. E. 373; 1 Enc. Pl. & Pr. 735; *Kurtz v. Hoffman*, 65 Iowa, 260, 21 N. W. 597.

That the amount in controversy cannot be increased fictitiously for the purpose of conferring the right to appeal is without question. Yet it is palpably evident that defendant undertook to violate this principle in the case at hand. "A defendant cannot acquire the right of appeal by filing a set-off manifestly specious and unprovable." 1 Enc. Pl. & Pr. 712. To know that defendant's claims are fictitious, specious, and not provable we have only to observe the inconsistency of defendant in claiming one hundred dollars for that which he admits he delivered for twelve dollars; or in now claiming twenty dollars for doctoring the mule, an item he had not invented when he gave over the mule for twelve dollars. We have only to observe the record as a whole to know beyond doubt that the only purpose of

the counterclaims was to litigate a twelve dollar suit in courts other than that of the justice of the peace. Defendant has filed no brief before us. Has he realized how glaringly appears the real purpose of his use of these alleged counterclaims?

We may appropriately say of defendant's counterclaims what the Virginia court said as to an action to recover rent, which was met by a counterclaim for rents previously paid under the lease: "The claim thus to set off the plaintiff's demand is not only a mere colorable claim, but is obviously nothing other than a specious pretense of a claim that has no foundation either in law or conscience. To permit a party to acquire jurisdiction in this court under such circumstances would open wide the door to fraud upon the jurisdiction of the court, and would largely tend to abrogate the constitutional provision limiting the minimum jurisdictional amount of this court." *Manchester Paper Mills Co. v. Heth*, 1 Va. Dec. 776, 18 S. E. 189.

The writ of error will be dismissed as improvidently awarded.

BRANNON, J. (dissenting). I dissent. I deem the matter of sufficient importance to make a short note. The decision virtually denies the right of a defendant filing in an action in a justice's court offsets to choose between a trial in that court and the circuit court. Appeal from a justice's judgment is a matter of right. No cause need be shown, and in the circuit court there is a new trial, without regard to the trial before the justice. That trial has nothing to do with the trial on the appeal. The defendant may prefer a trial before a competent judge. Or he may have forgotten to attend before the justice, or even neglected the trial, or have failed for other cause. He can appeal of right within the limit for appeal. You cannot say his offset is fictitious. That is a matter to be tested by the evidence on appeal. This is a question of fact for the jury. The character of the claim, whether well founded or fictitious or genuine, must be decided on the trial by the jury. That is a question of fact on which the suitor has a right to appeal to a jury, and I cannot see how the court can put its stamp of condemnation on it in advance of the evidence before a jury.

(69 W. Va. 412)

SCOTT et al. v. KEENAN et al.
(Supreme Court of Appeals of West Virginia.
May 16, 1911.)

(*Syllabus by the Court.*)

1. JUDGMENT (§ 407*)—ENFORCEMENT—SUBSEQUENT INTERVENERS.

After there has been a decree adjudicating the principles of a cause the remedy of a party

thereto, against the adverse claims of a subsequent intervening petitioner therein, is not by an independent suit to enjoin the execution of such decree, but by proper pleadings, and motions addressed to the court in the pending cause.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 768-774; Dec. Dig. § 407.*]

2. JUDGMENT (§ 407*)—ENFORCEMENT—REMEDY—APPEAL.

If prejudicial error be committed by the court below on such pleadings or motions, such error may be corrected here on appeal.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 768-774; Dec. Dig. § 407.*]

Appeal from Circuit Court, Randolph County.

Bill by C. H. Scott and others against L. H. Keenan and others. Decree for defendants, and plaintiffs appeal. Affirmed.

W. B. Maxwell, for appellants. Blue & Dayton and Jared L. Wamsley, for appellees.

MILLER, J. The object of the bill, or, as it styles itself, the petition, is to enjoin defendant L. H. Keenan from further proceedings in the cause of said Keenan against Scott and Cobb, and others, pending in the same court, as required by the decree and mandate of this Court pronounced in said cause, on appeal, 64 W. Va. 137, 61 S. E. 806, until the petition of Elizabeth Keenan, filed therein, subsequently, shall be finally matured and heard, and until her rights, as against said L. H. Keenan, the present plaintiffs, and others, parties thereto, set up therein, be finally determined and adjudicated.

We find nothing alleged in the present bill, or petition, justifying the relief prayed for. The petition of Mrs. Keenan was filed in the cause, proceedings in which are sought to be enjoined. She alleges ownership of the land by virtue of a deed from her husband, executed and delivered, pendente lite, a few days before the decision of this court on the appeal. She does aver in her petition, the equitable ownership of the land, with notice thereof to defendants, prior to said deed, and that said Scott and Cobb, then holding the legal title, had no authority, without her consent, to sell the land to the Davis Colliery Company, nevertheless, the prayer of her petition is, that she be substituted as the true plaintiff in said suit, in place of her husband, L. H. Keenan, and that said land, or the value thereof may be decreed to her, subject to the just and equitable charges against the same.

Notwithstanding the scope of her petition may be broader it is hardly likely the petitioner will be able to show herself entitled to greater relief than that granted her husband, L. H. Keenan, under whom she holds by deed, and in whose room and stead she seeks to be substituted as plaintiff. Keenan in his answer avers and charges that his deed to his wife can not in any event amount to

more than an equitable assignment to her of whatever amount he may be entitled to recover from Scott and Cobb in said cause.

[1, 2] But whatever the rights of petitioner may be, her petition is pending in the cause which is sought to be enjoined, not as an independent suit. The Court has the jurisdiction of the whole case of the subject matter and of the parties, and is competent on proper pleading filed, or proper motions addressed to the court in the cause, to protect and adjudicate the rights of all parties; and if error be committed therein, to the prejudice of any litigant, that error is correctible here on appeal from a final decree, or decree adjudicating the principles of the cause. Certainly no independent suit is proper or necessary.

We do not see that the cases collated in 11 Ency. Dig. Va. & W. Va. Rep. 712, and to which we are referred, have any application to the question presented here. If we should treat the petition of Mrs. Keenan as an independent suit, pending in the same court, and the present suit as a motion for a stay of proceedings, under section 6, chapter 136, Code 1906, and the decree appealed from as an order denying the motion, that order would not be the subject of appeal to this Court, except upon a final decree entered in the cause, or one adjudicating the principles of the cause, made upon the pleadings, and proofs therein. Stay of such proceedings under said statute, as was decided by this Court in *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209, rests in the sound discretion of the court, and to warrant such stay it must be essential to justice, and it must be that the judgment or decree, by another court, or the same court, in another cause, will have legal operation and effect in the suit in which the stay is asked, and settle the matter of controversy in it. But we have here no such independent suits to deal with, and that case has no real application.

For these reasons we think the decree below should be and it will be affirmed.

(99 W. Va. 414)

MAXWELL v. MAXWELL

(Supreme Court of Appeals of West Virginia.
May 16, 1911.)

(Syllabus by the Court.)

1. DIVORCE (§ 27*)—"CRUEL AND INHUMAN TREATMENT."

In a suit for divorce from bed and board, based on alleged cruel and inhuman treatment, the true issue and test is whether under all the facts proven, plaintiff can with safety to person and health continue to live with defendant.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 62-83; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1768-1777; vol. 8, p. 7624.]

2. DIVORCE (§ 27*)—GROUNDS—DRUNKENNESS NOT HABITUAL.

Drunkenness, not habitual, though not ground for divorce, is no excuse for cruelty. Cruelty, resulting from drunkenness, is cause for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 62-83; Dec. Dig. § 27.*]

3. DIVORCE (§ 27*)—CRUEL AND INHUMAN TREATMENT.

It is not cruel and inhuman treatment, justifying divorce, for a husband residing with a second wife and his children by a former wife, to separate her from them, and to provide for himself and her elsewhere, if that be necessary for the protection of the children against the wife's abuse, or evil influences, and for the peace and happiness of all concerned.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 62-83; Dec. Dig. § 27.*]

4. EQUITY (§ 65*)—CLEAN HANDS—DIVORCE.

The rule that one who comes into a court of equity must come with clean hands is applicable to divorce proceedings. Courts of equity are not open to give relief to husband or wife if the complaining party be responsible in a substantial degree for the wrongs and injuries complained of.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.*]

(Additional Syllabus by Editorial Staff.)

5. DIVORCE (§ 27*)—CRUEL AND INHUMAN TREATMENT—FALSE ARREST.

False arrest, without more, is not ground for divorce from bed and board, as cruel and inhuman treatment; cruelty being measured by the results upon complainant, and not by the law of damages for malicious prosecution.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 62-83; Dec. Dig. § 27.*]

Appeal from Circuit Court, Ohio County.

Suit by Emma W. Maxwell against A. O. Maxwell. Decree for defendant, and plaintiff appeals. Affirmed.

See, also, 67 W. Va. 119, 67 S. E. 379, 27 L. R. A. (N. S.) 712.

T. S. Riley and A. L. Sawtell, for appellant. John J. Coniff and Henry M. Russell, for appellee.

MILLER, J. As ground for a divorce from bed and board plaintiff charges defendant, her husband, with desertion, and with cruel and inhuman treatment; but here, as in the court below, she relies on cruel and inhuman treatment.

Plaintiff is the second wife of defendant, and he is her second husband. From her first husband she obtained a divorce, and was married to defendant in 1899. He took her to his home in Wheeling, where he had been living, with his five children by his first wife, all infants. Disagreements soon began, involving the two oldest daughters, resulting finally, in 1904, in defendant's turning over to his daughters the ostensible control of the house, he and his wife remaining as boarders. The understanding between him and the daughters, of which plaintiff was informed, was that she was to be confined to the use of her bed room, the bath

room, the dining room for meals, and the hall way for going in and out, and was not to go into any other part of the house, parlor not excepted, or to interfere in any way with the daughters in their control of the house. Disregard of this arrangement by plaintiff, on several occasions, resulted in quarrels between herself and husband, and his daughters, the husband always taking the side of his children against her. The breach became so wide that he did not always occupy the same room with her, but lodged in other rooms of the house. In 1904, defendant notified his wife that they were going to leave; she went out to be gone a short time, and not returning quite as soon as she had expected, she found herself barred out of the house by the daughters. They notified her, they say, she denies it, that she would find defendant, at a certain hotel. She says she went to her mother's home for shelter. There she received a special delivery letter from defendant, informing her that he had "secured quarters at the Park Hotel, Water Street, this City, for our accommodation, where you can come."

Plaintiff refused to go to the hotel, but remained with her mother, and soon afterwards sued for divorce. This suit remained pending until about February, 1905, when, after some understanding, it was dismissed, and defendant arranged with plaintiff to resume their marital relations, and to take up their abode with plaintiff's mother, and he arranged with the latter for room and board for himself and wife, making his wife a small allowance of ten dollars per month for personal expenses.

The specific acts of cruelty charged are, gross intoxication, before and after the separation in 1904, rendering life unpleasant, almost unbearable; abuse and mistreatment of her, and encouraging his children to abuse and mistreat her, before that separation, instancing the depriving her of the control and management of the home, and giving it over to the daughters, and confining her to her room, bath, dining room, and hall, as already noted, resulting finally in the proposition to leave, and to turn her out entirely, and the divorce proceedings of 1904; false accusations of unfaithfulness, criminal abortion, before and after the separation of 1904, of being a prostitute, and of improper relations with other men, calling her vile names, as liar, bitch, dirty whelp, degenerate, hell-cat, and other names of like character; false arrest and imprisonment on a false charge of threatening him with great bodily harm, and causing her to be taken before a justice, and there failing to appear against her; choking her, and threatening to shoot her and otherwise abusing and mistreating her, rendering life unbearable, and refusal to provide her with the necessities of life and proper medical treatment in sickness; and on one occasion,

after 1905, locking her out of the house in the night time.

The answer of defendant denies all material averments of the bill on which divorce, as prayed for, could be predicated. It makes counter charges, of wrongs and injuries inflicted by plaintiff on defendant, in accusing him to his children of crimes and misdemeanors, in threatening to shoot him, and to do him other acts of violence, and in the use of vile epithets against him. Other acts unbecoming a wife are charged, and other facts are alleged, justifying defendant's suspicions, not accusations, of improper relations by her with another man, and criminal self abuses, by all which plaintiff is alleged to have brought on herself and on defendant all their domestic troubles, of which she complains against him.

[1] Cruel and inhuman treatment, such as calls for divorce from bed and board, is defined by this Court in *Goff v. Goff*, 60 W. Va. 9, 53 S. E. 769, following authorities cited, as follows: "Such conduct and acts by a husband toward his wife, such treatment of her by him, as produces reasonable apprehension in her of personal violence, or produces mental anguish, distress and sorrow, and renders co-habitation miserable, impairing, or likely to impair, the wife's health or mind, is cruel and inhuman treatment authorizing a divorce from bed and board under the Code of 1899, chapter 64, section 6, though there be no personal violence."

[2] We have carefully examined all the evidence, and with special reference to the specific charges and counter charges of the parties in pleadings and evidence. First, with respect to abuse, as a result of excessive drunkenness. Drunkenness, not habitual, section 6, chapter 64, Code 1906, though not a ground of divorce, is no excuse for cruelty. Cruelty resulting from drunkenness is a cause for divorce. 1 *Nelson on Divorce and Separation*, section 322. Defendant admits occasional drinking, and sometimes slight intoxication, but denies cruel treatment of his wife. He accuses her, and she does not deny it, that she frequently drank with him. He testifies that she often urged him to drink liquor when he did not want it, and to supply it for her use and his.

The abuse of plaintiff by defendant, or his children, or his encouraging that abuse, as alleged, is denied by him and by them. We do not think the evidence supports these charges. It is true the management of the house was apparently turned over to the daughters, but defendant and the daughters prove accusations by plaintiff of wrong doings by the father; the use of vile and abusive language and epithets; threats that when they should reach their majority the children would be required to leave the home; loud and boisterous talking over the telephone; indecent and obscene language in the presence of the children, thereby render-

ing conditions in the home unbearable, and necessitating a separation of the family, the wife from the children, and providing for her elsewhere.

[3] The evidence does not entirely satisfy us that defendant was justified in turning over the management of the household to the daughters, and afterwards in entirely excluding plaintiff, first from certain portions of the house, and afterwards entirely from the home, and proposing to provide for her at an undesirable hotel, resulting in the divorce proceedings of 1904. It has been suggested that whatever be the truth about these transactions, they were condoned by plaintiff by her subsequent resumption of marital relations with defendant. Such, however, is not the law. 1 Minor Inst. 282. We are unable to say, however, from all the evidence that the court erred in denying the divorce. It must be conceded that defendant had the duty imposed upon him of providing for his children as well as his wife. If his evidence and that of his daughters is to be taken for true, an intolerable condition existed in the household justifying him perhaps in separating his wife from his children and providing for her elsewhere. If, however, this evidence be false, defendant's treatment of his wife in depriving her of his home, either in part, in the first instance, or finally putting her out, was cruel and inhuman. True it is the right of the husband, given by law, to manage the household, and protect his children. This justified him, if there was good cause, in separating her from them, and providing for her elsewhere. Such authority we think may be found in the general rules and principles relating to the subject, laid down in 1 Nelson on Divorce and Separation, sections 294, 296, and 299. These sections hold that the restraint by the husband over his wife and children, and in the management of his household, even to the extent of such separation, if that be necessary, will not amount to cruel and inhuman treatment, justifying divorce.

Defendant specifically denies in his answer and testimony, that he accused plaintiff of unfaithfulness to her marriage vows, or of criminal abortion, and prostitution, the evidence of plaintiff contradicting that of defendant. Defendant does not deny that he suspected his wife, and that he reprimanded her for conduct which he regarded unbecoming to a wife, particularly, in connection with the witness Beardmore. But he denies that he ever accused her of criminality. The evidence satisfies us that defendant was not without grounds of suspicion. He testifies, and she denies, that shortly before a miscarriage in 1905, she requested him to employ a doctor to produce an abortion, which he refused to do. It is an admitted fact, however, that a day or two afterwards, on going home, defendant found his wife in a critical condi-

tion, attended by a doctor, and that a miscarriage, due to natural or artificial causes, had taken place. A miscarriage under like circumstances had taken place in 1904, before the separation of that year. If a husband accuse his wife falsely of such crimes such accusations would be cause for divorce, provided, as in the case of other false accusations of crime, they be made under such circumstances, as to bring the wife into disrepute, affecting her reputation for chastity, and inflict upon her grievous mental suffering, impairing or likely to impair her health or mind, and rendering co-habitation miserable and unbearable. Goff v. Goff, supra. The test is the mental suffering of the wife, impairing the health, and threatening her life. 1 Nelson on Divorce and Separation, sections 274, 284.

[4] It is admitted by defendant that he accused his wife of lying, and of being a hell-cat; and in his evidence in this case he refers to her as the "degenerate daughter of an honored sire." He denies, however, the use of the other epithets, of which he is accused. But, as is the case when a wife is accused of adultery, prostitution and the like, whether such accusations will amount to cruel and inhuman treatment depends upon the effect produced or likely to be produced upon the mind, or health of the accused. If no such evil results follow, or are likely to follow, they will not amount to cruel and inhuman treatment, giving cause for divorce. See authorities cited in the preceding paragraph. And if the fact be, as the evidence in this case tends to show, that the plaintiff was herself guilty of crimination and recrimination, and of the like use of abusive language and epithets against defendant, and was guilty of conduct unbecoming her as a consort, and thus brought upon herself the troubles of which she complains, a court of equity should deny her relief. One who comes into a court of equity for divorce, must, as in all other cases, come with clean hands, and substantially without fault. Courts of equity are not open to give relief to husband and wife if responsible in a substantial degree for the wrongs and injuries of which they complain. This doctrine is fully covered by the opinion of this court in the recent case of Hall v. Hall, 71 S. E. 103, decided at the present term, and not yet officially reported. And the same principles were applied in Bacon v. Bacon, 70 S. E. 762.

[5] The charge of false arrest, though the evidence tends to support it, without more, is not a good ground for divorce from bed and board. Defendant accused plaintiff before a justice of threatening his life, and did not appear against her, giving as a reason the advice of his counsel, that without evidence to corroborate his own he could not succeed. The rule respecting malicious prosecutions seems to be, as in other cases of false accusation, that the fact that the accused has been

acquitted, or that the charge was groundless, does not establish cruelty, for cruelty is measured by the results upon the complainant, and is not determined by the law of damages for malicious prosecutions. 1 Nelson on Divorce and Separation, section 280. The test here as in other cases is, not the fact of false accusation, but the effect thereof on the health or mind of the accused.

The charges of choking, threatening to shoot, refusal to provide necessities of life, and to provide proper medical treatment, and defendant's alleged lock out of plaintiff, all substantially depend on plaintiff's unsupported testimony, except as to one instance, where defendant is accused of having raised his hand as to strike his wife. This was just before the present suit, in the presence of one Beardmore, a fellow boarder at her mother's house. The testimony of Beardmore is relied on by plaintiff in support of her evidence. The evidence, with corroborating circumstances, satisfies us, however, that this demonstration, if any, was directed, not against plaintiff, but against Beardmore, who admits he thrust himself between plaintiff and defendant, when the latter late at night was endeavoring to induce his wife to return to her room. Defendant's denial of personal violence, or threats of personal violence, prior to the separation of 1904, is supported by the evidence of his daughters; and he is supported in his denials of similar acts, while living with plaintiff's mother, by the mother herself. She testifies, that so far as her observations went, defendant's treatment of his wife was always gentle and kind, and that she never saw defendant abuse his wife. She was present when defendant is accused of having raised his hand as if in the act of striking his wife. The charge of failure to provide, as a ground for divorce, for cruel and inhuman treatment, is unsupported by the evidence. The provision for the support of the plaintiff the last two years before the institution of the suit, while in some respect it may appear to have been meagre, particularly the monthly allowance to the plaintiff for personal expenses, yet it seems to have been fairly satisfactory to her. There is some evidence that defendant neglected his wife to a certain extent when she was ill and suffering from her last miscarriage; but after some reluctance he paid the doctor's bill. Such neglect, to be ground for divorce for cruel and inhuman treatment, must cause or be likely to cause injury to health, or to produce great mental suffering. 1 Nelson on Divorce and Separation, section 374. There is nothing in the evidence justifying such conclusion in this case.

We conclude as the court below concluded that a case for divorce on the grounds of cruel and inhuman treatment, or upon any ground, has not been made out, by proof, and that the decree below should be affirmed.

(88 W. Va. 421)

MILLS v. EDGELL.

(Supreme Court of Appeals of West Virginia.
May 16, 1911.)

*(Syllabus by the Court.)***1. EJECTMENT (§ 86*)—BURDEN OF PROOF—IDENTITY OF LAND.**

A plaintiff in ejectment, claiming title under a deed which excepts certain parcels of land out of the tract therein described, and seeking recovery of only a small part of such boundary, must identify the land in controversy as his by proving it to be within the lines of the tract granted, subject to exceptions, and outside of the excepted parcels.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. § 86.*]

2. EJECTMENT (§ 86*)—BURDEN OF PROOF—IDENTITY OF LAND.

Demand of the land in two counts, one covering the entire boundary and the other limited to the land actually withheld, does not alter the rule of practice here stated.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. § 86.*]

3. DEEDS (§ 139*)—DESCRIPTION—EXCEPTIONS—SUFFICIENCY.

An exception of "some small tracts quit-claimed in settlement and exchange of lands" by the grantor is sufficiently definite and certain.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 453, 459; Dec. Dig. § 139.*]

*(Additional Syllabus by Editorial Staff.)***4. DEEDS (§ 95*)—CONSTRUCTION—USE OF WORDS—PRESUMPTIONS.**

Parties to a deed are presumed to have used the words therein in the sense in which they are generally understood.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 241-254; Dec. Dig. § 95.*]

Error to Circuit Court, Wetzel County.

Action by John Mills against James A. Edgell. Judgment for defendant, and plaintiff brings error. Affirmed.

Thomas P. Jacobs and Hall & Hall, for plaintiff in error. E. L. Robinson and Glenn Snodgrass, for defendant in error.

POFFENBARGER, J. Withdrawal of this case from the consideration of the jury by a peremptory instruction to find for the defendant constitutes the basis of all the errors assigned. It is an action of ejectment for the recovery of 35 acres of land, lying within the boundaries of a 9,000-acre grant, according to the claims of the plaintiff, but wholly or partially outside thereof, under the defendant's interpretation of the evidence. Though the evidence set forth in some hundreds of pages of the printed record, pertains to locations, boundary lines and possession, these are by no means the only questions involved. On the contrary, failure of the plaintiff to adduce any evidence of the location of exceptions from his title papers may render all this great mass of testimony utterly valueless to both parties.

In his declaration the plaintiff demands the whole of the Isaac Hilliard 9,000-acre

survey, granted to Hilliard July 17, 1797, and then a portion thereof, 35 acres, described as the land actually withheld. The defendant entered a disclaimer as to all the land except the 35 acres and apparently as to a small portion of it. The Hilliard grant came down to the plaintiff by a long chain of conveyances, but certain deeds excepted portions thereof. One made by William H. Johnson and wife to Thomas W. Ewart, September 14, 1869, excepted 684 acres out of the southwest corner of the grant, and also 800 acres, granted, according to the recital in the exception, to Sterling Johnson, and "to be surveyed and set off to said Sterling in a square form on one of the outside lines" of the Hilliard grant. By a deed dated March 28, 1878, Ewart conveyed to McEldowney the land he acquired from Johnson and also the excepted 800 acres, reciting a purchase thereof from Sterling Johnson. As the land in controversy here lies in the eastern portion of the Hilliard grant, if in it at all, the 684-acre exception, lying in the southwestern corner of that grant does not cover it, and, as Ewart acquired the 800-acre exception and included it in his deed to McEldowney, trustee, and necessity for locating it was thus dispensed with, the plaintiff was obviously under no duty to locate either of these. But there were other exceptions, apparently out of the re-acquired 800 acres, but certainly not of some portion of the 9,000-acre grant, as shown by the following clause of the Ewart deed: "Also the eight hundred acre tract excepted in said deed as the property of Sterling Johnson since purchased in the name of T. W. Ewart, John Mills and Jared Maris in the suit of Wm. H. Johnson against Sterling Johnson, sale confirmed and George E. Boyd Commissioner ordered to make a deed therefor in Law Order Book No. 4 at page 162 in Clerk's office of Wetzel County, excepting some small tracts quitclaimed in settlement and exchange of lands, but including all tracts deeded to me in exchange specially by Alexander Lantz (Lantz) by his deeds to me recorded at pages 184 & 396 of Deed Book No. 7, Wetzel county." This deed conveyed the land to McEldowney, subject to these exceptions, in trust to indemnify sureties. Having sold an undivided one-sixth thereof to John Mills and others under the deed of trust, McEldowney, as trustee, conveyed said portion to them, by his deed, dated Nov. 3, 1882, making the same exception Ewart had made in his deed. John Mills, the plaintiff, claims under these deeds.

The defendant is in possession of the 35 acres, claiming title thereto. It is a portion of an 85-acre tract, surveyed and entered, by Thomas Tucker, under a land office treasury warrant, issued May 10, 1848. Tucker sold his right under this survey to Silas Wiatt, giving him a memorandum of the sale. Wiatt assigned this to James Edgell, who conveyed a portion of the land to Abram Ice.

By a deed, dated January 5, 1894, he conveyed the residue thereof, the 35 acres in controversy, together with two other tracts, making an aggregate of 92.25 acres, to his son, James A. Edgell, the defendant in this action. As the 35-acre tract had never been entered upon the land books for taxation, it was sold, in the manner prescribed by law, as forfeited land, in the year 1889, and purchased by said James A. Edgell.

[1, 3, 4] If this land is not within the Hilliard patent, or, if within it, and also within an exception from the Ewart deed, the plaintiff cannot recover, for the defendant is in possession under a perfect title, in the case first supposed, and under a bona fide claim and color of title in the other. He is not an intruder, wherefore his possession alone avails him as against persons unable to show good title, or failing to do so. Hence a vital inquiry is whether the plaintiff was bound to prove the land in controversy was within the 9,000-acre survey and also outside of the exceptions from the Ewart deed, agreeably to the general rule as to the burden of proof. Acquiescing in the rule, declared in *Stockton v. Morris*, 39 W. Va. 432, 19 S. E. 531, *Patrick v. Dryden*, 10 W. Va. 387, and later cases, the plaintiff in error denies its application upon the theory of invalidity of the exceptions for indefiniteness and uncertainty of the terms used for creation thereof. They are described as "some small tracts quitclaimed in settlement and exchange of lands." Other terms used in immediate connection with this descriptive matter clearly indicate that they were "quitclaimed" by Ewart, the grantor. By them he granted all tracts deeded to him "in exchange." Obviously this means the excepted lands had been quitclaimed by him in exchange of other lands conveyed to him. Nor do we doubt that the term "small tracts quitclaimed" means lands previously conveyed by quitclaim deeds. Such deeds are well known in conveyancing, and the parties are presumed to have used the words in a deed or contract in the sense in which they are generally understood. If the clause in question had excepted lands "deeded" or "conveyed," there could be no doubt as to the meaning of the word. What we have here differs from the supposed case only in the use of a word importing previous conveyances by a particular kind of deed. This conclusion accords with the interpretation of the word "quitclaim" in *Brame v. Towne*, 56 Minn. 126, 57 N. W. 454. So construed, this clause furnishes means of identification of the excepted lands. They are lands conveyed by Thomas W. Ewart, out of the land generally described in the deed, to persons not named, and in exchange for other lands, some of which were so conveyed to Ewart by Alexander Lantz by certain deeds, recorded in a certain deed book at pages given by number. In *Low v. Settle*, 32 W. Va. 600, 9 S. E. 922, an exception, giving the quantity of land and

the name of the vendee, was upheld. The name of the grantor constitutes an equally good index. The conclusion, here stated, is amply sustained by the following authorities: *McCormick v. Monroe*, 46 N. C. 13; *Justice v. Eddings*, 75 N. C. 581; *Midgett v. Wharton*, 102 N. C. 14, 8 S. E. 778; *King v. Wells*, 94 N. C. 344; *Brown v. Rickard*, 107 N. C. 639, 12 S. E. 570; *Rockefeller v. Arlington*, 91 Ill. 375; *Johnson v. Lumber Co.*, 47 Wis. 328, 2 N. W. 552; *Getchell v. Whittemore*, 72 Me. 393. That the excepted land need not be described by metes and bounds or by name in the excepting clause of the deed is conclusively established by the decisions just cited and also by others. See *Stockton v. Morris*, 39 W. Va. 432, 19 S. E. 531, in which Judge Brannon said: "But there is reserved a quantity of nine hundred and eighty-five acres besides other claims specifically mentioned, and it may be in the bank's five thousand-acre entry," and also *Patrick v. Dryden*, 10 W. Va. 387, in which a similar exception was sustained. Some of the authorities here cited sustain exceptions which do not state the quantity of the land. Nor is it necessary that the excepting clause refer to records or documents for identification, as matter of description, as many of them will show. In *Johnson v. Lumber Co.*, 47 Wis. 328, 2 N. W. 552, it was held that production of a recorded mortgage, for one made descriptive of excepted land, and found to be contradictory of other descriptive terms used, was not proof of the nonexistence of an unrecorded mortgage, accordant with the description in the deed. No particular form is essential to an exception. Plain expression of intent to except and descriptive matter by which the subject of the exception can be identified always suffice. These authorities compel us to say the exceptions are not void for uncertainty.

Impossibility of locating the excepted land is the burden of complaint against the application of the rule of practice above mentioned. This has not been shown. The record discloses no evidence of any effort to locate them. For aught that appears, the deeds may be recorded and cover the land in controversy. No witness testifies to any unsuccessful effort of any kind to locate them. Whether proof of inability to do so would vary the rule of practice we are not called upon to say, since the record discloses none.

[2] The form of the declaration, relied upon as dispensing with the application of the rule, pertains to the issue, not the proof. The count, particularly demanding the 35 acres, with the plea of not guilty, clearly, and sharply defines the issue for the purposes of trial and verdict, and was approved as good pleading in *Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. 214. The question we have here is one of practice, pertaining to trial and evidence, not pleading.

This conclusion necessarily and admittedly justifies the giving of the peremptory instruction, affirms the judgment and renders consideration of the additional assignments of error useless.

(39 W. Va. 428)

HANNIS DISTILLING CO. v. BERKELEY COUNTY COURT.

(Supreme Court of Appeals of West Virginia.
May 16, 1911.)

(Syllabus by the Court.)

1. TAXATION (§ 88*)—OWNERSHIP OF PROPERTY IN CUSTODY—EVIDENCE—ISSUANCE OF CERTIFICATE.

A warehouseman overthrows the presumption of his ownership of property in his custody by proving the issuance of certificates therefor to other persons by which he has bound himself to deliver the possession thereof to the holder on the surrender of the certificate and payment of storage and other charges on the property.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 178, 179; Dec. Dig. § 88.*]

2. TAXATION (§ 83*)—LISTING OF PROPERTY FOR OWNERSHIP—WAREHOUSEMAN—TAXATION—STATUTORY PROVISIONS—"TRUSTEE."

Under section 55 of chapter 85 of the Acts of 1905 (section 739, Code 1906), it was the duty of every agent, having the custody of personal property, to list the same for taxation in the name of the owner. A warehouseman is a trustee within the meaning of clause "d" of said section.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 172, 173; Dec. Dig. § 83.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7128-7133, 7822.]

3. TAXATION (§ 83*)—LISTING OF PROPERTY FOR TAXATION—STATUTORY PROVISIONS.

Such a custodian of property is not personally chargeable therewith for the purposes of taxation, if he lists it for that purpose in the name of the owner, on the request of the assessor.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 172, 173; Dec. Dig. § 83.*]

4. TAXATION (§ 86*)—LISTING FOR TAXATION—REFUSAL OF WAREHOUSEMAN TO LIST PROPERTY BELONGING TO ANOTHER—POWER OF ASSESSOR.

On the refusal of a warehouseman to list the property under his control and to disclose the name of the owner thereof, the assessor may properly assess it in the name of the custodian.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 86.*]

5. TAXATION (§ 461*)—LISTING OF PROPERTY FOR TAXATION—PENALTY FOR FAILURE TO LIST.

An agent or other person, charged, for the purposes of taxation, with personal property of another in his possession, on his refusal to list the same, as required by chapter 85 of the Acts of 1905 (Code 1906, §§ 672-821), is not entitled to relief from such assessment.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 461.*]

(Additional Syllabus by Editorial Staff.)

6. TAXATION (§ 493*)—VALUATION FOR TAXATION—RIGHT TO REVIEW.

In controversies involving only questions of valuation of admittedly taxable property, the right of review stops in the circuit court, but, as to controversies involving taxability of property or taxation thereof in the name of a par-

ticular person, supposedly made by the statute, the right of review extends to the Supreme Court of Appeals.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 493.*]

Error to Circuit Court, Berkeley County.

Action by the Hannis Distilling Company against the County Court of Berkeley County. Judgment for defendant, and plaintiff brings error. Affirmed.

Faulkner, Walker & Woods, for plaintiff in error. H. B. Glukeson and A. B. Noll, for defendant in error.

POFFENBARGER, J. On this writ of error, involving an assessment of taxes against the plaintiff in error for the year 1907, our jurisdiction in cases of this class is questioned, and, after that, the correctness of the judgment of the circuit court.

The nature of the controversy is the same as that involved in *Hannis Distilling Co. v. County Court*, reported in 62 W. Va. 442, 59 S. E. 1051, which was an assessment of the same company for the year 1905. Taxed with several thousand barrels of whisky found in its bonded warehouse, and claiming not to be the owner thereof, the plaintiff in error tested the assessment unsuccessfully in the county court, appealed from its order to the circuit court, and obtained a writ of error from this court to the judgment of the circuit court. The appellate jurisdiction of this court was not then denied. Here the objection of want of such jurisdiction is interposed.

[8] A distinction between controversies involving only questions of valuation of admittedly taxable property and controversies involving the taxability of property or taxation thereof in the name of a particular person supposedly made by the statute has been often adverted, and it has been generally conceded that the right of review stops in the circuit court in the former class, but extends to this court in the latter.

Upon mature and laborious consideration, the jurisdiction was upheld in *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688. The reasoning of Judge Holt in that case is not conclusive, but the decision has never been overruled. Moreover, it harmonizes with decisions in *Bank v. Mercer County*, 36 W. Va. 341, 15 S. E. 78; *U. S. Coal, etc., Co. v. Randolph County Court*, 38 W. Va. 201, 18 S. E. 566; *Bridge Co. v. Kanawha County Court*, 41 W. Va. 658, 24 S. E. 1002; *Bank v. State*, 58 W. Va. 559, 52 S. E. 494. The jurisdiction has been denied in several cases involving only questions of valuation. *Bluefield Waterworks Co. v. State*, 63 W. Va. 490, 60 S. E. 403; *McLean v. State*, 61 W. Va. 537, 56 S. E. 884; *Bank v. County Court*, 65 W. Va. 208, 63 S. E. 1098. None of the latter in any way conflict with those of the former class. Though the *McLean Case* may have in-

volved taxability of oil and gas in place, it was disposed of as one pertaining only to valuation and the appellate jurisdiction denied on that ground. Whether the decision in *State v. South Penn Oil Co.*, on the question of jurisdiction, was right or wrong, it has stood unchallenged and unaffected for many years. Though the tax laws have been frequently revised and altered by the Legislature within that period, the power and jurisdiction asserted, as aforesaid, have not been denied or divested by any statutory provision. From this we assume satisfaction with the ruling on the part of both the people and the Legislature, and the wholesomeness of such jurisdiction is manifest. But for it property might be regarded in one judicial circuit as taxable and in another untaxable, and persons as chargeable with taxes on property under certain conditions, and not under others, according to the circuit in which they happen to reside. Uniformity of decision upon questions of this kind is both desirable and necessary, and it is difficult to see how it could be attained otherwise than by the exercise of the jurisdiction of this court in some form. In view of these considerations, we are unwilling to overrule these decisions, and consider it unnecessary to enter upon any elaborate discussion of the question.

On the writ of error disposed of in 62 W. Va. 442, 59 S. E. 1051, we held that the joint custody and control of a bonded warehouse by the proprietor thereof and the federal storekeeper in charge did not constitute such a change of possession of the liquor stored therein as to destroy presumption of ownership thereof by the distiller; and that, upon an application for relief from erroneous assessment, by the distiller, upon the theory of ownership of the liquor assessed to him in the holders of warehouse receipts or certificates therefor, he must overcome this presumption by proof of title in the holders of such certificates.

Seeing the proof of such ownership did not measure up to the legal requirements, the judgment of the circuit court, refusing to disturb the assessment, was affirmed.

[1] In this case we are confronted with proof which we deem sufficient to overcome the presumption. Insufficiency of the evidence to prove it has been argued at great length in the brief, but we think the position of the attorneys for the defendant in error is untenable. They have also insisted that the plaintiff in error is a trustee in possession or a pledgee in possession against whom the tax on the property may be lawfully assessed. We are not convinced by this argument either. The distilling company has no title to the property or beneficial interest therein. It is a mere bailee for hire. It is therefore clearly not a trustee within the meaning of that provision of the statute. Neither is it a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

pledgee. The property is not held for any independent, collateral, or antecedent indebtedness of any kind. It is merely stored in the warehouse and subject to a lien by contract, as well as by the common law, for storage charges, for the enforcement of which no power of sale is given either by the contract or the law.

If the record disclosed nothing more, the applicant would have been entitled to relief. In its return to the assessor it charged itself with 8,305 barrels of whisky, claiming that to be all it owned, although there were 22,000 barrels more in the warehouse. This it disclaimed ownership of and failed to list as the property of any other person. Thereupon the assessor charged it with \$176,000 as the value of the omitted property. Assuming failure of duty on the part of the applicant, respecting the listing of this property, an inquiry arises as to which the briefs are silent, namely, whether such failure denied the applicant any remedy for the assessment of this property against it. In the case between these same parties, reported in 62 W. Va. 442, 59 S. E. 1051, we held that, for the purposes of taxation, the title to personal property was presumed to be with the possession thereof, and that an assessment against this applicant of property in its possession, but not owned by it, on its refusal to disclose the name of the owner, was a proper assessment. If, therefore, it refused in 1907 to disclose the name of the owner of the property, then in its custody, the same principle will sustain this assessment, if the statute denied it all remedy for correction of the error by way of punishment for its refusal to list the property.

[2] The assessment was made under an act passed by the Legislature on February 24, 1905, and in effect from its passage. That act made it the duty of the owners of property to furnish the assessor, on his application, all necessary information concerning the same, and also provided that lists, according to a prescribed form, should be made and furnished—in the case of the property of a minor, by his guardian, if any, and, if none, by his father, if living, or if not, by his mother, if living, and, if neither was living or resided in the state, by the person having charge of the property; in the case of property of a married woman, by herself or her husband, in her name; in the case of the property of a husband, out of the state or incapable of listing the property, by his wife; in the case of property held in trust, by the trustee, if in possession thereof, otherwise by the party for whose benefit it was held; in the case of property of a deceased person, by the personal representative; in the case of the property of an insane person, or a person confined in the penitentiary, by his committee; in the case of the property of a company, incorporated or not, whose assets were in the hands of an agent, factor or receiver, by such agent, factor or receiver, or the pres-

ident, proper accounting officer, partner, or agent within the state. Other provisions were made for listing property held under other peculiar circumstances. In all these cases, the person required to list the property was directed to list it separately from his own, designating the person, company, estate, or trust to which it belonged. The plain object of this provision was to secure a full and complete return of all personal property for the purposes of taxation. It is less general in its terms than the corresponding provision found in the previous statute. Section 41 of chapter 29 of the Code of 1899 (Code 1906, § 821—44). The first clause of that section required every person of full age and sound mind to list for taxation the property belonging to him, subject to certain exceptions, and the persons and property under his charge and control subject to taxation, and furnish to the assessor, on his application, all necessary information respecting the same. These two provisions are in pari materia. Presumptively the new statute was intended to be as broad as the old one. It would have been anomalous and manifestly contrary to the presumed legislative intent to leave an avenue of escape for any taxable property. We must assume, therefore, that somewhere in section 55 of chapter 35 of the Acts of 1905 the Legislature intended to provide for the return of any taxable property belonging to one person and in the possession of another. It is plain that it did not intend to charge property against any person simply and only because he had it in his possession, for he was authorized and directed to list it in the name of the owner.

[3] But manifestly it did not intend to permit property to escape taxation by reason of the custody thereof by persons other than the owners. As has already been stated, this new section is not as broad in its terms as the old one. Nowhere does it say every person shall list his own property and the property under his charge and control. Instead of saying this and then proceeding to give directions for listing in certain cases of such custody, it gives directions in those cases, but omits the general provision covering all other similar cases. However, the two provisions are acts in pari materia, and the old one may be looked to for purposes of the new one. In the case of a minor, his property must be listed by the person having it in charge, if there is no other person in the state to do it. In the case of property owned by companies having their assets in the hands of an agent, factor, or receiver, such agent, factor, or receiver must list it. Neither of these two provisions, found in clauses "a" and "g" of said section 55, covers the case we have here in express terms, but they disclose the spirit and purpose of the section. Clause "d" of that section says property held in trust must be listed by the trustee if in possession thereof, otherwise by the party for whose benefit it is held. Giv-

ing effect to the presumed intention of the Legislature, we must give the word "trustee" its broadest and fullest meaning. While the applicant was a bailee, and not technically a trustee, a bailment involves a trust in the broad sense of the term. The bailee is a custodian of property which clearly embraces a trust. If the statute contained no word, expressive of intent, to require custodians of property, other than those specifically mentioned, and we regarded "trustee" as having been used in its technical sense, we might hold the statute insufficient to cover a case like this (*White v. County Court*, 63 W. Va. 230, 59 S. E. 884, 981), but we have a word here, which, taken in its broad, nontechnical sense, expresses the intent of the old statute, and makes the new one accord with it as well as the mandate of the Constitution requiring taxation of all property. We think, therefore, it was the duty of the applicant to list the property in question.

Assuming its refusal to do so, after a proper demand, we must ascertain the consequences of such failure. Sections 71 and 72 of said chapter 35 of the Acts of 1905 (sections 755, 756, Code 1906) require persons listing property for taxation to append to the lists certificates of a prescribed form, and then provided as follows: "Any person whose duty it is by law to list property for taxation and who shall refuse to verify such list, being called upon to do so, shall, in addition to any other penalty provided for such refusal, be denied the right to apply to any court to have the assessment and valuation of his property, which the assessor may make, changed in any manner." Section 73 (section 757) provided as follows: "If any person whose duty it is by law to list any real or personal property, being called upon by the assessor to do so, refuse to furnish a proper list thereof, or to make such oath as is required by this chapter; or if any person refuse to answer, or answer untruly, any question lawfully asked by the assessor, or fail or refuse to deliver any statement required by law, * * * he shall be denied all remedy provided by law for the correction of any assessment made by the assessor." In the case of the failure of any person to furnish a proper list or the furnishing of an incomplete or erroneous list, the assessor was authorized by section 74 (section 758) to list the property and fix its value, or to supply the omission and correct the errors, upon the best information he could obtain from other sources.

[4, 5] Thus the law provided a remedy in case of refusal to furnish a list or the rendition of an incomplete or erroneous list. It authorized the assessor to charge the delinquent person with such property as in his opinion based upon the information obtainable he ought to be charged with. It also inflicted upon the obdurate citizen a penalty for his misconduct by denial of any relief from

the error, if any, in the assessor's list and valuation. Section 129 (section 815) of the same chapter gave a right to apply to the county court for relief from erroneous assessments, but that section must be read in connection with sections 72, 73, and 74 denying relief in certain cases and for stated causes. Effect must be given to all these sections. We are not to assume the Legislature intended by implication to give back in section 129 what it had taken away by sections 72 and 73; and effect may be given to said sections without destroying the effect of section 129. The Legislature may well have contemplated numerous cases of errors and mistakes on the part of citizens and officers in the listing and valuation of property, who were in no sense guilty of any disobedience of law. All such are allowed the benefit of that section. Nothing in the statute says a list for valuation made, as required by sections 55, 72, and 73, shall be binding upon the person who makes it. The plain purpose of these provisions is to compel a full and complete disclosure of taxable property with its value. If, by some mischance, a person erroneously charged himself with more property than he owned, or valued it beyond its worth, he also could obtain the benefit of the provision in section 129 of the same chapter. Hence, there is no rule of construction which forbids reasonable operation to all of these provisions. They were all in effect in the year 1907, when this assessment was made.

Obviously, then, the remaining and conclusive inquiry is whether a demand was made upon the applicant to list the property and it refused to do so. That a blank list was delivered to it is beyond question. It filled out that list, charging itself with all of its own property, but omitting the 22,000 barrels of whisky in question. As to that property it made no list, and the assessor testified that its agent in charge refused to do so. In response to the question whether he had any conversation with the agent about the assessment of this property, he says, "Well, as well as I can recollect, when Mr. Parks handed me that blank, it was filled up by the Hannis Distilling Company. I don't know whether I could go over the exact words that he said. He said I would have to get it like I got it before, and I got it." He then testifies that for the year 1905 he went to the officials of the company, and they told him they could not give him any information about the whisky in the warehouse, and he then reported the matter to the State Tax Commissioner, who directed him to assess it to the company arbitrarily. He did so and that assessment was the one formerly disposed of in this court. Several letters from the Tax Commissioner to the assessor, dated in the month of July, 1905, relating to the subject and giving such directions, were put in evidence in this proceeding. Mr. Parks, the agent, denies the conversation about the ownership of the property to which the assessor

testified, saying he was positive no such inquiry was made of him for the year 1907, but he thinks it was made in the year 1905. He also admits having told the assessor he did not know who the owners of the property were, and that, if he had inquired of him in 1907, he could not have told him the names of the owners, but would have submitted the matter to the Philadelphia office. We think it plain from all this evidence that the information would not have been given, if it had been asked, that the list would not have been made, and also that a sufficient demand was made by the assessor, when he mailed or delivered to the applicant a blank on which this property should have been listed. The demand and refusal of 1905 would not suffice for the year 1907, of course, but the transactions of that year show a deliberate purpose on the part of the company to prevent the taxation of the property stored in its warehouse in its own name or in the names of the owners. It maintained this position in 1906. It received an assessment blank in 1907, knowing the assessor desired it to list this property, and used it for its own property. It must have known additional blanks would have been furnished on request. These circumstances all go into the scale on the conflict in testimony between its agent and the assessor which both the county court and the circuit court have passed upon. We cannot disturb their finding.

Seeing no error in the judgment, we affirm it.

(39 W. Va. 429)

COPP et al. v. STATE et al.

(Supreme Court of Appeals of West Virginia.
May 16, 1911.)

(Syllabus by the Court.)

1. TAXATION (§§ 456, 493*)—ILLEGAL ASSESSMENT—REMEDIES OF OWNER.

If an assessor assesses land which is not liable for taxes, the party aggrieved has a right to appear before the board of review and equalization and have such erroneous assessment corrected by said board, in the manner provided by section 18 of chapter 29, Code 1906, as amended by chapter 80, Acts 1907 (Code Supp. 1909, c. 29, § 18). If said board should refuse to make the correction, he can appeal to the circuit court.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 813, 876-883; Dec. Dig. §§ 456, 493.*]

2. TAXATION (§ 493*)—REVIEW—APPEAL TO SUPREME COURT.

In the matter of such appeal, the circuit court acts judicially when it decides the question of the liability, or nonliability, of the property to taxation, and the judgment of the circuit court is subject to review, upon writ of error, by this court, when the taxes levied on such property amount to \$100 or more.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 876-883; Dec. Dig. § 493.*]

3. TAXATION (§ 5*)—ASSESSMENT—EXEMPTIONS—GOVERNMENT LANDS.

If land once owned and used by the United States for governmental purposes be sold to

private persons, pursuant to an act of Congress, and the legal title retained to secure the future payment of any part of the purchase money, it is not liable to taxation by the state or by any of the state's governmental agencies, so long as the lien in favor of the United States remains unsatisfied.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 17, 31-45; Dec. Dig. § 5.*]

Error to Circuit Court, Ohio County.

Action by C. H. Copp and others against the State and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

T. C. Townsend, J. B. Handlan, and W. G. Conley, Atty. Gen., for plaintiffs in error. Hubbard & Hubbard, for defendants in error.

WILLIAMS, P. This is a writ of error to a judgment of the circuit court of Ohio county, rendered January 15, 1910, exonerating the old customs house and post office lot and building in the city of Wheeling from taxes assessed thereon for the year 1909. The case presents for decision two questions: (1) Jurisdiction in this court; (2) the right of a state to levy taxes upon real estate to which the United States had the legal title, and upon which it holds a lien for the purchase money. The judgment complained of was rendered by the circuit court upon an appeal awarded by it to C. H. Copp and others, the purchasers of the property, from a judgment of the board of review and equalization. Said board held that the property was liable for taxes assessed thereon for state, county, and district purposes for the year 1909, and the circuit court reversed this action of the board, and held that the property was not, at that time, liable for such taxes.

As to the jurisdiction of this court to entertain the writ of error. This depends upon two questions: (1) Whether or not the circuit court had jurisdiction to review the action of the board of review and equalization; and (2), having jurisdiction, whether it acted ministerially or judicially. The capacity in which the court acts in matters of appeals from erroneous assessments depends upon the nature of the question to be decided. In controversies concerning the valuation of property only, there is no appeal from the circuit court to this court, because the action of the court is ministerial, rather than judicial. *Mackin v. Taylor County Court*, 38 W. Va. 338, 18 S. E. 632; *McLean v. State*, 61 W. Va. 537, 56 S. E. 884; *Bluefield Waterworks Co. v. State*, 63 W. Va. 480, 60 S. E. 403. But, if the controversy is concerning the right of the state to tax the property, or concerning the constitutionality of the act providing the method of ascertaining the value of property, then the question is a judicial one, and this court can review the judgment of the circuit court. *Bank of Bramwell v. County Court*, 36 W. Va. 341, 15 S. E. 78; *South Side Bridge Co.*

v. County Court, 41 W. Va. 658, 24 S. E. 1002; State v. South Penn Oil Co., 42 W. Va. 80, 24 S. E. 688; Clark v. County Court, 55 W. Va. 278, 47 S. E. 162. These cases were decided when the county court was the tribunal for correcting errors in the assessment of property. But the principle decided in those cases is the same that is involved in the present one, because Acts 1907, c. 80, amending the assessment laws, and substituting the board of review and equalization for the county court, in the matter of correcting errors in the assessment, gives the same right of appeal to the circuit court from the judgment of said board as was formally allowed from the judgment of the county court. Section 18, c. 29, of the Code, as amended by chapter 80, Acts 1907, empowers the board of review and equalization "to examine and review the land and personal property books, and of its own motion or on sufficient cause being shown by any person (It) shall add to said land and personal property books the names of persons, the value of personal property and the description and value of real estate liable to assessment in said county, omitted from said assessment books, by the assessor; they shall correct all errors in the names of persons, in the description of property upon such books and in the assessment and valuation of property thereon, and they shall cause to be done whatever else may be necessary to make said assessment as returned by the personal property assessor comply with the provisions of this chapter, and to the end that all property shall be assessed at its true and actual value. * * * " Section 129 of chapter 29 of the Code, as amended by chapter 80, Acts 1907, gives the right of appeal from said board to the circuit court, and reads as follows: "Any person claiming to be aggrieved by any assessment in any land or personal property book in any county who shall have appeared and contested the same as provided in section eighteen of this chapter, may, within thirty days from the adjournment of the board of equalization and review, apply for relief to the circuit court of the county in which such books are made out." This section gives the right of appeal to the state also. Section 18 of chapter 29, as amended, gives the board of equalization and review the power to pass on the question of the taxability, as well as upon the valuation, of property, and property not liable to taxation, which has been assessed by the assessor, should be stricken from the land book. The language of the statute is: "They shall correct all errors in the names of persons, in the description of property upon such books and in the assessment and valuation of property thereon," etc. There is no question of the right of appeal by Copp and others in this case from the judgment of the board of review and equalization to the circuit court.

The circuit court reviewed and reversed the action of said board, and by order en-

tered January 15, 1910, held that the property in question was not liable to taxation. As we have before said, this action by the circuit court was judicial, and, the amount of taxes involved being more than \$100, the judgment of the circuit court may be reviewed by this court. This brings us to the main issue in the case.

Pursuant to an act of Congress approved May 30, 1908 (Act May 30, 1908, c. 228, 35 Stat. 523), the Secretary of the Treasury sold the lot and building thereon at public auction on the 24th day of July, 1908, to O. H. Copp, Joseph Speldel, and W. B. Peterson, for \$118,500, one-fourth of which was paid in cash and the balance to be paid in one, two, and three years, with interest. By the terms of sale the government retains title until all the purchase money is paid, and, upon payment in full, is to make a quitclaim deed to the purchasers. The contract of sale binds the purchasers to keep the property insured against loss by fire, for the benefit of the government, until all the purchase money is paid, and gave them immediate possession. The contract further provided that, in the event of default for 30 days in the payment of any installment of the purchase money, the government may resell the property, and pay the net proceeds, after deducting all expenses of resale, to the purchasers. It also binds the purchasers personally for any deficiency that may result from a resale, and gives them the right to make such repairs and minor alterations and improvements upon the building as they may deem necessary.

The legal question which the record presents is: Has the United States government such an interest in the property as entitles it to be exempt from taxation by the state for the year 1909? It has the legal title and a vendor's lien upon it for three-fourths of the purchase price. None of the deferred payments were due when the taxes for that year were assessed. Do these facts not show that the government has such an interest in, or claim upon, the property as will exempt it from state taxes? Section 3, c. 1, Code 1906, expressly exempts the property in question from all taxes "so long as the United States shall be the owner thereof." But the question must be decided independent of the statute, for the reason that no state has the power to tax any of the agencies of the United States government without its consent. We must be governed by the decisions of the Supreme Court of the United States, because the rule announced by it is the supreme law of the land on this question. Chief Justice Marshall, who delivered the opinion of that court in *McCulloch v. Maryland*, 4 Wheat. 316, at pages 429-430 (4 U. S. Ed. 579), says: "All subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are upon the soundest principles exempt from taxation. This proposition may almost be pronounced self-evident. The sovereignty of

a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently the people of a single state cannot confer a sovereignty which will extend over them. * * * We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers." This principle was again announced in *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 6 Sup. Ct. 670, 29 L. Ed. 845; and was recognized and followed by this court in *Old National Bank of Martinsburg v. County Court of Berkeley County*, 58 W. Va. 559, 52 S. E. 494, 3 L. R. A. (N. S.) 584.

But it is insisted by counsel for plaintiffs in error that the government has parted with its interests in the property, that it is simply the holder of the legal title, and the purchasers are the equitable owners. It is true they are the purchasers and have an equitable right in the property, and under the terms of their contract are at present occupying it and receiving the rents and profits. But, notwithstanding, must they not be complete equitable owners; that is, must they not have paid all the purchase money, and must they not be in a position to demand of the government a deed for the land, before they can be regarded, in law, as such equitable owners as will make the property liable for taxes? From a careful consideration of the following decisions such seems to be the requirement of the law. *Railway Company v. Prescott*, 16 Wall. 603, 21 L. Ed. 373, was a case in which it appears that Congress had in 1862 passed an act (Act July 1, 1862, c. 120, 12 Stat. 489) to aid the Kansas-Pacific Railway Company. The act provided that upon the construction of each section of 40 miles in length of its road and upon inspection and acceptance of the same by the President grants should be issued to said company for alternate sections of land on each side of the road within certain limits. It also provided that any lands not sold by the company within three years after the final completion of the road should be liable to be sold to actual settlers under the pre-

emption law at \$1.25 per acre, and the money paid to said railroad company. In 1864 the act was amended (Act July 2, 1864, c. 216, 13 Stat. 356) so as to require the railway company to pay into the treasury of the United States the cost of surveying, selecting, and conveying the lands to the company, or party in interest, as the titles should be required by the said company. Certain persons had acquired tax titles to these lands, by virtue of sales for delinquent taxes, which had been assessed under the laws of the state of Kansas while the legal title thereto still remained in the United States. The railway company filed its bill in the state court of Kansas against Prescott, a claimant by tax title, to quiet its title. From a judgment of the state court adverse to the railway company an appeal was taken to the Supreme Court of the United States. The primary question presented was whether the land was liable for state tax, and this depended upon the question whether or not the railway company was the complete owner of the land at the time it was taxed. At the time of the assessment, and sale of the land for taxes, the expenses for surveying and selecting the land had not been paid by the railway company into the treasury of the United States. This charge for said expenses, against the land, was all the interest the government had in it, still the court held it not taxable by the state. The court in its opinion, at page 608 of 16 Wall. (21 L. Ed. 373), says: "While we recognize the doctrine heretofore laid down by this court that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the right to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid or any act to be done going to the foundation of his right. The present case does not fall within that principle. Two important acts remain to be done, the failure to do which may wholly defeat the right of the company to a patent for these lands. The first is the payment of the costs of surveying. It is admitted that this has never been done in the present case. If the company have such an interest in these lands that they can be sold by the state under her power of taxation, then the title is divested out of the government without its consent, and the right to recover the money expended in the surveys is defeated. As the government retains the legal title until the company or some one interested in the same grant or title shall pay these expenses, the state cannot levy taxes on the land, and under such levy sell and make title which might in any event defeat this right of the federal government reserved in the act by which the inchoate grant was made." The same question was again presented to that court in a later case of *Railway Company v. McShane*, 22 Wall. 444, 22 L. Ed. 747, and was again decided against

the right of a state to tax land to which the government has legal title and on which it has a claim for expenses of making surveys. The court there again held that "lands on which the costs of survey have not been paid, and for which the United States have not issued a patent to the company, are exempt from state taxation." In the opinion at page 462 of 22 Wall. (22 L. Ed. 747) the court says: "That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the government can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done without which the company is not entitled to a patent. The case clearly is not within the rule which authorizes state taxation of lands, the title of which is in the United States." The same point again arose in *Northern Pacific R. R. Co. v. Traill County*, 115 U. S. 600, 6 Sup. Ct. 201, 29 L. Ed. 477, and the court followed its previous decisions made in *Railway Co. v. Prescott*, supra, and *Railway Co. v. McShane*, supra.

The principle was also made clear in *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805. That was a case involving the right of the state of Michigan to levy taxes upon land which had been granted to said state by Congress to be disposed of by it according to the provisions of said act, to aid in the construction of certain railroads. The court in discussing the right of the state to levy taxes upon the land, after having disposed of it in accordance with the act of Congress, at page 572 of 22 Wall. (22 L. Ed. 805), says: "Upon general principles she could not tax the land while the title remained in the United States, nor while she held them as the trustee of the United States, which, in the view of the law, was the same thing. But when the state proceeding in the execution of the trust had transferred her entire title to the company, and they had perfected their title and acquired the right to sell, the case assumed a very different aspect. * * * Nothing remained to the state but the performance of the remaining duties of the trust, without any title, present or potential, to the lands." This quotation from the opinion clearly shows that the reason for holding the lands taxable by the state in that case was that the railway company had perfected its title, and the government no longer had any claim upon the land. *Colorado Company v. Commissioners*, 95 U. S. 259, 24 L. Ed. 495, is also a case in point. In that case Gov. Armijo, of New Mexico, had in 1843 granted about 500,000 acres of land to Gervacio Nolan. After the United States acquired the territory, embracing this grant, from Mexico, a report of the grant to Nolan was made to Congress. That body was of opinion that the grant was good only to the extent of 11 square leagues; the governor having power under the laws of Mexico

to grant no more than that quantity to one person, and passed an act (Act July 1, 1870, c. 202, 16 Stat. 646) confirming this grant to the heirs of Nolan to the extent of 11 square leagues, but provided in the act for the locating and surveying thereof to be made under the Commissioner of the Land Office. The act further provided that, upon the perfecting of the surveys and plats, the title should vest in the confirmees, who were to bear the expenses of making same. Congress reserved the power to enforce payment of said expenses by sale of the lands, or by any other appropriate method. The court held that the lands were not liable to be taxed by the territorial government of Colorado, within whose bounds they lay, until the expenses of surveys and plats had been paid into the treasury of the United States by the confirmees. The act provided that: "Before the confirmation provided for by this act shall become legally effective, the heirs of said Gervacio Nolan, or their legal representatives, shall pay the costs of such surveys as inure to their benefit respectively." The court says: "We are of opinion that the clause above quoted suspends the vesting of title in the claimants, or of any perfect equitable right to the title until the expenses of surveys are paid; and that this was done intentionally to secure that payment. If not paid after a reasonable time subsequent to the perfection of the surveys and plats, there remains in Congress the power to enforce that payment by a sale of the lands, a resumption of the grant, or any other appropriate mode." To the same effect are the following cases: *Wisconsin Cent. R. R. Co. v. Price Co.*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687; *Hessman v. Durham*, 165 U. S. 144, 17 Sup. Ct. 253, 41 L. Ed. 664. See, also, 1 *Cooley on Taxation*, p. 137. An examination of these cases shows that the reason for holding the lands not liable to taxes imposed under state and territorial law is that the grantees were not at the time of the assessment of taxes the complete equitable owners, and that the government still had a pecuniary interest to be protected by holding the legal title. In view of these decisions, we are bound to hold that the land purchased of the United States by C. H. Copp and his associates is not liable for state, county, or district taxes, so long as the United States has any claim upon it for any portion of the purchase money. If it were subject to taxation, it would also be liable under our statute law to be sold for their nonpayment, and in such case, if not redeemed, complete title to the entire interest in the land would pass to the tax purchaser. Under the West Virginia statute, it is not alone the interest of Copp and his associates in the land that is taxed, but it is the entire interest and estate therein on which taxes are assessed, and to suffer it to be taxed, so long as any portion of the purchase price remains unpaid, might operate

as a serious embarrassment to the government in the enforcement of its claim for the purchase money.

Counsel for plaintiffs in error rely upon the case of *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U. S. 375, 25 Sup. Ct. 50, 49 L. Ed. 242, as authority to support their contention that the purchasers are the equitable owners of the land, and that it is liable to be taxed, notwithstanding the legal title is in the government. But that case is not in conflict with the decisions above cited. It is clearly distinguishable from them, and presents a different state of facts from the case now before us. In that case the land in question was a part of Ft. McHenry, which belonged to the government. Under an act of Congress passed in 1878 (Act June 19, 1878, c. 310, 20 Stat. 167), it was conveyed to the plaintiff, on condition that plaintiff should construct a dry dock, and should "accord to the United States the right to the use forever of the said dry dock at any time for the prompt examination and repair of vessels belonging to the United States free from charge for docking and that if at any time the property hereby conveyed shall be diverted to any other use than herein named or if the said dry dock shall be at any time unfit for use for a period of six months or more, the property hereby conveyed with all its privileges and appurtenances shall revert to and become the absolute property of the United States." In that case the court treated only the interest of the dry dock company in the property as taxed, or as being liable for taxes. The opinion of the court at page 381 of 195 U. S., at page 51 of 25 Sup. Ct. (49 L. Ed. 242), says: "It is true commonly taxes on land create a lien paramount to all interests, and that a tax sale often has been said to extinguish all titles and to start a new one. *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 751 [8 Sup. Ct. 337, 31 L. Ed. 309]; *Textor v. Shipley*, 86 Md. 424, 438 [38 Atl. 932]; *Emery v. Boston Terminal Co.*, 178 Mass. 172, 184 [59 N. E. 763, 86 Am. St. Rep. 473]. Perhaps it was assumed that this always was the effect of tax sales in *Northern Pacific Railroad v. Traill Co.*, 115 U. S. 600 [6 Sup. Ct. 201, 29 L. Ed. 477]. But it needs no argument to show that a state may do less. It may tax a life estate to one and a remainder to another, and sell only the interest of the party making default. With regard to what the state of Maryland has done and what are the purport and attempted effect of the tax in this case, we follow the Court of Appeals. That court treated the tax and the lien as going only to the dock company's interest in the land, although probably by an oversight it neglected to modify the judgment according to its own suggestion so as to show the fact. That only the company's interest was taxed is shown by the reduction

of the assessment on account of the condition. Of course, it does not matter what form of words the judgment employs, when its meaning is thus declared by the court having the matter under its control."

We do not think the fact that Copp and others have not the legal title to the land would affect the question of its taxability by the state, provided they were the complete equitable owners and were in a position to demand a conveyance, but we are clearly of the opinion that, according to the decisions herein cited, the state has no right to tax the land, while the United States government has any claim upon it for any portion of the purchase money. The judgment of the lower court will be affirmed.

(69 W. Va. 449)

HUNT v. DI BACCO et al.

(Supreme Court of Appeals of West Virginia.
May 16, 1911.)

(Syllabus by the Court.)

1. ASSAULT AND BATTERY (§ 24*)—ACTIONS—PLEADING—ALLEGATIONS OF TIME.

A declaration in trespass for assault and battery need not allege the exact time when the trespass was committed.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 25, 26; Dec. Dig. § 24.*]

2. ASSAULT AND BATTERY (§ 24*)—PLEADING—GENERAL ISSUE—ADMISSIBILITY OF EVIDENCE—MATTERS IN EXCUSE OR JUSTIFICATION.

In an action for damages for assault and battery, matters in excuse or justification are not admissible under the general issue, but must be specially pleaded.

[Ed. Note.—For other cases, see *Assault and Battery*, Dec. Dig. § 24.*]

3. PLEADING (§ 173*)—GENERAL REPLICATION.

A general replication traverses all the matters of defense alleged in a plea of confession and avoidance. Plaintiff need not reply specially unless he cannot deny all the averments of the plea, and wishes to admit the truth of some of them, and to avoid the effect of his admission.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 339, 340, 385; Dec. Dig. § 173.*]

4. PLEADING (§ 99*)—DUPLICITY—ABOLISHMENT.

By virtue of statute in this state, a defendant can plead several matters of defense, whether of law or fact, in the same plea. The common-law objection for duplicity is thereby abolished.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 202; Dec. Dig. § 99.*]

5. TRESPASS (§ 31*)—ACTIONS—PERSONS LIABLE—JOINT AND SEVERAL LIABILITY.

Joint trespassers may be sued either jointly or severally.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 70; Dec. Dig. § 31.*]

6. TRESPASS (§§ 30, 46*)—PERSONS LIABLE—"AIDER AND ABETTOR."

Any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances and approves the same, is in law deemed to be an aider and abettor, and liable as principal, and proof that a person is present at the commission of a trespass without disapproving or op-

posing it is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance, and approved it, and was thereby aiding and abetting the same.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 69; Dec. Dig. §§ 30, 46.*

For other definitions, see *Words and Phrases*, vol. 1, pp. 293, 294.]

7. ASSAULT AND BATTERY (§ 39*)—APPEAL AND ERROR (§ 1004*)—REVIEW—EXCESSIVENESS OF DAMAGES—PUNITIVE DAMAGES—WANTON AND WILLFUL TRESPASS.

For a wanton and willful trespass, the jury have the discretion to award exemplary damages; and, in a case where they may properly assess such damages, the court will not set aside their verdict for excessiveness, unless the amount is so great as to evince passion, prejudice, partiality, or corruption.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 54; Dec. Dig. § 39;* *Damages*, Cent. Dig. § 204; *Appeal and Error*, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

Error to Circuit Court, Tucker County.

Action by Daniel Hunt against Joe Di Bacco and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Chas. D. Smith and D. E. Cuppett, for plaintiffs in error. Cunningham & Stallings and J. P. Scott, for defendant in error.

WILLIAMS, P. Joe Di Bacco and Vincent Di Bacco were granted a writ of error to a judgment of the circuit court of Tucker county against them for \$1,579 in favor of plaintiff in an action of trespass for an assault and battery. A demurrer to the declaration was overruled, and the defendants pleaded the general issue, and also filed two special pleas. Plaintiff replied generally to all of said pleas. Issue was thereon joined, and the jury found for the plaintiff the above-named sum.

The first error assigned relates to the overruling of the demurrer. The demurrer was in writing, and the grounds assigned are: (1) That the place of plaintiff's injury is not set out; (2) that the time of the injury is not sufficiently averred; and (3) that the declaration charges a joint tort in one count.

The demurrer was properly overruled. The declaration sufficiently alleges that the trespass was committed in Tucker county. In the caption of the declaration the court is styled as follows: "State of West Virginia, County of Tucker, to wit: In the Circuit Court of said County." And in the body of the declaration it is alleged "that the defendants did, on the ——— day of October, 1903, with force and arms, assault the plaintiff at the county aforesaid," etc. The words "the county aforesaid" refer to Tucker county, the county named in the caption. But we do not mean to intimate that such an averment is essential to show jurisdiction. We are inclined to think it is not. The action is transitory, and may be brought in the

county of defendant's residence. *Payne v. Britton's Ex'r*, 6 Rand. (Va.) 101; *Shaver v. White*, 6 Munf. (Va.) 110, 8 Am. Dec. 730. Moreover, no want of jurisdiction appearing upon the face of the declaration, it could not be raised by demurrer. There was no plea in abatement.

[1] It was not necessary to allege the day on which the trespass occurred. Its nature was such that defendants could not have been surprised by failure to allege the time; nor is the exact time an indispensable allegation. *Tabb v. Gregory*, 4 Call. (Va.) 225; *Shaver v. White*, 6 Munf. (Va.) 110; *Brown v. Point Pleasant*, 36 W. Va. 290, 15 S. E. 209.

[5] As to the third ground of demurrer: It is universal law that joint tort-feasors may be sued either jointly or severally. *Day v. Coal Co.*, 60 W. Va. 27, 53 S. E. 776, 10 L. R. A. (N. S.) 167; *Shaver v. Edgell*, 48 W. Va. 503, 37 S. E. 664; *Riverside Cotton Mills Co. v. Lanier*, 102 Va. 148, 45 S. E. 875.

Defendants moved for judgment of non prosecution, and the motion was overruled; and this action of the court is assigned as error.

A judgment by non prosecution can be had only where plaintiff, at some stage of the action, after his appearance and before judgment, abandons and fails to prosecute his suit. 4 Min. Inst. (3d Ed.) 957; *Buena Vista Limestone Co. v. Parrish*, 34 W. Va. 652, 12 S. E. 817.

[3] Counsel insist that plaintiff's failure to reply specially to defendants' two special pleas was an admission of the truth of the allegations therein contained, and amounted to an abandonment of his action. But special replications were not necessary in order to put the matters in issue. They were replied to generally. This was a general traverse, and it put in issue all the facts alleged in the pleas. Plaintiff need reply specially only in case he cannot traverse all the allegations of the plea, as, for example, if plaintiff had, in fact, assaulted and beat Vincent Di Bacco, and had wished to justify his act, he should have replied specially. 1 Chitty (11th Ed.) 592. But plaintiff does not admit having struck the first blow, and therefore it was proper to reply generally. *Hogg's Pl. & Forms*, § 283.

[2] Plaintiff's counsel insist that the special pleas were improperly admitted, because, as they claim, the matters therein alleged are properly provable under the general issue. This is not correct. Matters in justification of or given in excuse for, an assault and battery, are not provable under the general issue. They must be specially pleaded. 1 Chitty (11th Ed.) 501; *Shires v. Boggess*, 69 S. E. 469.

The first of said pleas is objected to because it sets up two distinct matters of de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fense. It alleges, in substance: (1) That Vincent Di Bacco was the proprietor of a licensed saloon in the town of Thomas, Tucker county, W. Va., and that Joe Di Bacco was employed as his clerk; that it was the duty of Vincent Di Bacco to preserve order and to protect his guests from trespass therein; that plaintiff entered the saloon and assaulted and beat a certain guest named William Jacobs; that in his attempt to preserve order Vincent Di Bacco gently laid hands on plaintiff and evicted him from the saloon, doing no more than was necessary for that purpose; and (2) that immediately thereafter plaintiff again entered the saloon and assaulted and beat the defendant Vincent Di Bacco, and thereupon the defendants, in attempting to preserve the peace and prevent plaintiff from so acting, laid hands upon him and again evicted him from the saloon, using no more force than was necessary for that purpose; and that these are the acts of trespass of which plaintiff complains.

[4] It is no valid objection to the plea that it seeks to justify on two several grounds. A defendant is permitted by statute in this state to plead as many several matters, whether of law or fact, as he shall think necessary. At the common law this plea would have been bad, and subject to special demurrer for duplicity, but not so under our statute which permits more than one issue to be presented for trial. Section 20, c. 125, Code 1906. "Duplicity in a plea is no longer ground of demurrer or objection to it." *Poling v. Maddox*, 41 W. Va. 779, 24 S. E. 999.

The second plea is purely one of son assault demesne, or self-defense. It alleges that the injury of which plaintiff complains was wholly caused by the assault and battery first committed by him upon defendants, and that defendants did no more than was necessary to protect themselves from injury by plaintiff. We find no fault with this plea.

The evidence shows that the assault and battery upon plaintiff was committed in a saloon conducted by Vincent Di Bacco, and in which Joe Di Bacco was employed as bartender; that it occurred in the nighttime on October 24, 1908. There had been a Republican rally in the town that day, and a large number of people from the country and the nearby coal mines had come to the rally. Plaintiff and a number of other young men went into Di Bacco's saloon, bought some beer, and went into a back room and drank it. Returning from the back room to the bar, they found a number of others at the bar, drinking. Among the number standing at the bar was a colored man by the name of William Jacobs. It appears that plaintiff and Jacobs had some unpleasant words, and plaintiff struck Jacobs in the face, and immediately walked out of the saloon. Later plaintiff and some other companions again went into the saloon, and some

of the parties bought some more beer, and they went into the back room and drank it. Plaintiff testifies that, on returning from the back room to the barroom, a white man by the name of John Lucier and a colored man were engaged in an argument or dispute; that he was standing listening to them; that Vincent Di Bacco took hold of him, and started to put him out; and that he was then struck on the head and shoulder with a stick, and was knocked unconscious. The fact that he was struck with a pick handle by Joe Di Bacco, the bartender, and his collarbone broken, and a gash cut in his scalp about $2\frac{1}{2}$ or 3 inches long, is not denied. Joe Di Bacco himself admits striking plaintiff as many as two licks with a pick handle. He says he did it to defend himself against the attack which he claims plaintiff had made upon the "boss" (meaning Vincent Di Bacco). He says that plaintiff had struck Vincent Di Bacco and knocked him over against the corner by the door, as he was trying to take him out. This fact, however, is denied by plaintiff and by a number of other witnesses. In another part of his testimony Joe Di Bacco, in answer to the question why he struck plaintiff, says: "For hitting the boss." He also says that he had to protect the place and the "boss." Joe Di Bacco is a young Italian, weighing about 230 pounds. The plaintiff is a young man who weighed something over 130 pounds, and had but one arm. Vincent Di Bacco says the bartender told him to take plaintiff out; that he took hold of him and put him out, and tried to shut the front door; and, as he attempted to shut the door, plaintiff struck him in the face. But the fact that plaintiff struck him is denied by plaintiff, and also by a number of other witnesses. Plaintiff's testimony, and that of some of his witnesses, tends to prove that, when Vincent Di Bacco had hold of plaintiff by the only arm which he had, Joe Di Bacco struck him over the head and shoulder with a pick handle. Some witnesses say that he struck him as many as four or five times. Defendant Joe Di Bacco admits striking him at least twice. Just prior to the time plaintiff was struck he and two or three others, not those who were with him the first time, had gone into the back room, and had drunk their beer, and were returning to the outside, and had halted in the main barroom. The evidence is conflicting as to whether plaintiff then began a quarrel with one of defendant's guests. But, whether he did or not, he was clearly not a trespasser. He was in defendant's barroom by virtue of the general invitation which, in the character of defendant's business, he extends to the public. Of course, it was plaintiff's duty to demean himself in a decent, orderly, and peaceable manner. But even admitting that he was quarrelsome, and manifested a disposition and purpose to strike some other guest in the barroom, still

the defendant owed him the duty not to do him unlawful or unnecessary injury. He had no right to use any more force than was necessary to eject him. There is evidence to support the theory, and the jury must have so found, that the beating and wounding was wholly unnecessary to accomplish plaintiff's eviction, and also that it was done willfully, wantonly, and even viciously.

It is not seriously contended that Joe Di Bacco is not liable; but it is earnestly insisted that the evidence fails to make a case of liability against Vincent Di Bacco. But there are two well-settled rules of law applicable to the facts and circumstances of this case as the jury could find them, either of which determines the liability of Vincent Di Bacco: First, if he aided and abetted Joe Di Bacco in the commission of the unlawful act, he is liable as a principal in the commission of the trespass; and, second, if the trespass was committed by Joe Di Bacco alone within the scope of his employment, while engaged in the line of his duty therein, Vincent Di Bacco is liable, because the defendants occupy the relation to each other of master and servant, and the law makes the master liable for such a trespass committed by the servant.

[6] Concerning the first proposition: The jury had the right to infer, from the testimony herein referred to, and from the additional facts, that Vincent Di Bacco did nothing to restrain Joe Di Bacco from committing the wrong, and retained him in his services after the wrong was committed, that he encouraged Joe Di Bacco, and approved his act. This would make him equally liable with Joe Di Bacco as his aider and abettor. 3 Greenleaf on Evl. § 40; 3 Cyc. 1069. The principle of law which may properly be applied to this case was correctly stated by the Supreme Court of Massachusetts in *Brown v. Perkins and Wife*, 1 Allen, 89, as follows: "Any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances and approves the same, is in the law deemed to be an aider and abettor, and liable as principal; and proof that a person is present at the commission of a trespass without disapproving or opposing it is evidence from which in connection with other circumstances it is competent for the jury to infer that he assented thereto, lent to it his countenance, and approved it, and was thereby aiding and abetting the same." The same rule was announced by the Supreme Court of Missouri in *McMannus v. Lee et al.*, 43 Mo. 206, 97 Am. Dec. 386. The following authorities are also in point: *Daingerfield v. Thompson*, 33 Grat. 136, 36 Am. Rep. 783; *Gillon v. Wilson*, 3 T. B. Mon. (Ky.) 216; *Bishop v. Ely*, 9 Johns. (N. Y.) 294; State

v. Noeninger, 108 Mo. 166, 18 S. W. 990; 3 Greenleaf on Evidence, § 41.

As to the second proposition: Joe Di Bacco was the bartender. He was serving guests at the bar at the time he committed the assault and battery on plaintiff. He says it was his duty to protect the place and the "boss," and the master does not deny this. He also says that he struck plaintiff because plaintiff had struck the "boss." This is certainly sufficient evidence to prove that the unlawful act was committed by Joe Di Bacco in the line of his employment, and while he was discharging his duties to his master. For such an unlawful act of the servant the law holds the master liable. 26 Cyc. 1518.

Complaint is made that the verdict is excessive; but, in view of the nature of the trespass, we are unable to say that it is so large as to evince passion, prejudice, partiality, or corruption.

[7] The jury may have found, which they had the right to do, that the trespass was committed willfully and wantonly. In such case they can award exemplary damages. Where damages do not admit of definite estimate, and there is no legal measure, the law leaves the measure to the sound discretion of the jury. 4 Ency. Dig. Va. & W. Va. 183.

We have carefully examined the instructions given for the plaintiff, to which the defendants objected, and also those asked for by the defendants which the court refused, and we find no error in the court's ruling in relation thereto. The court gave, at the request of defendants, a number of instructions. Their No. 2 correctly states the law, but was properly refused because the principle involved was stated in other instructions which were given at their request. The others not given were not applicable.

No error appears, and the judgment will be affirmed.

(9 Ga. App. 435)

TWILLEY v. STATE. (No. 3,363.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. GAMING (§ 98*)—PROSECUTION—EVIDENCE. The evidence authorized the verdict.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 291-298; Dec. Dig. § 98.*]

2. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where the fact of guilt depends entirely upon circumstantial evidence, it is obligatory upon the trial judge, even in the absence of a timely written request, to charge the jury upon the law as to the force and effect of circumstantial evidence in criminal cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1999; Dec. Dig. § 824.*]

Error from City Court of Sparta; R. W. Moore, Judge.

Thomas L. Twilley was convicted of gaming, and brings error. Reversed.

T. M. Hunt and R. H. Lewis, for plaintiff in error. R. L. Merritt, Sol., for the State.

HILL, C. J. The accused was indicted with three others for the offense of gaming; the indictment charging that they "did play and bet for money and drinks of liquor, a thing of value, at a game played with cards, contrary to the laws of said state, the good order, peace, and dignity thereof." Following his conviction the defendant filed his motion for a new trial, based on the general grounds and on the special assignment that the court failed to charge the jury upon the law as to the effect of circumstantial evidence.

[1] The evidence, substantially stated, is as follows: The accused, with three others named in the indictment, were caught by the marshal of the town of Sparta while playing a game of cards on the "headboard of a grave in the Catholic cemetery." Neither money nor whisky was seen, but the marshal testified that he "smelt whisky strong," and an empty bottle was lying on the ground, and two of the players were apparently under the influence of whisky. After they had been caught and arrested, two of the players, not the accused, stated that they were "just playing for drinks," and the marshal and another witness testified that "a drink of whisky was a thing of great value in Hancock county." This statement of the other defendants, made after the arrest and after the completion of the offense (if any offense was committed), had no probative value as against the accused. The only evidence against the accused, except the circumstance that he was playing with the others, was the statement made by him, some time after his arrest, to the mayor, that he would like the mayor, as his friend, to have the thing "squashed," and that on the day when they were caught playing one of the players came by his shop, stated to him that he had a bottle of whisky, and proposed that they go to the Catholic cemetery and play cards for drinks. This statement, while not amounting to a confession, was incriminatory, and, considered in connection with the other strongly suspicious circumstances, may be regarded as of sufficient probative weight to show the corpus delicti, and that the accused was a particeps criminis.

We cannot say, as a matter of law, that the circumstances were not sufficient for that purpose. For four men to leave their business in the daytime and go to a cemetery and play cards on the headboard of a grave would seem to indicate that there was something more in the way of temptation than the mere pleasure of playing an innocent game of cards, and in view of the indicia of the presence of intoxicants, and the evidence

that a beverage of this character was hard to get in Hancock county and was very valuable, it would seem to be not unreasonable to infer that the "drinks" furnished the inducement for the playing of the game, and it is difficult to believe, in view of the evidence as to the great value of whisky in Hancock county, that the generosity of one of the players would have furnished without price the tempting stake. It is so natural for men who play cards, and for those who drink, to play for drinks, that this court is constrained to the conclusion that the verdict of the jury was not wholly unauthorized. Apparently the law against gaming, as well as against the sale of liquor, is most vigorously enforced in Hancock county, and in the town of Sparta, when the citizens of the town are compelled to resort to the cemetery to play cards for drinks, and when, even in that secluded spot, they don't have a ghost of a chance.

[2] The evidence, however, was entirely circumstantial. Even the incriminatory statement only inferentially indicates guilt. In such case it is well settled by the repeated rulings of the Supreme Court that it is the duty of the trial judge, even in the absence of a request, to charge the jury the law defining the probative value of circumstantial evidence, as laid down in section 1010 of the Penal Code of 1910. The writer confesses his inability to see any practical difference between the universal rule of "reasonable doubt," applicable in all criminal cases, and the special rule of "reasonable hypothesis," applicable to cases of circumstantial evidence. Whether dependent upon direct or circumstantial evidence, a conviction is unauthorized unless the jury believe the evidence of guilt is proved beyond a reasonable doubt; and, so long as there is a reasonable hypothesis of innocence, a reasonable doubt of guilt exists. And where a jury is instructed that a verdict of guilty cannot be legally found unless the evidence proves guilt beyond a reasonable doubt, this would seem to be tantamount to telling the jury that they could not legally convict unless the evidence excluded "every other reasonable hypothesis save that of the guilt of the accused." But the law has made a difference between "reasonable doubt" and "reasonable hypothesis," and the Supreme Court has many times declared that, when a conviction is based alone on circumstantial evidence, it is reversible error for the trial judge to fail to instruct the jury that the evidence must exclude every reasonable hypothesis save that of guilt, although he has clearly charged that a conviction would be unauthorized unless the evidence proved the guilt of the accused beyond a reasonable doubt.

Judgment reversed.

(9 Ga. App. 349)

MAYOR, ETC., OF CITY OF CORDELE v. JETER. (No. 2,961.)

(Court of Appeals of Georgia. June 7, 1911.)

*(Syllabus by the Court.)***1. REVIEW OF EVIDENCE.**

The evidence authorizes the verdict.

2. MUNICIPAL CORPORATIONS (§§ 763, 803*)—DEFECTIVE STREETS—DILIGENCE REQUIRED.

In a suit against a city by a traveler injured by a defect in one of the public streets, it was not error for the court to instruct the jury as follows: "I charge you, gentlemen of the jury, that ordinary care or diligence upon the part of a person passing along a public street or sidewalk of a municipal corporation, and ordinary diligence upon the part of the municipal corporation in constructing, repairing, and maintaining its streets and sidewalks, do not imply a like degree of vigilance in foreseeing danger and guarding against it."

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. §§ 763, 806.*]

Error from City Court of Cordele; E. F. Strozler, Judge.

Action by J. T. Jeter against the Mayor, etc., of the City of Cordele. Judgment for plaintiff, and defendant brings error. Affirmed.

Walter F. Hall, for plaintiff in error.
Crum & Jones, for defendant in error.

POWELL, J. [2] Only the proposition stated in the second headnote will be amplified. The instruction complained of is taken almost literally from the opinions of the Supreme Court in *Wilson v. City of Atlanta*, 63 Ga. 291, and *Idlett v. City of Atlanta*, 123 Ga. 821, 51 S. E. 709. While it is true, as contended by counsel for the plaintiff in error, that there are many expressions of the Supreme Court and of this court, appearing in the opinions, which it would not be proper for a trial judge to quote in his charge to the jury, still we think that the present instruction was not only abstractly correct, but was pertinent to the issues involved. It was proper for the court to tell the jury that the plaintiff (the user of the street) and the defendant (the city) were both held to the same degree of diligence, though not necessarily to the same quantum of diligence, and that this degree was ordinary care and diligence, but that less vigilance (a thing going to the quantum, and not to the degree, of the diligence) might fulfill this legal standard so far as the one was concerned than would be required to fulfill it so far as the other was concerned. To state it somewhat differently, it was proper for the court to tell the jury that, while a traveler upon the highway must use ordinary care and diligence, still this duty upon him might not in all cases require him to be actively alert to see whether the city had left the highway in a dangerous condition, especially where the danger was not patent; but the duty of ex-

ercising this same degree of diligence might require the city to be actively alert to discover and remedy such a defect.

[1] The charge as a whole was very fair, full, and lucid, and the evidence, though conflicting, fully authorizes the verdict; so there is no ground for interference by this court.

Judgment affirmed.

(9 Ga. App. 487)

McWHORTER v. STATE. (No. 3,366.)

(Court of Appeals of Georgia. June 7, 1911.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 741*)—INSTRUCTIONS—CONFESSION.**

The evidence in this case being in conflict as to whether in fact the accused had made any confession of guilt, the court did not err in submitting that issue to the jury, and in charging generally on the law of confession as laid down in Pen. Code 1910, §§ 1031, 1032.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 741.*]

2. CRIMINAL LAW (§ 1092*)—APPEAL—EXCEPTIONS TO CHARGE.

Other exceptions to the charge of the court, not being verified by the trial judge, will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.*]

3. CRIMINAL LAW (§ 1160*)—APPEAL—REFUSAL—NEW TRIAL.

The evidence as to the animus furandi is exceedingly weak and unsatisfactory; but as the trial judge fully charged the law applicable to this issue, and there are some slight circumstances from which the jury could have inferred a criminal intent on the part of the accused in taking and carrying away the property described in the indictment, this court does not feel authorized to set aside the verdict and reverse the judgment of the lower court in refusing another trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

Error from Superior Court, Greene County; B. F. Walker, Judge.

Hamp McWhorter was convicted of crime, and brings error. Affirmed.

J. G. Faust and Noel P. Park, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 393)

CARR v. ROUNTREE. (No. 3,165.)

(Court of Appeals of Georgia. June 7, 1911.)

*(Syllabus by the Court.)***1. JUDGMENT (§ 145*)—DEFAULT—MOTION TO VACATE.**

Irrespective of whether the court had any power to set aside the judgment and open up the default, the refusal to do so was not erroneous, in light of the fact that the defense which was tendered in connection with the motion to vacate the judgment and open the default was not a meritorious defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292-296; Dec. Dig. § 145.*]

2. BILLS AND NOTES (§§ 103, 453*)—LIMITATION OF ACTIONS (§ 173*)—CHECK—SUFFICIENCY OF CONSIDERATION—LIMITATIONS—DURESS.

R. sued C. upon a check (upon which payment had been refused), made by C. and payable to F., and indorsed by F. to R. C. attempted to set up as a defense that, while he and F. were in company with a party of ladies, the attorney of R. made a demand upon F. for payment of a sum of money which he claimed was due by F. to R., and threatened to have F. arrested unless the sum was paid; that the transaction out of which the alleged indebtedness grew was more than 13 years old; that R. finally agreed to take \$500 in settlement of his claim; that C., seeing the plight of his guest, gave him this check that he might pay the \$500; that the check was without consideration, and that, if it represented any debt at all, even as between F. and R., it represented a debt which was barred by the statute of limitations. *Held*, that no valid defense was asserted. As between F. and R., the settlement of the disputed claim was a sufficient consideration. F.'s privilege of pleading the statute of limitations, even if the plea would have been good, was personal to him, and could not be exercised by C.; the fact that C. was dunned for the debt while in the presence of ladies, and was threatened with arrest if the debt was not paid, was not (at least in the absence of other allegations) adequate to show fraud; and, even if duress existed as against F., C. cannot plead it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 233-240, 1344-1351; Dec. Dig. §§ 103, 453; * Limitation of Actions, Dec. Dig. § 173.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by D. W. Rountree against J. S. Carr. Judgment for plaintiff, and defendant brings error. Affirmed.

J. S. & N. M. Reynolds and Moore & Pomeroy, for plaintiff in error. Anderson, Felder, Rountree & Wilson, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 248)

ESTES v. PALMOUR. (No. 2,919.)

(Court of Appeals of Georgia. June 7, 1911.)

(*Syllabus by the Court.*)

1. JUSTICES OF THE PEACE (§ 207*)—CERTIORARI—TRAVERSE—HEARING.

Where a traverse is filed to the answer of the magistrate in a certiorari case, the certiorari is not ripe for hearing until the traverse has been disposed of, unless the traverse relates to an immaterial matter. In the present case the traverse did relate to a very material matter; for, unless the traverse was sustained, the evidence fully authorized the verdict, if it did not demand it.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 207.*]

2. CERTIORARI (§ 70*)—APPEAL—ASSIGNMENT OF ERROR—SUFFICIENCY.

Where a bill of exceptions recites that the court in such a case entered up judgment sustaining the certiorari, an exception and assignment of error as follows is sufficient: "To the judgment of the court sustaining the certiorari and granting a new trial, without submitting the issue growing out of the traverse to the justice's answer to a jury and with the traverse still pending, plaintiff in error excepted, and now excepts, and assigns the same as error,

on the grounds that the same is contrary to law and contrary to the evidence contained in the Justice's answer."

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 202; Dec. Dig. § 70.*]

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action between George P. Estes and Ernest Palmour. From a judgment sustaining a certiorari to a magistrate, Estes brings error. Reversed.

Wm. M. Johnson, for plaintiff in error.
B. P. Gaillard, Jr., for defendant in error.

POWELL, J. Judgment reversed.

(9 Ga. App. 328)

ROBERTS v. ARNALL. (No. 2,906.)

(Court of Appeals of Georgia. June 7, 1911.)

(*Syllabus by the Court.*)

1. EVIDENCE (§ 437*)—PAROL EVIDENCE—CONSIDERATION OF CONTRACT.

"Extrinsic evidence is always admissible to show that the object or consideration of an agreement is in fact illegal."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2025-2028; Dec. Dig. § 437.*]

2. EVIDENCE (§ 437*)—PAROL EVIDENCE—OBJECT OF CONTRACT.

Parol evidence is admissible to show that a written contract, which on its face and by its terms purports to relate to a lawful transaction, was in fact entered into as a wagering contract, and that the lawful form was adopted as a guise to evade the law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2025-2028; Dec. Dig. § 437.*]

Error from City Court of Newnan; W. A. Post, Judge.

Action by J. O. Arnall against M. V. Roberts. Judgment for plaintiff, and defendant brings error. Reversed.

A. H. Freeman, for plaintiff in error. W. G. Post and W. C. Wright, for defendant in error.

POWELL, J. Arnall sued Roberts to recover damages for the latter's failure to deliver the cotton specified in the following written contract:

"Senola, Ga., 6/29/1909.

"For and in consideration of the sum of \$1.00 to M. V. Roberts in hand paid by J. Claude Arnall, as part payment of the cotton herein purchased, the receipt whereof is acknowledged, I hereby agree to sell to J. Claude Arnall 25 bales of cotton, delivered at Haralson, Ga., between the first and 25th of October next. The delivery to be made at such times, at seller's option, in lots of not less than 50 bales. Cotton to average not less than 500 pounds per bale. If the cotton does not average 500 pounds per bale, I will deliver a sufficient number of bales to bring up the average to 500 pounds. The cotton to be of any grade between strict ordinary and fair, inclusive, at a price of 10½ f. o. b. cents

per pound for 25 bales of 4's, said grade being good middling, American standard classification. With deductions and additions for other grades according to grade and such differences in effect on the day of delivery. It is fully understood and expressly agreed by the parties to this contract that same cannot be settled by payment of money, but only by delivery of the actual cotton, in square merchantable bales weighing 500 pounds, as aforesaid. [Signed] M. V. Roberts.

"We accept the above contract, with its conditions and obligations.

"[Signed] J. O. Arnall."

The defendant tendered a plea alleging that the contract sued upon was illegal and void, because it was a wagering or gambling contract; "that at the date of the execution and delivery of the same it was understood by both of the parties to the same that there was to be no actual delivery of the cotton, but that on the date fixed for the delivery of the same there was to be a settlement between said parties of the difference based upon the market value of the cotton on that day. Defendant says that he was not a producer of cotton, and had no cotton on hand, nor had he contracted to purchase cotton to fulfill said contract, at the date of the said contract, and that the said contract was entered into by said parties purely as a speculation on chances; that said contract is unilateral, and not mutually binding between the parties." The court struck this defense. We may say, in passing, that the plea, so far as it alleged that the contract was unilateral, is not well taken.

On its face the contract between the parties appears to relate to a valid, legal, enforceable transaction. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28. In that case, the general rule as to contracts for the future delivery of commodities is very well stated in the first three headnotes, as follows: "An executory agreement for the sale of goods to be delivered at a future day is valid, though at the time the seller has not the goods in his possession, has not contracted to purchase them, and has no expectation of acquiring them, otherwise than by producing, manufacturing, or purchasing them at some time before the day of delivery. Such a transaction is not rendered invalid by the provisions of section 3537 of the Civil Code (Civil Code 1910, § 4117), unless it is made to appear that neither of the parties contemplated an actual delivery of the goods, and that it was the intention of both that there should be no actual delivery, but that on the day fixed for delivery there should be a settlement of their differences, based on the market value of the goods on that day. In that event the transaction would be a pure speculation upon chances, but not otherwise. When a contract is valid upon its face, or, when taken in the light of the circumstances surrounding the parties at the time it was entered into, appears to be valid,

it is incumbent on him who attacks the contract to show its invalidity." Counsel for both sides in this case seem to recognize that this is the rule. The point involved in the present case is whether the illegality of the contract can be shown by extrinsic evidence which contradicts the recitals appearing on the face of the written contract itself. It is well settled, as a general rule, that "when a contract appears to have been reduced to writing, before parol evidence can be admitted to show a collateral agreement, it must appear, either from the contract itself or from the attendant circumstances, that the contract is incomplete, and that what is sought to be shown as a collateral agreement does not in any way conflict with or contradict what is contained in the writing." This quotation is taken from the sixth headnote in the case just cited.

[1] While this is the general rule, there are certain exceptions. In Williston's *Wald's Pollock on Contracts* (3d Ed.) 492, one of the exceptions is stated thus: "Extrinsic evidence is always admissible to show that the object or consideration of an agreement is in fact illegal. This is an elementary rule, established by decisions both at law and in equity." Before we proceed further, let us notice the suggestion that since the general rule on this subject is laid down as one of the propositions in the *Forsyth Manufacturing Company Case*, cited above, and since in that case the contention was made that the contract was void because speculative, the conclusion follows that the court intended to hold that, where a contract for the sale of cotton was apparently valid on its face, parol evidence would be inadmissible to show that the actual agreement between the parties was one of a gaming nature; but an inspection of the decision in that case discloses that this rule of law was invoked, not in resistance to any effort to set up the illegality of the contract, but in an effort to engraft upon it as a legal contract another term in no wise affecting it with immorality or illegality, namely, that the cotton which was to be delivered should be procured from a certain specified source.

[2] Our reports are full of cases laying down and enforcing the general rule that unambiguous written contracts must speak for themselves, and that parol evidence is inadmissible to contradict, vary, or add to them. Still the exception which allows the admission of extrinsic and even parol evidence to show that the object or consideration of the agreement was in fact illegal has been as uniformly recognized. For instance, in *Henderson v. Thompson*, 52 Ga. 149, 152, the court laid down and most vigorously enforced the general rule; but it is also said in that case: "The exception to the rule is where the real contract is forbidden by law, and the parties have reduced to writing a contract legal on its face. In such cases public policy suspends the rule and allows the truth to be proven, in spite of and in con-

tradition to the writing." *Of. Faircloth v. De Leon*, 81 Ga. 158, 7 S. E. 640; *Baggett v. Trulock*, 77 Ga. 369 (2) 3 S. E. 162; *Lytle v. Scottish Am. Co.*, 122 Ga. 458, (1), (7), 467, 50 S. E. 402. The Supreme Court of the United States in the case of *Irwin v. Willmar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, 229, in which there was a similar plea as to an apparently legal contract for the delivery of grain, said: "If, however, at the time of entering into a contract for the sale of personal property for future delivery, it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager, and nothing more. It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade." In *Stewart v. Schall*, 65 Md. 299, 4 Atl. 399, 57 Am. Rep. 327 a similar ruling was made, and the admissibility of extrinsic evidence to show the illegality of a contract which was lawful in form was recognized. *Cf. Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414. This court, in *Luke v. Livingston*, 9 Ga. App. —, 70 S. E. 596, recognized the right to introduce parol evidence to show the invalidity of a similar contract which we held to be valid on its face.

It is easy to see that if two persons desired to speculate upon the cotton market, and to put their transaction in such shape that the winner could enforce his contract by suit against the loser, all they would have to do, if any other rule than the one here announced were followed, would be to draw a written contract similar in form to the one here involved; for, unless the illegal purpose of the apparently legal contract could be shown by parol, the result would be that the aid of court could be successfully invoked to effectuate the unlawful purpose, as the only judgment which the court then could render would have the effect of causing the loser to pay to the winner just what it was contemplated he should pay under the very plan and purpose of the illegal transaction. Now, formalism and technicality are very important to the successful and orderly administration of justice in any juridic system; but there is too much plain common sense stored away in the substructure upon which our whole system is based to allow of any such result as that parties may take advantage of formal or technical rules designed for the carrying out of the law, and divert them into instrumentalities by which they may violate the very cardinals of the law itself. In nearly every case where ingenuity seeks to evade the law under cover of the law itself, it finds itself flanked by some rule or exception by which the major

purpose of the law protects itself. It is a good thing that the wisdom of the ages, which has thus become crystallized and expressed in our law, is capable of proving superior to the transient ingenuity of such individuals as from time to time rise up to proclaim that they have found a way to get around the law.

Of course, these strictures are not intended as comment upon the facts of the particular case. The present transaction may be perfectly legal. That question has not yet come under investigation, as the court struck the plea and admitted no testimony in support of it. As Chief Justice Bleckley said in *Faircloth v. De Leon*, 81 Ga. 158, 161, 7 S. E. 640, as to a stricken plea which sought to set up the illegality of a somewhat similar attempt to evade one of the criminal laws of this state: "The plea may not be true; but, if true, it is quite sufficient."

Judgment reversed.

(9 Ga. App. 449)

LANGSTON v. CITY OF HAZLEHURST.
(No. 3,400.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. CERTIORARI TO JUSTICE.

The judge of the superior court did not err in refusing to sanction the petition for certiorari.

2. JUDGES (§ 42*)—MAYOR'S COURT—DISQUALIFICATION OF MAYOR.

A mayor is not disqualified, on the trial of one accused of a violation of a city ordinance, because in the event of a conviction a portion of the fine imposed is to be paid to him as costs. *Pace v. City of Hazlehurst*, 9 Ga. App. —, 70 S. E. 967; *Wellmaker v. Terrell*, 3 Ga. App. 792, 60 S. E. 464.

[Ed. Note.—For other cases, see *Judges*, Dec. Dig. § 42.*]

3. INTOXICATING LIQUORS (§ 224*)—ILLEGAL SALE—DEFENSES.

On the trial of one charged with the violation of a city ordinance in having on hand intoxicating liquor for the purpose of illegal sale, evidence that he received money from another person, accompanied with a request to secure whiskey for the latter, and that shortly thereafter the accused delivered a bottle of whiskey to that person, would cast upon him the burden of showing where, how, and from whom he got the whiskey; and this burden is not successfully carried simply by the statement of the accused that he had no interest in the whiskey, but had secured it from another person. *Bray v. City of Commerce*, 5 Ga. App. 605, 63 S. E. 596; *Shaw v. State*, 3 Ga. App. 607, 60 S. E. 326.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 275-281; Dec. Dig. § 224.*]

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

Charley Langston was convicted of a violation of an ordinance of the City of Hazlehurst, and from an order refusing the certiorari, he brings error. Affirmed.

H. A. King and Gordon Knox, for plaintiff in error. S. D. Dell, for defendant in error.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 309)

LAWRENCE v. GEORGIA RY. & ELECTRIC CO. (No. 2,815.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 119*)—PLEADING—GENERAL AND SPECIFIC ALLEGATIONS.

When a petition sets forth specific allegations of negligence, but also includes a general allegation of negligence, the specific will be considered as amplification of the general, and the plaintiff's right of recovery depends upon the establishment of negligence on one or more of the specific particulars alleged. *Palmer Brick Co. v. Chenall*, 119 Ga. 387 (6), 47 S. E. 329.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

2. NEGLIGENCE (§ 119*)—PLEADING—GENERAL AND SPECIFIC ALLEGATIONS.

When a petition asserting a right of action for personal injuries makes two particular and distinct specifications of negligence, and follows these with the words, "and in causing the accident and injuries to plaintiff under the facts and circumstances heretofore alleged," this language should be treated as a mere general allegation of negligence, within the purview of the rule stated in the foregoing headnote. *Harris v. Southern Ry. Co.*, 129 Ga. 383, 391, 58 S. E. 873.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by E. E. Lawrence against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Anderson, Felder, Rountree & Wilson, for plaintiff in error. Colquitt & Conyers, for defendant in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 335)

CASON v. TYE. (No. 2,833.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. ACTION (§§ 27, 45*)—ACTION ON CONTRACT—JOINDER OF ACTIONS.

A. employed B. under a written contract as an overseer and laborer for the year 1909, beginning January 1st and ending December 31st thereafter, at stipulated wages for the year, payable monthly. In October A. discharged B. from his employment, and B., at the expiration of the year, brought suit against A. to recover damages for breach of the contract, alleging that his discharge was wrongful, setting out the contract, and claiming the right to recover the balance of his wages due thereafter. *Held*, that the action was one ex contractu. Civil Code 1910, § 3588; *Rogers v. Parham*, 8 Ga. 190; *Britt v. Hays*, 21 Ga. 157. *Held*, further, that a claim for money which B.

had paid at the request of A. to one of his employees, and also for the amount of money which A. had agreed to pay B. for the hire of a mule during the year, were properly joined in the same action. Civil Code 1910, § 5521.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195, 378-448; Dec. Dig. §§ 27, 45.*]

2. REVIEW ON APPEAL.

No error of law appears; and, while the evidence in support of the verdict is weak and unsatisfactory, it was sufficient to satisfy the jury and the trial judge, and the judgment overruling the motion for a new trial is affirmed.

Error from City Court of Sparta; R. W. Moore, Judge.

Action by P. F. Tye against R. A. Cason. Judgment for plaintiff, and defendant brings error. Affirmed.

E. P. Davis, for plaintiff in error. L. D. McGregor, for defendant in error.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 402)

HAMILTON v. STATE. (No. 3,232.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

DISORDERLY CONDUCT (§§ 1, 11*)—PROVOCATION—QUESTION FOR JURY.

In a prosecution under Pen. Code 1910, § 387, for using opprobrious words and abusive language, the sufficiency of the provocation which will justify the use of such words is a matter exclusively for the jury. The jury cannot be instructed as a matter of law that, if one simply said "howdy" to the defendant this would not be sufficient justification for the defendant to use opprobrious words and abusive language. Whether this would be sufficient provocation would depend on the manner of the salutation and the surrounding circumstances. There may be justifiable provocation where no words have been spoken. The sufficiency of the provocation depends, not only upon the language employed, but upon the relationship of the parties, the state of feeling existing between them, the tone, manner, and spirit in which the language is used, and other circumstances from which the jury may in some instances determine that words apparently or ordinarily innocent afforded reasonable cause for provocation under the circumstances or in the manner in which they were used. The question is so exclusively one of fact that any intimation or direction to the jury as to the weight or effect of any portion of the testimony illustrative of the subject of provocation is error.

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. § 8; Dec. Dig. §§ 1, 11.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Burke Hamilton was convicted of using opprobrious words and abusive language tending to cause a breach of the peace, and brings error. Reversed.

Mozley & Moss, for plaintiff in error. J. P. Brooke, Sol. Gen., for the State.

RUSSELL, J. Judgment reversed.

(9 Ga. App. 423)

BAKER v. STATE. (No. 3,343.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. WORDS AND PHRASES—"SQUATTER."

A "squatter" may be defined to be a person who settles or locates on land, inclosed or uninclosed, with no bona fide claim or color of title and without the consent of the owner. Pen. Code 1910, § 216, subd. 4; Words and Phrases Judicially Defined, vol. 7, p. 6619.

2. TRESPASS (§ 79*)—CRIMINAL TRESPASS—EVIDENCE.

An indictment charged that the accused "did then and there unlawfully and with force and arms squat and settle and remain on the inclosed lands" of a person named, describing the same, with no bona fide claim of title therein and without the consent of the owner therein named. The undisputed evidence in support of this allegation shows that the accused walked up to a window of a dwelling house on the land in question, looked in the window for a second, and then crawled under the house, where he remained for a few minutes. When he came from under the house, he was pursued and caught by the owner. *Held*, that the evidence is insufficient to support the allegation that the accused was guilty of an act of trespass in squatting or settling upon the land, and a conviction was unauthorized.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 169; Dec. Dig. § 79.*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

Harve Baker was convicted of trespass, and brings error. Reversed.

J. S. James, for plaintiff in error. J. R. Hutcheson, Sol. Gen., for the State.

HILL, C. J. Judgment reversed.

(9 Ga. App. 397)

PYE v. GILLIS et al. (No. 3,181.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. MALICIOUS PROSECUTION (§ 47*)—PETITION—SUFFICIENCY.

A petition which shows that the defendant swore out against the plaintiff a criminal warrant charging him with an offense against the laws of this state, though the offense was described only by giving one of the constituent elements by which it is commonly designated, and that the defendant followed up this prosecution by going before the grand jury of the county and preferring an indictment for the same offense, in which the alleged crime was fully and distinctly set forth, and that the grand jury returned a "no bill," and that the prosecution was malicious and without probable cause, sets forth a valid cause of action for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 91-111; Dec. Dig. § 47.*]

2. CRIMINAL LAW (§ 102*)—JURISDICTION—SUPERIOR COURTS—CITY COURTS.

The fact that the act creating a city court provides that all persons charged before magistrates of the county with misdemeanors shall be bound over to the city court for trial does not divest the superior court of jurisdiction in such cases, or deprive the grand jury impaneled at

the superior court of the right to investigate an indictment preferred for a misdemeanor, for which a warrant had previously been sworn out before one of the magistrates in the county.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 206-212; Dec. Dig. § 102.*]

Error from City Court of Sylvester; J. B. Williamson, Judge.

Action by Louis Pye against W. D. Gillis and others. Judgment for defendants, and plaintiff brings error. Reversed.

Claude Payton, for plaintiff in error. Tip-ton & Passmore, for defendants in error.

POWELL, J. Pye sued Mr. and Mrs. Gillis for malicious prosecution. The petition alleged that for an improper purpose, set forth, Mr. Gillis procured his wife to go before a magistrate and without probable cause and maliciously to swear out a warrant charging him with the offense of being drunk at her (Mrs. Gillis') residence, and that a warrant was issued charging him with this, as a misdemeanor, and that he was arrested; that no commitment trial took place, but that shortly subsequently Mrs. Gillis, accompanied by her husband, went before the grand jury, impaneled in the superior court, and preferred an indictment charging him with the same offense, upon which the grand jury returned a "no bill." This sets out enough of the petition for an understanding of the points we are called upon to decide in the case. The court below sustained general demurrer to the petition, and the plaintiff has excepted.

[1] The ground on which the action of the trial court in sustaining the general demurrer was based (so we are informed in the argument) was that the affidavit sworn out by Mrs. Gillis and the warrant based thereon charged no offense against the laws of this state, and was therefore void, and that the acts set forth did not constitute a prosecution. The rule is well settled that an action for malicious prosecution cannot be based upon proceedings which show upon their face that they are void. If the prosecution is by affidavit and warrant, these papers should charge some offense. In the present case the affidavit under which the warrant issued charges that "Louis Pye did commit the offense of drunkenness at the residence of Elizabeth Gillis, in the town of Sylvester, in the county of Worth," on a named day. The warrant commanding the arrest of the defendant recited that the affidavit had been made by Mrs. Gillis, charging Louis Pye with "the offense of a misdemeanor—drunkenness at her residence in Sylvester, Georgia." For a criminal warrant to be valid as process, it is not necessary that the offense charged therein should be stated with that definiteness or certainty which is required in an indictment or accusation. Except in prosecutions for lar-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ceny, where certain additional facts are to be stated, the offense may be charged in the affidavit and in the warrant in general terms. See Penal Code 1910, §§ 904-906. It has been held that even a failure to allege these additional particulars in an affidavit to secure a warrant for larceny is not fatal. "It seems to be the settled law of this state that an affidavit need do no more than name the offense, without describing the way in which it was committed, or its character, with any degree of particularity." *Brown v. State*, 109 Ga. 570, 572, 34 S. E. 1031, 1032. For affidavits in which very meager or general descriptions of the offenses charged were given, but which were held to be valid, see *Dickson v. State*, 62 Ga. 583; *Brown v. State*, 109 Ga. 570, 34 S. E. 1031; *Glass v. State*, 119 Ga. 299, 46 S. E. 435; *Murphy v. State*, 119 Ga. 300, 46 S. E. 450; *Howell v. State*, 5 Ga. App. 186, 62 S. E. 1000. In *Williams v. State*, 107 Ga. 693, 33 S. E. 641, an affidavit which charged the accused only with "the offense of committing a misdemeanor" at a certain time and in a certain county was held to be sufficient. It is true that if the accusation and warrant go into details in describing the offense, and disclose that the thing charged was not an offense at all, or fail to name some constituent element of an offense, the warrant does not constitute valid process, nor authorize an arrest thereunder. *Alexander v. West*, 6 Ga. App. 72, 64 S. E. 288; *Satilla Mfg. Co. v. Cason*, 98 Ga. 14, 25 S. E. 909, 58 Am. St. Rep. 287.

The affidavit in the present case did name a constituent element of the offense set forth in Penal Code 1910, § 442, and described that offense in language by which it is commonly known. That section of the penal Code provides that "if any person shall be and appear in an intoxicated condition on any public street or highway, or within the curtilage of any private residence not in the exclusive possession of the person or persons so intoxicated," etc., he shall be guilty of a misdemeanor. It is true that this section provides, also, that the drunkenness must be made manifest by boisterousness, or by indecent conduct, or by vulgar language, or by loud and violent discourse; but these things are made evidentiary characteristics of the offense, rather than constituent elements of it, within the meaning of that term as it is employed in the case of *Satilla Mfg. Co. v. Cason*, *supra*. Considering the fact that it is alleged in the petition that the plaintiff in the present case had been charged in the affidavit and in the warrant with one of the constituent elements by which the offense is commonly known, and that the defendants followed this up by going before the grand jury of the county and preferring an indictment which fully com-

plied with the law as to specifcness and definiteness, we think that a criminal prosecution was abundantly shown; and as malice and lack of probable cause are asserted, as well as the fact that the prosecution had terminated by the return of a "no bill" by the grand jury, we have no hesitancy in holding that the petition set forth a valid cause of action.

[2] 2. It was necessary for the plaintiff to show in his petition that the prosecution had terminated, and for this purpose he alleged the return of the "no bill" by the grand jury of the county. Defendant's contention is that, while the allegation of the return of a "no bill" would ordinarily be sufficient, it is not so in the present instance, because under the act creating the city court of Sylvester, the magistrates by whom criminal warrants are issued for misdemeanors are required to bind the offenders over to the city court for trial, and not to the superior court. This makes no difference. The superior court has concurrent jurisdiction with all other courts as to the trial of misdemeanors, and no direction given in a special law requiring that magistrates shall commit solely to another court can affect its jurisdiction. Until some other court has tried the case and disposed of it, the grand jury sitting in the superior court has full authority to take up the matter, and to dispose of it by return of a true bill or a "no bill," as the case may be. The court erred in sustaining the demurrer.

Judgment reversed.

(9 Ga. App. 346)

MUNSON v. HOUSER et al. (No. 2,954.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. VENUE OF ACTION.

Irrespective of whether the suit was one *ex contractu* or *ex delicto*, the venue was in Bibb county. Civil Code 1910, § 2798.

2. RECEIVERS (§ 174*)—ACTIONS AGAINST—LEAVE OF COURT.

Suits against receivers, trustees, assignees, and other like officers operating railroads in this state, or partially in this state, whether arising *ex contractu* or *ex delicto*, where the cause of action relates to injuries or damage to personal property, may be brought without first having obtained leave to sue from any court. Civil Code 1910, §§ 2788, 2789.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 333-343; Dec. Dig. § 174.*]

3. SUFFICIENCY OF PETITION.

The judgment on the demurrer is fully controlled by the decision of the Supreme Court in *Louisville & Nashville R. Co. v. Warfield*, 129 Ga. 473, 59 S. E. 234.

Error from City Court of Macon; Robt. Hodges, Judge.

Action by F. H. Houser and others against J. B. Munson, receiver. Judgment for plaintiffs, and defendant brings error. Affirmed.

F. U. Garrard and Hardeman, Jones, Cal-laway & Johnston, for plaintiff in error. Guerry, Hall & Roberts, for defendants in error.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 349)

T. I. THOMASON & SON v. E. GOLDMAN & CO. (No. 2,962.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. **BILLS AND NOTES (§ 103*)—VALIDITY—FRAUD.**

Where one has been induced to sign a written contract by false and fraudulent representations as to its contents, made by the opposite party with intent to deceive and which did deceive him, he may set up this fraud as a defense to a suit on notes based upon the contract thus obtained; and this is especially true where, in addition to the false and fraudulent representations as to the contents of the contract, the conduct and representations of the party who made them relieve the opposite party from the imputation of negligence in signing the contract without first reading it. *Wood v. Cincinnati Safe & Lock Co.*, 96 Ga. 120, 22 S. E. 909; *McBride v. Publishing Co.*, 102 Ga. 422, 30 S. E. 999; *Angier v. Brewster*, 69 Ga. 362; *Marietta Fertilizer Co. v. Beckwith*, 4 Ga. App. 245, 61 S. E. 149.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 233-240; Dec. Dig. § 103.*]

2. **EVIDENCE (§ 434*)—PAROL EVIDENCE AFFECTING WRITING—FRAUD.**

The ruling above announced does not contravene the well-established rule that parol evidence will not be admitted to add to, take from, or vary the terms of a valid written agreement; for the purpose of the parol evidence admissible under the ruling is to disprove the existence of the contract, and not to contradict it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

3. **SUFFICIENCY OF PLEA.**

A plea alleging a state of facts substantially as stated above constituted a good defense, if proved, to the notes based on the contract so procured, and the court erred in not allowing it.

Error from City Court of Bainbridge; J. G. Cranford, Judge.

Action between T. I. Thomason & Son and E. Goldman & Co. From the judgment, Thomason & Son bring error. Reversed.

R. G. Hartsfield, for plaintiffs in error. Jno. R. Wilson, for defendants in error.

HILL, C. J. Judgment reversed.

(9 Ga. App. 394)

LEITNER v. COOPER. (No. 3,168.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

SALES (§ 161*)—DELIVERY.

The evidence supports the verdict, and no sufficient reason appears for granting a new trial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-380; Dec. Dig. § 161.*]

Error from City Court of Sylvania; H. A. Boykin, Judge.

Action by C. M. Leitner against S. F. Cooper. Judgment for defendant, and plaintiff brings error. Affirmed.

White & Lovett, for plaintiff in error. M. K. Overstreet, for defendant in error.

POWELL, J. Leitner sued Cooper for the price of a dog. The state of facts appearing in the record is about as follows: Cooper ran a hotel at Sylvania, and on January 30, 1910, mailed to Leitner, at Egypt, a letter in the following language: "I understand you have a good bird dog for sale. I want to buy one. I have been sick several months, and my physician says I must get in the woods and stay there, so thought I would hunt awhile, as I am an old bird hunter and like the sport. Please write me what you will take for the dog. Send him to me by baggage master on Central of Georgia at my expense. Let me try him a day or two, and if he is all right I will send you check for him by return mail; if he is not all right, I will return him to you in good order. We have more scraps to throw away around the hotel than 20 dogs can eat." When Leitner received the letter he had a dog, which he priced at \$35, and after a few days (about five days would seem to be about what the time probably was from certain correspondence appearing in the record) he shipped the dog to Cooper's address by express, over the Brinson Railroad, stating that he did not think it was safe to trust the dog to the baggage master on the Central of Georgia, as he had been directed. Before the dog arrived, Cooper, not hearing from Leitner, decided to go to North Georgia to visit his parents, but in the meantime left word with the conductor of the Sylvania & Girard Railroad, if the baggage master of the Central brought the dog in, to look after him and to take charge of him. When the dog came by express, in the absence of Cooper, his wife receipted for the shipment, and, to quote literally from Cooper's testimony in the record, "she tied him up at the hotel, which we ran, and he howled so much that she took him out for a walk for some exercise, and he got away." The wife telephoned about to various places trying to find the dog, and also advertised for him in the official gazette of the county; but the dog was never heard of again, unless a dog of somewhat similar appearance, which was killed some distance away a few days later was the same dog. Cooper conceded that his wife had authority to sign for express packages, and that he was bound by her act in that respect. The jury found for the defendant.

The plaintiff concedes that he violated the defendant's instructions in sending the dog by express, instead of sending it by the bag-

gage master, but says that inasmuch as the defendant's wife receipted for the dog from the express company, and had authority as his agent to receipt for packages from the express company, the defendant waived this violation of instruction, and became bound, according to the terms of the letter, either to return the dog or to pay its value. We cannot concede the correctness of this proposition. The defendant had made arrangements with another agent (his friend, who was a conductor on the Sylvania & Girard Railroad) to take care of the dog if it arrived during his absence. He had not, so far as the record shows, constituted his wife his agent to take care of the dog. He had the right to select his agent for this purpose, and when the plaintiff, by his disregard of instructions, placed the custody of the dog in the hands of the wife, she held it as a mere gratuitous bailee, and the defendant was not bound, under his original contract, either to pay for the dog or to return it, but, if bound at all, was bound only to exercise that degree of care which is imposed by law upon gratuitous bailees. The jury was amply authorized to find that the plaintiff's disregard of the defendant's instructions was so material an element in the case as to relieve the defendant from liability for the loss of the dog, under the circumstances. There is no complaint that the judge did not fairly submit all these issues to the jury. There is an exception in the record as to the refusal of the court to sustain certain special demurrers to a portion of the defendant's plea; but, in view of the shape that the case finally took upon the proof, the points there made are not material or important, and, if decided favorably to the plaintiff in error, would not justify a reversal.

Judgment affirmed.

(9 Ga. App. 308)

DEAN v. STATE. (No. 3,298.)

(Court of Appeals of Georgia. April 24, 1911.
Rehearing Denied June 7, 1911.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 110*)—REQUISITES OF ACCUSATION—FOLLOWING LANGUAGE OF STATUTES.

The indictment described the offense in the language of the Code, and with sufficient additional particularity to fully identify the transaction wherein the accused was alleged to have violated the law.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

2. EXTORTION (§ 13*)—INDICTMENT—SUFFICIENCY.

An indictment for extortion is sufficient, when it designates the office held by the accused, and states that, by color of his office and in his official capacity, he unlawfully took from a named person a specified sum of money, which was not due him.

[Ed. Note.—For other cases, see Extortion, Cent. Dig. § 12; Dec. Dig. § 13.*]

3. EXECUTION (§ 127*)—REQUISITES AND SUFFICIENCY—"LEVY."

To constitute a "levy," there must be an actual or constructive seizure of property. The property must be so far brought under the subsection of the officer that he can exercise control, and does assume to exercise dominion, of it by virtue of his writ. The mere declaration by an officer of an intent to seize property does not constitute a levy. The officer must do some act for which he could be successfully prosecuted as a trespasser, if it were not for protection afforded him by the writ.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 282-286; Dec. Dig. § 127.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4101-4106; vol. 8, p. 7705.]

4. EXTORTION (§ 15*)—EVIDENCE—SUFFICIENCY.

The evidence authorized the conviction.

[Ed. Note.—For other cases, see Extortion, Cent. Dig. § 14; Dec. Dig. § 15.*]

(Additional Syllabus by Editorial Staff.)

5. EXTORTION (§ 7*)—ELEMENTS OF OFFENSE—EXECUTION OF LEGAL PAPER.

Under Pen. Code 1910, § 302, providing that "extortion" shall consist of any public officer unlawfully taking by color of his office from any person any money or thing of value that is not due him, or more than is due, an officer who uses his office to exact money not due him may be guilty of extortion, though he does not pretend to be executing any process, nor does he extort money upon promise not to execute.

[Ed. Note.—For other cases, see Extortion, Cent. Dig. § 7; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2622-2624.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

J. W. Dean was convicted of extortion. From a judgment overruling a petition for certiorari, he excepts. Affirmed.

Thos. B. Brown, for plaintiff in error.
Lowry Arnold, Sol., H. M. Dorsey, Sol. Gen.,
and Eb. T. Williams, for the State.

RUSSELL, J. The plaintiff in error was convicted of extortion. A petition for certiorari, sued out to review the judgment of guilty, was overruled, and he excepts to the latter judgment.

[1] 1. The defendant demurred to the indictment upon the grounds: (1) It set out no particular act or conduct of the defendant. (2) It does not set forth whether the defendant was executing, or pretended to execute, some legal or purported legal paper under the color of his office. (3) It does not describe the offense of extortion with sufficient certainty to put the defendant on notice as to what he must defend. (4) It does not allege any particular act on the part of the defendant in the discharge of his duty under color of his office, in which he demanded, exacted, or took more than was due him, or before it was due him, or whether it was taken as costs, or any other pretended legal purpose coupled with the discharge of his duties as constable. We think this demurrer

was properly overruled. Extortion, as defined by the Code, "shall consist of any public officer unlawfully taking by color of his office from any person any money or thing of value that is not due to him, or more than is due." Penal Code 1910, § 302. Under Penal Code 1910, § 954, "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury." Under our system of criminal pleading, in order that the nature of the offense may be plainly understood by the jury, it is generally sufficient if the offense is stated in the language of the Code; but there are exceptions to this rule, as we pointed out in *Soell v. State*, 4 Ga. App. 337, 61 S. E. 514. At least so far as the rights of the defendant are concerned, the real requisite of a valid indictment, so far as its form is concerned, is that the offense with which the accused is charged shall be so stated as to give him ample opportunity to prepare for his defense. The definition of extortion, as contained in the Code, is extremely simple, and in passing upon the demurrer it is only necessary to inquire whether the case is one which falls under the general rule, where the language of the Code is sufficient to inform the defendant of the nature of the charge against him, and of the transaction in which he is alleged to have violated the law, or whether it comes within the exception, where there must be an amplified statement of details of the transaction, so as not to deprive the defendant of the substantial right of being informed of the nature of the charge against him, and of having an opportunity to defend against it. The indictment described the offense in the language of the Code, and with sufficient additional particularity to fully identify the transaction wherein the accused was alleged to have violated the law.

[5] It is alleged that "the said J. W. Dean, in the county aforesaid, on the 23d day of May, in the year of our Lord 1910, with force and arms, being then and there a lawful constable in and for the 1,422d district, G. M., of Fulton county, Ga., did, by color of his office as such constable, unlawfully take \$3.80 in money from Mrs. W. G. Overby, which was not due him, said money of the value of \$3.80, and the property of Mrs. W. G. Overby." The sum and substance of the objections contained in all the grounds of the demurrer, except the second, comes to the point that the defendant was not told in what particular respect, or what particular transaction, he was violating the law. The second ground alleges the indictment to be defective, because it is not alleged whether the defendant was executing, or pretending to execute, some legal or pretendedly legal paper under color of his office. Under the

Code definition of extortion, if an officer by color of his office (which means using his office as a means to effect his object) obtains money or other thing of value which is not due him, the offense is committed, whether he was executing a legal paper, or even if he was not pretending to execute any paper at all. Under the Code section, one who is an officer and clothed with authority, who uses his office to exact money that is not due him, or more than is due him, may be guilty of extortion, although he may not pretend to be executing any process, and he may be guilty if he extorts such money upon promise not to execute. As to the first, third, and fourth grounds of the demurrer, the office the defendant held is alleged in the indictment, and it is alleged that by color of his office he collected from Mrs. W. G. Overby, upon a given date, a certain sum of money specified in the indictment. The indictment is in the language of the Code, and in this particular instance that language is sufficient to make clear to the jury the nature of the offense charged and the transaction involved.

[2] 2. The definition of extortion is such that the language of the Code is sufficient as the basis of the indictment, provided the facts of the particular transaction are set out, so as to protect the accused from being again put in jeopardy for the same transaction. An indictment for extortion is sufficient when it designates the office held by the accused and states that by color of his office and in his official capacity he unlawfully took a specified sum of money, which was not due him, from a named person.

[3] 3. It is insisted that the conviction of the defendant was unauthorized, because the evidence is undisputed that a levy of the laborer's lien was made upon the property of Mrs. Overby, and that the overplus of the amount actually due by her was returned as soon as the amount could be ascertained. According to the evidence of the prosecuting witness, there was no levy, but merely a threat to levy; and upon the verdict as rendered the testimony of the state upon this subject must be accepted as the truth. According to the testimony of Mrs. Overby, no levy was made; but she was threatened with a levy in pursuance of a laborer's lien, and was informed that she could not give bond. To constitute a levy there must be an actual or constructive seizure of property. The property must have been so far brought under the subjection of the officer that he can exercise control, and does assume to exercise dominion, of it by virtue of his writ. The mere declaration by an officer of an intent to seize property does not constitute a levy. The officer must do some act for which he could be successfully prosecuted as a trespasser, if it were not for the protection afforded him by the writ.

[4] 4. The evidence authorized the verdict

of guilty. It is true there was evidence on the part of the defendant that he did not collect the money, that he did not say anything to Mrs. Overby at all, and that he was merely present with one Hopkins, who was the officer in charge of the fl. fa.; but, on the other hand, as disclosed by the answer, Mrs. Overby swore that the defendant was the person who made the threat of the levy and insisted upon the demand of the money, and the person to whom she paid the money. This raises a distinct issue of fact. The credibility of witnesses is so exclusively within the province of the jury that this court has no jurisdiction to set aside the finding in this case.

Judgment affirmed.

(9 Ga. App. 414)

HOLTON v. STATE. (No. 3,329.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

The numerous exceptions to excerpts from the charge of the court are without merit. The charge is a fair, full, clear, and correct presentation of the law applicable to the issues made by the evidence, and is not justly subject to adverse criticism.

2. CRIMINAL LAW (§ 938*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A new trial should have been granted on the ground of newly discovered testimony. The statutory requirements in support of his ground were fully complied with. The proposed evidence is not merely cumulative and impeaching in character, and is vitally material to the defense, and, if believed by the jury, would probably lead to a different result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2317; Dec. Dig. § 938.*]

Powell, J., dissenting.

Error from Superior Court, Mitchell County; Frank Park, Judge.

Howard Holton was convicted of voluntary manslaughter, and brings error. Reversed.

Davis & Merry, Spence & Bennet, Roscoe Luke, and E. E. Cox, for plaintiff in error. W. E. Wooten, Sol. Gen., F. A. Hooper, J. H. Tipton, and H. C. Dasher, Jr., for the State.

HILL, C. J. Howard Holton was indicted for murder, and was found guilty of voluntary manslaughter. His motion for a new trial being overruled, the case is here for review.

[1] The amended motion for a new trial contains exceptions to numerous excerpts from the charge of the court. It is unnecessary to discuss each one of these exceptions, for we have made a careful examination of them in connection with the evidence and the entire charge, and we find no error in any of them. We have rarely read instruc-

tions that more clearly, fairly, and fully presented all the issues, and have read none less vulnerable to attack. The exceptions to the rulings relating to testimony are also without merit, and a charge on the law of voluntary manslaughter was demanded, under several viewpoints of the evidence. The complaint made in the motion that, after the jury had been charged with the case, three of them separated from their fellows, who continued a consideration of the case while they were absent, in the light of the counter showing made by the state, is unsupported, and clearly not entitled to serious consideration. Indeed, from a very careful consideration of the very voluminous record, we are satisfied that the trial was conducted in all respects without error, and the verdict, under the evidence presented and the law applicable thereto, is fully authorized.

[2] We have concluded, however, that the plaintiff in error is entitled to another trial on the ground of alleged newly discovered evidence. A brief statement of the evidence adduced at the trial, in connection with that which is alleged to be newly discovered, will, we think, clearly show the correctness of this conclusion. The evidence preceding the homicide and up to its actual occurrence is not in conflict. The decedent and the accused, who had been friends, were together at the barber shop of the former. Both men were under the influence of intoxicants. While in this condition they began to throw nickels in the game of crack-a-loo. The decedent won repeatedly, whereupon the accused made some insinuations against the fairness of his play. This was resented by the decedent, who denounced the implication as a "damned lie." The accused thereupon threw his hand in the direction of his hip pocket, and the decedent met this motion by taking a pistol from behind the mirror near his barber chair. The accused relieved the tension of the situation thus produced by an invitation to drink, which invitation was declined by the decedent on the ground that the accused had insulted him by the accusation made as to the fairness of his play. The decedent replaced his pistol behind the mirror, and the accused left the shop, and was absent for about 35 or 40 minutes. He returned to the shop, and, on entering, immediately referred to the differences between the decedent and himself, and intimated to the decedent that he would not repeat outside of the shop what he had said, and invited him to go out into the rear of the shop. The decedent accepted the invitation. The accused held the back door open for him to pass out, and they both went outside.

The evidence as to what occurred on the outside is in conflict. The witnesses for the state testified that the decedent went out with his hands in his pocket, apparently

making no demonstration to draw a weapon of any sort; that immediately after the door was closed they heard the voices of the two men angrily recurring to the incident of the game of crack-a-loo, the accused repeating the insinuation of unfairness in the play by the decedent, and the decedent denouncing the insinuation as a "damned lie," and that this verbal dispute was followed immediately by five shots in rapid succession. The decedent, upon being shot, turned and endeavored to retrace his steps, and in a few seconds fell to the ground. The accused ran away from the scene. Several persons rushed to the scene of the shooting, and found the decedent lying on the ground in the article of death. Near his left hand was found a medium size unopened pocket knife. It may be stated here that there is some contention in the evidence as to whether this pocket knife belonged to the decedent, and as to whether it was in his possession when he was shot; it being claimed by the prosecution that he had no knife in his possession, except a little pearl-handled knife which was found by the undertaker in his vest pocket, and that the knife found had been placed on the ground by friends of the accused, several of them testifying that they made an unsuccessful search for a knife immediately after the killing. The theory set up by the accused is that the knife was the property of the decedent, and they endeavored to account for the fact of its being closed by the insistence that the decedent, after he was shot, either himself closed the knife, voluntarily or involuntarily, or that some of his friends closed it after he had been shot.

There is evidence on both sides of this contention, and the jury were authorized to believe, even from the state's evidence, that the knife was in fact the knife of the decedent. There is no evidence to authorize the inference that it was either closed by the decedent after he was shot, or had been found open and closed by one of his friends; the only rational theory on this point being that the decedent had succeeded in taking his knife from his pocket, and before he had opened the blade one of the shots from the pistol of the accused struck the bone of his right arm near the elbow, and the shock thereby produced caused the fingers to unclasp and the knife to fall to the ground. The testimony for the state fails to disclose the attitude of either man at the exact moment of the homicide. The last seen of the two men by these witnesses was when they were going outside and the decedent then had his hands in his pockets, and the accused had not then drawn his pistol, and the last words heard by them was the angry conversation between the two, followed immediately by a rapid succession of shots, five in number. The decedent was hit three times, twice in the breast, the balls going through his body, one through his heart, and once in

the elbow of his right arm. The other two bullets are not accounted for.

The accused introduced two witnesses to the conduct of the two men at the exact time of the homicide. These two witnesses concur in the testimony that the decedent was advancing on the accused with an open knife; that the accused was backing from him, and warning him not to come on him with the knife, but that he continued to advance, when the accused drew his pistol and shot him. One of these witnesses was a servant of the accused, and had been in his employment for over three years, and ran away with the accused from the scene of the homicide. The other witness was a negro boy related to the first witness, who gave literally the same account. This latter witness was impeached by proof of contradictory statements. The accused, in his statement to the jury, after giving an account of the preliminary incidents, substantially as related in the testimony in reference to the crack-a-loo game and the angry discussion that arose relating thereto, stated that he returned to the barber shop after this dispute for the purpose of getting a half pint of whisky to carry home with him; that he asked the decedent for the whisky, and the decedent went to the rear end of his store and got the half pint, and he paid him for it, and the decedent then asked him to take a drink out of a quart bottle he got out of his desk; that after taking the drink he went to the rear of the shop to get a drink of water; that when he went to the rear end of the shop the decedent came back and renewed the dispute in reference to the crack-a-loo game, referring to the insinuation the accused had made against him that he had taken his money away from him; that the decedent, while talking to him, was standing near the door with his open knife cutting on the side of the door; that the decedent then said to him: "Howard, you are a God damn littler man than I thought you were, to get mad about a nickel," and I said, 'I ain't mad, Jim Bob, but you know you got all the money,' and he said, 'You are a God damn lie,' and I said, 'Jim Bob, don't call me a God damn lie,' and he repeated the epithet, and I said, 'You are another one,' and he then started to me with his knife open in a drawn position and said, 'Take it back.' He was nearly in reaching distance of me, and I began to back off as fast as I could, and I said, 'Jim Bob, don't come on me with that knife,' and he kept coming, and I shot twice to stop him, and stumbled over something, and he continued to rush at me, trying to cut me, when I shot two or three more times as fast as I could, trying to stop him, and when the pistol quit firing, I ran off."

The statement of the accused and the testimony of his two witnesses are in accord, and, if true, would make a case of self-defense. The jury, however, disregarded both the statement and the corroborative evidence,

and accepted the theory of mutual combat as one of the theories arising from a consideration of the state's evidence. This is, in substance, the material evidence both for the state and the defense. While the evidence for the state authorized the verdict, it did not demand it. It was shown that the decedent had his hand in his pocket when he left the shop and went into the rear yard, and it is also shown that he did in fact have a knife. The evidence for the state is silent as to what he was endeavoring to do with the knife, or was apparently endeavoring to do with it, when he was shot; but the direction of the shots show that he was facing the accused, and the rapidity with which he was shot would warrant the inference that the accused felt the pressure of some emergency. As before intimated, it is clear that the shot which struck the arm of the decedent produced a shock which caused the hand to open spasmodically and the knife to drop. This is the theory of the physician, and it is the most rational theory. The shot evidently struck the arm before the decedent had time to open the knife. It does not appear what was the number of this shot. The writer of this opinion is not prepared to hold as a matter of law that a person who sees another advancing on him with a knife in his hand is compelled to wait until the blade is open before he would be authorized to defend himself. It would depend entirely upon the circumstances that appeared to the person at the time he acted—the distance between the two, whether there was an apparent effort to open the blade, the size of the knife, and the character of the assailant. In other words, even from the evidence in behalf of the prosecution the theory of self-defense is not entirely excluded as a rational hypothesis.

Now, in this situation let us briefly set out the testimony alleged to be newly discovered, in order that we may determine whether it is material, and, if credited on a second trial, would probably lead to a different result. It may be stated that the statutory requirements as to preliminary proof in support of this ground of the motion are fully complied with. Ignorance on the part of the accused and his counsel of the existence of this evidence alleged to be newly discovered and inability with reasonable diligence to have discovered and to have produced it at the trial, and the credible character of the witnesses who are relied upon to give the evidence, are all set out in support of this ground of the motion. The affidavits of two white men, farmers living near the town, are presented. The affiants swear that, just shortly before the homicide, they went to the shop of Jim Bob Cochran, the decedent, for the purpose of buying some whisky from him; that on reaching the shop they saw him standing in the door with a pistol in his hand; that they asked him what he was doing with the pistol, and he replied, "I came near killing Howard Holton a minute

ago, and am sorry that I did not do it;" that they asked him what was the matter and he said, "I won a few nickels from him in a crack-a-loo game, and he got mad." One of the affiants then admonished him that that would not do, and he said: "If Howard is so God damn little as to get mad about a few nickels, somebody ought to kill him, and if he ever says anything else to me about it I will cut his throat." One of the affiants then expressed the hope that there would not be any trouble, and Cochran said: "I am not going to have any trouble. I will just cut his throat and pay for it."

The persons who make this affidavit are accredited by 16 citizens of the county as men of good character and worthy of belief, who frequently visit the town of Camilla and are well known to them. It will be seen that this testimony is in no sense cumulative. It certainly would be competent and admissible for the purpose of showing the *quo animo* of the decedent just before the homicide, and would be material, and would strengthen the defense relied upon. It would also strongly corroborate, not only the testimony of the two negro witnesses, who were not believed by the jury on the trial (because they were impeached both by contradictory statements and by the fact that one of them was the servant of the accused and the other related to that servant), but would also strongly corroborate the statement of the accused as to what did occur at the time of the shooting.

Another affidavit produced in support of this ground of the motion was made by one who stated therein that he witnessed the shooting; that he was in a grocery store near the barber shop of the decedent, and heard some one say, "Don't come on me with that knife;" and that, looking to his left, he saw, about 20 feet away, Jim Bob Cochran advancing on Howard Holton with an open knife in his hand, and saw Holton back off some distance, and Cochran going on him with his arm drawn as if attempting to cut him, and then saw Holton shoot Cochran and run off, and then saw Cochran turn and walk back towards his barber shop and fall on his face.

This testimony would be of vital importance to the defense, and, if the jury believed it to be the truth of the transaction, it would probably cause a different result on a retrial, especially when considered in connection with the other alleged newly discovered testimony just considered, and also in connection with the testimony of the two witnesses for the defense and with the defendant's statement, being strongly corroborative of both. It is in a sense cumulative; that is, it is additional evidence to support the same facts which were set out on the trial. The rule is well established—indeed, it is the language of the statute of this state—that new trials should not be

granted for evidence merely cumulative in character. The adverb "merely," in the statute and in the decisions, as qualifying the character of the evidence, is significant. We apprehend that, if the newly discovered testimony as to some facts was that of a witness who was entitled to credit as against the testimony to the same point given by witnesses on the trial who were not entitled to credit, or who had been impeached, the testimony would not be merely cumulative; for the additional fact of the character of the newly discovered witness would take it out of that category, at least to some extent, and it is easy to imagine cases in which a fact, although testified to by many witnesses on the previous trial, while not believed because of the character of the witnesses who testified to its existence, yet might be believed without hesitation, if, on a second trial, it was testified to by only one witness of unquestioned and unimpeached veracity.

The state made a counter showing as to the alleged testimony of this proposed witness. Affidavits are produced which attack the general character of the proposed witness, and affidavits are produced tending to show that he was not present and did not witness the difficulty, as he swears. But this affiant's character is sustained by a half dozen citizens of the county, who swear that his character is good and that he is worthy of belief, and that he worked in the store near the barber shop of Jim Bob Cochran, the decedent. The weight of the testimony of this proposed witness would therefore be an issue to be determined by the jury. They would be authorized to believe him worthy of credit. And in view of the character of the defendant's witnesses who testified to what occurred at the time of the killing, and the very reasonable hypothesis that they were not worthy of credit because of their relationship to the accused, we think he is entitled to have the question of this proposed witness' veracity passed upon by a jury, because the proposed testimony is so vital to his rights under the law.

We are perfectly aware that courts are very reluctant to grant a new trial on the ground of newly discovered evidence, and of the well-settled rule that applications of this kind are necessarily directed largely to the discretion of the trial court, and great weight should be given to the judgment of that court with reference to them, and we thoroughly concur in the opinion universally expressed by courts as to the suspicious and unreliable character of applications for new

trial on this ground. Public policy demands that when a case has once been fairly and fully tried, and a reasonable opportunity afforded both parties to present all their evidence, it should remain forever at repose. There are cases, however, in which great injustice might result if a party should be denied the benefit of newly discovered evidence. No fixed standard can be established for the measurement of every case, and no iron-bound, inflexible rule supplied; but each case must be governed by the circumstances surrounding it. After all has been said and written on the subject, it seems to us that the true rule is this: If the evidence is in fact newly discovered; if it is material to the rights of the party making the application, and not merely cumulative; if he could not with reasonable diligence have discovered and produced it at the trial—justice and the law demand another trial; for, if the newly discovered testimony is in fact material, it can only be material because it would tend to strengthen the defense relied upon, and would therefore probably lead to a different result.

After giving this ground in the present case a most careful consideration we are satisfied that it measures fully up to these essentials, and that the accused is entitled under the law, as well as in furtherance of justice, to have an opportunity of presenting this new evidence which is of vital materiality to his defense; and we are strengthened in this view by the fact that, although justifiable homicide in self-defense was relied upon at the former trial, it was supported by witnesses whom the jury were fully authorized to discredit, because of their character and relationship to the accused. Solely for the reasons above discussed, we are constrained to reverse the judgment of the lower court in overruling the motion for a new trial.

Judgment reversed.

POWELL, J. (dissenting). I regret that I cannot agree with my colleagues as to a reversal because of the newly discovered evidence. Personally my sympathies nearly always go out to the defendants in criminal cases, and they go out to this defendant; but as a judge I do not believe that I can honestly say that the trial judge misjudged the importance of the alleged newly discovered testimony and abused his discretion in refusing a new trial. I am very reluctant to grant new trials for newly discovered evidence, unless it be of considerable importance.

(9 Ga. App. 480)

DAVIS v. STATE (No. 3,862.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. DEDICATION (§ 5*)—HIGHWAYS (§§ 21, 18, 1*)—ESTABLISHMENT OF HIGHWAY—LEGISLATIVE ENACTMENT—STATUTORY PROCEEDINGS—PRESCRIPTION—ACCEPTANCE OF DEDICATION.

The fact that a road is a public highway may be proved (1) by showing that it was made such by legislative enactment; (2) that it was regularly laid out and established as such by the proper authorities; (3) by showing dedication by the owner of the soil and acceptance by the public for the purpose of a highway; (4) by prescription.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 2; Dec. Dig. § 5;* Highways, Cent. Dig. §§ 37, 25, 1; Dec. Dig. §§ 21, 18, 1.*]

2. DEDICATION (§ 37*)—ACCEPTANCE—SUFFICIENCY.

Where the fact of dedication and acceptance is relied on to show that land used as a road is a public highway, the dedication as well as the acceptance may be either express or implied. If the owner of the soil, either by direct language or by express conduct (such conduct as opening up the property as a public street), offers to dedicate it, the element of acceptance is supplied whenever the property is used for such a length of time that the public accommodation or private rights would be materially affected by an interruption of the enjoyment. Where the dedication is implied only, or where it rests upon mere acquiescence of such a nature as to indicate consent, the public use and keeping up of the road as a highway must continue for as long as seven years before the road becomes a legally established public highway.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73-74; Dec. Dig. § 37.*]

3. HIGHWAYS (§ 6*)—ESTABLISHMENT—PRESCRIPTION.

A prescription may be gained as to a public highway, against the consent of the owner, by the public use and working of the same as such for the period of 20 years, or, if the public use and occupancy be under color of written title, within 7 years.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 8, 9; Dec. Dig. § 6.*]

4. HIGHWAYS (§ 6*)—ESTABLISHMENT—PRESCRIPTION—CONTINUITY OF OCCUPATION.

Where prescription is relied on to establish a highway, alleged to have been acquired contrary to the consent of the owner, the element of continuity is involved, and the public use of the highway must exist continuously throughout the period specified in the preceding headnote. However, there is such privity between the municipal authorities of an incorporated town and the county authorities of the county in which the town is situated as that the public occupancy of the one may be tacked to the public occupancy of the other, in order to make out a prescription, where the continuity is not otherwise broken.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 8, 9; Dec. Dig. § 6.*]

5. DRUNKARDS (§ 11*)—EVIDENCE—PLACE OF OFFENSE.

Where drunkenness on a highway is charged, it is permissible for the state to show that the accused was acting disorderly, and in a manner indicative of insobriety upon places adjacent to the highway, at or about the same time it is alleged that he was drunk upon the highway.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. § 18; Dec. Dig. § 11.*]

(Additional Syllabus by Editorial Staff.)

6. DRUNKARDS (§ 11*)—CRIMINAL DRUNKENNESS—ELEMENTS OF OFFENSE—EXISTENCE OF HIGHWAY.

The offense of being drunk on a public highway being strictly statutory, it is necessary for the state to show, not merely that the accused was drunk on some road or passageway over which the public might more or less pass, but that the road was at the time a public highway within the legal meaning of the term.

[Ed. Note.—For other cases, see Drunkards, Dec. Dig. § 11.*]

Error from City Court of Sparta; R. W. Moore, Judge.

Newsome Davis was convicted of being drunk on a public highway, and brings error. Affirmed.

Burwell & Fleming and R. H. Lewis, for plaintiff in error. R. L. Merritt, Sol., for the State.

POWELL, J. [8] The accused was convicted of being drunk on a public highway. The offense is strictly statutory, and it is necessary in the prosecution thereof for the state to show, not merely that the accused was drunk upon some road or passageway over which the public might more or less frequently pass, but that the road was, at the time of the offense, a public highway, within the legal meaning of the term. *Johnson v. State*, 1 Ga. App. 195, 58 S. E. 265.

[1] A public highway may be created in either of four ways: (1) By legislative enactment; (2) by its being regularly laid and established as such by the proper authorities; (3) by dedication; (4) by prescription. In the present case it was conceded that there was no proof that the road in question had been established as a public highway by legislative enactment, or through its having been laid out by proper authorities. Dedication and prescription were relied upon. A witness who had lived in the community about 35 years testified that the road had been there practically as long as he had; that it had been publicly used for more than 20 years; that when the town of Culverton was incorporated, the municipal authorities worked it; and that when Culverton was not incorporated and after its charter had been repealed, the county worked it and kept it up. The point is made that the road was not registered as a public road under Civil Code 1910, § 636 et seq.; but as will be seen by reference to section 639, these provisions are not applicable, except in certain counties, upon recommendation of the grand jury.

[2] 2. Where dedication is relied on, both dedication and acceptance must be shown. *Healey v. Atlanta*, 125 Ga. 736, 54 S. E. 749. The dedication or the acceptance may be either express or implied. If the dedication is express, as where the owner of the soil grants the property to the public use, or where he himself lays it out as a street and devotes it to public use, and the same is so

used for such a length of time that the public accommodation or private rights would be materially affected by an interruption of the enjoyment, dedication and acceptance become complete, even though the period be less than seven years. Civil Code 1910, § 4171. If the dedication is implicit only, as where the consent of the owner to the use of his land as a highway is implied from his conscious acquiescence, the public use and enjoyment must exist for as long as seven years before dedication and acceptance become complete. *Johnson v. State*, supra, citing *Healey v. Atlanta*, supra. The title of the public, so to speak, to the use and occupation of the road in cases of this character, is based on a form of prescription, as that word is used at common law, but not as it is used in the Code of this state. Through our Code we have adopted acquisitive prescription to lands from the civil law, and in such cases adverseness of possession is a requisite and permissive possession cannot be the foundation thereof; but we have still retained the common-law notion of prescription as to easements and incorporeal rights, and as to this form of prescription the implied consent of the landowner is an essential element. Cf. *Whelchel v. Gainesville Ry. Co.*, 116 Ga. 431 (5), 42 S. E. 776.

[3] 3. Through the use and occupancy of a road as a highway, in the nature of adverse possession, the public can convert the road into a public highway, without the consent, actual or implied, of the owner. "Where there is no intention to dedicate, but the public has taken possession of the property of an individual, and used and maintained it as a highway for a period of 20 years or more, a highway by prescription becomes complete." *Healey v. Atlanta*, supra. By analogy to our Code provisions relating to the acquisition of prescriptive title to land, the rule would seem to be that it takes 20 years of continuous use and occupancy of a public road as a highway in order to extinguish the title of the landowner and to perfect the title of the public, in cases where the use and occupancy has not been under color of title; and by the same analogy, it would seem that if some one, not the true owner, should in writing attempt to convey or to dedicate the property, continuous, bona fide, adverse use and occupation of the property under this writing for a period of 7 years would be sufficient. See Civil Code 1910, §§ 4168, 4169.

[4] 4. Continuity of use and occupancy is always an essential element of adverse possession and where an attempt is made to show that the public has acquired highway rights over land by the use, occupation, and working of it as a public road, and no consent actual or implied, of the owner is shown it is necessary to show that the use and occupancy and other acts by which the public have appropriated the property as a highway have been continuous throughout

the one or the other of the periods of time (as the case may be) mentioned in the preceding division of this opinion. In this case the point is made that this continuity was broken by reason of the fact that within the period of 20 years relied on this highway had been included within the corporate limits of the town of Culverton, whereupon the county authorities ceased to work it as a public road and the municipal authorities worked it as a public street, and that thereafter, the charter of Culverton having been repealed, the county authorities again began to work it as a public road. Counsel for the plaintiff in error say, therefore, that inasmuch as the county authorities had never acquired a prescriptive title prior to the time of the incorporation of the town of Culverton, and inasmuch as 20 years has not elapsed since the charter of Culverton was repealed, 20 years' continuous possession has not been shown.

While continuity of possession is an element of adverse possession, still this element of continuity need not exist as to any one person or corporation, public or private; but all such periods of possession as are in community of interest and are not adverse to each other may be tacked. There is such a community of interest, such a privity, so to speak, between the municipal authorities of an incorporated town and the county authorities of the county in which the town is located as to such county roads as by reason of the incorporation of the town become city streets and as to such streets as, upon the repeal of the charter of the town, cease to be city streets and become county roads, as that the use and maintenance and working of the highway by the two may be tacked where the element of continuity is not otherwise lacking. It must be remembered that the duty of opening and maintaining highways is a function of the state itself, and that, when the Legislature authorizes this function to be performed by counties or municipalities, it is still the state indirectly performing a duty which it would have the right to perform directly, so that there is some analogy between the successive acts of use and occupation performed as to a highway by a county and a municipality and the successive occupancies of tenants of the same landlord; and, of course, as to the ordinary acquiring of title by adverse possession no break of continuity ensues when one tenant moves out and another tenant of the same landlord moves in. We think that in the present case there was ample evidence to show that the road in question was a public highway in the legal sense of the word.

[5] 5. The court permitted the state's counsel to show that on the day in question the accused was cursing, fighting, and otherwise acting disorderly upon private premises adjacent to the highway, and counsel for the accused moved to exclude this testimony on

the ground that the charge was drunkenness upon the highway, and that these acts elsewhere committed were not relevant. We cannot concede the correctness of this contention. One of the issues was whether the defendant was drunk or not. Indeed he admitted that he had been drinking somewhat, but contended that he was not drunk. We think that the light shed upon the transaction by this testimony as to what he did at other places about the time when he appeared on the highway showed, not only that he was drinking somewhat, but that he was "gloriously and hilariously" drunk, and, what is more important that he was "cussingly and fightingly drunk." He acted as no sober man would have been at all likely to have acted.

Judgment affirmed.

(9 Ga. App. 356)

GRAY v. OGLESBY. (No. 2,970.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

BILLS AND NOTES (§§ 489, 475, 473, 497*)—ACTION ON NOTE—INDORSEMENT—PLEA OF NON EST FACTUM—BURDEN OF PROOF.

Where the plaintiff sues as the transferee of a note, and then shows in evidence the note with the transfer regularly written thereon, he does not have the burden of proving the execution of the indorsement, unless the defendant has filed a plea of non est factum as to the indorsement. A plea that the transfer was fraudulently made is not equivalent to a plea of non est factum. The title of the holder of the note cannot be inquired into, except for the purpose of letting in defenses. It is permissible for the defendant to plead defenses to the note, and to plead in addition thereto that the title of the holder of the note was not taken in good faith. But in such cases, where the holder appears to have taken the note by regular transfer before its maturity, the burden is upon the defendant to establish not only his defense, but also the bad faith attendant upon the plaintiff's taking the title.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1611, 1514, 1507, 1675-1681; Dec. Dig. §§ 489, 475, 473, 497.*]

Error from City Court of Nashville; W. D. Buile, Judge.

Action by Z. W. Oglesby against J. P. Gray. Judgment for plaintiff, and defendant brings error. Affirmed.

J. P. Knight, for plaintiff in error. Branch & Snow, for defendant in error.

POWELL, J. Oglesby sued Gray upon a promissory note. The note was originally payable to Oglesby & Cozine, alleged to be a partnership composed of Z. W. Oglesby, Jr., and John W. Cozine; but on the back was an indorsement in their name transferring the note to Z. W. Oglesby, the plaintiff. The plaintiff claimed to be a bona fide holder for value. The defendant set up that there had been a failure of consideration, and that the

note had been fraudulently transferred for the purpose of cutting off his defense, and that, while Z. W. Oglesby was nominally the holder, it was really owned by Oglesby & Cozine, or by Z. W. Oglesby, Jr. Upon the trial of the case, the plaintiff introduced the note in evidence, and the transfer referred to was on the back of it. The defendant attempted to prove that Z. W. Oglesby, Jr., had acted as if he were the owner of the note, after the date of the alleged transfer, by reason of his having undertaken certain negotiations in reference thereto, as if he were the owner. The court excluded this testimony, and no further evidence was introduced by either party. The court then directed a verdict for the plaintiff for the amount of the principal and interest.

The plaintiff in error, the defendant in the court below, insists that the judge should not have directed the verdict, but should have submitted to the jury the question as to whether Oglesby, Sr., was the owner of the note, or whether it belonged to the firm of Oglesby & Cozine; that, as the plaintiff alleged that he was the transferee of the note in good faith and for a valuable consideration, he did not make out his case, in the absence of affirmative evidence on this subject. In the brief of counsel it was also contended that the court should not have directed the verdict, because there was an issue as to the liability of the defendant for attorney's fees; but, as the court eliminated the attorney's fees in his direction of the verdict, this point is not well taken. "The title of the holder of a note cannot be inquired into, unless it is necessary for the protection of the defendant, or to let in the defense which he seeks to make." Civil Code 1910, § 4290. "An indorsement or assignment of any bill, bond, or note, when the same is sued on by the indorsee, need not be proved unless denied on oath." Civil Code 1910, § 4299.

In this case the defendant did not deny the execution of the indorsement or transfer on the back of the note, but set up that it was an invalid indorsement, because fraudulently made. Section 4299, quoted above, has reference to cases where a formal plea of non est factum is filed as to an indorsement; hence the plea in the present case was inadequate to put the plaintiff to proof of the execution of the transfer. When the note containing the indorsement or transfer was introduced in evidence, its factum appeared with legal sufficiency. The defendant's plea, however, was not without legal purport. It set up a defense good against the original payee, and then set up the fact that the plaintiff's title to the note was infected with bad faith. Hence to take the plea as setting up the truth of the case would make section 4290, supra, applicable. But under such a plea the burden is on the defendant, not merely to impeach the bona fides of the

plaintiff's title to the note, but also to establish his defense. In this case, even if we concede that the evidence which was excluded would have tended to affect the bona fides of the plaintiff's title to the note, there was no evidence offered as to the other essential thing, namely, that the defendant had a defense to the note. With the evidence in this shape, there was nothing left for the court to do but to direct a verdict for the plaintiff.

Judgment affirmed.

(9 Ga. App. 403)

SMITH v. STATE. (No. 3,236.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§ 255*)—EVIDENCE—SUFFICIENCY—VOLUNTARY MANSLAUGHTER.

The evidence, though conflicting, authorized the verdict rendered.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 255.*]

2. HOMICIDE (§§ 218, 221*)—EVIDENCE—DYING DECLARATIONS—DETERMINATION AS TO ADMISSIBILITY—EFFECT.

The admissibility of dying declarations is only prima facie a question for the court. After testimony as to the statements of the deceased is admitted, it is for the jury to determine whether they were in fact made by him when he was in the article of death and when conscious of his condition, so as to make them dying declarations. Even when the jury is satisfied that the statements attributed to the deceased were made by him, and that he was at that time in a dying condition and conscious of that fact, they should still be received with great care and weighed with caution.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 458, 459, 463, 464; Dec. Dig. §§ 218, 221.*]

3. HOMICIDE (§§ 205, 207, 203*)—EVIDENCE—"DYING DECLARATIONS"—SENSE OF IMPENDING DEATH.

The admissibility of dying statements attributed to a deceased person is not affected by the fact that the statements may have been elicited in response to questions put to him by a bystander; nor does it matter how or by what means the deceased becomes conscious that he is dying, provided he is really conscious of that fact and impressed with the solemnity of his situation. The circumstances under which one mortally wounded might be apprised of his dying condition, as well as the fact that he made his statements in response to questions, or under other circumstances, may affect the credibility of the alleged statements; and the jury, in the light of the facts and in the exercise of the caution required by law, would have the right to accept them as true, or to reject them as unworthy of credit, because they might be considered due to outside influence, or because made in a spirit of revenge, or because made under such circumstances that the declarant was either unable to state the facts or unwilling to do so.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 439, 430-437; Dec. Dig. §§ 205, 207, 203.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2297, 2298.]

(Additional Syllabus by Editorial Staff.)

4. CRIMINAL LAW (§ 1092*)—APPEAL—RECORD—EXCEPTION—APPROVAL BY TRIAL JUDGE.

The Court of Appeals cannot consider an exception which is not approved by the trial judge.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.*]

5. CRIMINAL LAW (§ 1092*)—NEW TRIAL—PROCEEDINGS TO PROCURE—STRIKING OUT GROUND OF MOTION.

A ground of motion for new trial that the judge erred in failing to instruct the jury as to the law governing the consideration of dying declarations should not be stricken out by the judge, but should either be approved or disapproved as untrue.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.*]

Error from Superior Court, Oglethorpe County; D. W. Meadow, Judge.

John Smith was convicted of voluntary manslaughter, and brings error. Affirmed.

E. P. Shull and Joel Cloud, for plaintiff in error. Thos. J. Brown, Sol. Gen., for the State.

RUSSELL, J. [1] 1. The plaintiff in error was indicted for the offense of murder and found guilty of voluntary manslaughter. The evidence in his behalf would have fully justified the jury in acquitting him; but, on the other hand, the evidence on the part of the state, if it was more credible to the jury, fully authorized the result which was reached. A very large number of witnesses testified on each side of the issue; but the testimony of each witness accorded in the main with that of all of his fellows on the same side, and was in conflict with the testimony of all the witnesses in behalf of the opposite party. The case is that of a killing where a large gathering was assembled, and where one set of witnesses saw the transaction in one light, and another testified to an entirely different state of facts. It was for the jury to resolve the conflict.

[2] 2. The only assignment of error which really presents anything for our consideration is that which relates to the admissibility of certain statements of the deceased admitted as dying declarations. It appears that Jim Morris, the deceased, was an employé of the prosecuting witness, Lee Calloway. It is argued that in consequence of this relationship Calloway exercised a great, if not a controlling, influence over the deceased, and that, as Calloway told the deceased that he was going to die before the latter made the alleged dying declarations, and as they were elicited by Calloway's questions, they should have been excluded from the consideration of the jury. An additional objection to the testimony was that a proper foundation for its admission was not laid prior to its introduction. Calloway's tes-

timony was very brief. He said: "I knew Jim Morris. I saw him after he was dead. He lived on my place. I saw him about 9 o'clock at night. He died some time during the night. He told about the difficulty between him and John Smith, when he got shot. I think he knew he was going to die. I told him I thought he was going to die. He said he thought so too. I told him I would like for him to tell me exactly what occurred there. I went down there as soon as I got my supper. He was not in pain then. He was lying on the bed, breathing very hard. He didn't discuss his death. He said he was dancing on the head, and John Smith came on and took his place, and that July asked him if he was shooting at him. He said, 'No,' and Jim asked him if he was shooting at him, and he took out his pistol and shot him. He told me that from the first. He was very thin then. I suppose he was about 5 feet 11. I suppose he would weigh about 145 pounds. I first told him I thought he was going to die, and told him to tell me what occurred."

Under this testimony we think the statements attributed to the deceased were prima facie admissible as dying declarations. "Dying declarations, made by any person in the article of death, who is conscious of his condition, as to the cause of his death and the person who killed him, are admissible in evidence in a prosecution for the homicide." Penal Code 1910, § 1028. The admissibility of dying declarations is only prima facie a question for the court. After the testimony as to the statements of the deceased is admitted, it is for the jury to determine whether they were in fact made by him when he was in the article of death and when conscious of his condition, so as to make them dying declarations. Even when the jury is satisfied that the statements attributed to the deceased were made by him, and that he was at that time in a dying condition and conscious of that fact, they should still be received with great care and weighed with caution.

In the present case the objection to the testimony, if any, should have been addressed to the jury, instead of to the court, and placed upon the ground that the circumstances under which the statements were made were such as to rob them of that sanctity which is equivalent to the administration of an oath. Three things must be shown to render statements admissible as dying declarations within the meaning of the law: (1) That the deceased made the statements; (2) that he was in a dying condition; and (3) that he was conscious of that fact. The existence of the two latter requisites should be ascertained and determined before any inquiry is made into the nature of the statements themselves; but in this case the witness was permitted to testify, and then a motion was made to exclude the testimony as a whole. Address-

ing ourselves as the trial judge had to do, to the question as to whether Jim Morris was in a dying condition and conscious of that fact, it must be remembered that both of these facts are susceptible of proof by circumstantial as well as by direct evidence. That he was in a dying condition might be determined in the first instance by the court, and subsequently by the jury, from the fact that Calloway talked with him about 9 o'clock at night, and that he was dead before daylight; and likewise it was inferable from the statements of the deceased that he, too, thought that he was going to die and that he was conscious of his condition. We do not say that the fact that the deceased stated he thought he was going to die necessarily compelled a conclusion on the part of the jury that he really believed he was going to die, but certainly the judge, in determining as to the admissibility of the testimony, could not adjudge that the deceased falsely stated this opinion.

[3] 3. So far as the admissibility of this testimony is concerned, the fact that Calloway told Jim Morris that it was his opinion that Morris was going to die, before Morris expressed any opinion upon that subject, is without any legal significance, though this circumstance might detract from the weight the jury might give to the statement attributed to Morris. If the jury thought that the declarant's statement that he, too, thought he was going to die was for any reason untrue, they would, of course, reject all statements made by him upon the ground that, it not being shown that the deceased was really conscious that he was going to die, the sanctity of an oath could not be dispensed with. On the other hand, if satisfied that the witness really thought and believed that he was soon to die, the jury could consider the statements as being in the nature of a dying declaration, but could still test the credibility of the statements by other circumstances, similar to those which might affect the credibility of any witness. Were the statements of the deceased, even though he was dying and conscious of that fact, influenced by the controlling mind of another, or colored by the character of the questions put to him, or actuated by revenge, or unreliable because of physical or mental weakness, or because of ignorance as to facts which he purported to relate? The admissibility of a dying declaration is one thing; the weight to be attached to it another and entirely different thing. The admissibility of such evidence is an exception to the general rule. Its admissibility is to be twice tested—first by the court, and finally by the jury. Ordinarily the court alone tests the admissibility of testimony, and the jury is only to say whether it believes or disbelieves such testimony as the court submits to it. Dying declarations, however, belong to that class of testimony which, even after the court has held it to

be prima facie admissible, it is still within the power of the jury to disregard. The reason lies in the fact that, if there is any evidence that the deceased was at the time of his statement in a dying condition and conscious of that fact, not only should the credibility of the statement be submitted to the jury, but also the issue as to whether it was in fact a dying declaration; and not only is it within the power of the jury to discredit the statements attributed to the deceased, even if convinced that they were made under circumstances which the law holds to be equivalent to the sanctity of an oath, but the jury may find, upon a review of all the facts and circumstances, that at the time the statements were made the deceased was not in a dying condition, and that, even if he was in a dying condition, he was not conscious of that fact. So much as to the admissibility of dying declarations.

Even, however, if the jury in any case should find it to be its duty to consider the dying declarations as a part of the testimony in the case, they should be received with the utmost caution. It is to be borne in mind that the author of this testimony is not subject to cross-examination; that, like all other human beings, he is subject to the influence of passion and revenge; that his physical condition may militate against a clear statement of what actually occurred; or that he may be giving expression rather to his opinion as to what occurred than to facts actually resting in his knowledge. The only point made in the assignment of error of which we are now treating is as to the admissibility of the testimony, and as to this we think the views we have expressed are amply supported by previous rulings in this state. In *Dumas v. State*, 62 Ga. 59, it was held: "That declarations, offered in evidence as dying declarations, were made under the belief that the wound was mortal and death impending, may be inferred from the nature of the wound and other circumstances, though nothing direct was said respecting death or danger. The court must judge of the preliminary evidence in the first instance, and, deeming it prima facie sufficient, should admit the declarations to the jury, instructing the jury afterwards to pass finally for themselves on the question whether or not the declarations were conscious utterances in the apprehension and immediate prospect of death." To the same effect are the rulings in *Young v. State*, 114 Ga. 849, 40 S. E. 1000, and *Bush v. State*, 109 Ga. 126, 34 S. E. 298, as well as in numerous other cases which might be cited. The ruling in *Robinson v. State*, 180 Ga. 362, 60 S. E. 1005, which is cited by learned counsel for the plaintiff in error, has no application to the point raised

in the present record. In that case the error of the trial judge consisted in charging that, when a man is conscious that he is dying or about to die, and has received a mortal wound from which of necessity he must die, the law presumes that statements made by him in view of approaching death are true. Of course, this charge was disapproved, and it is manifest error for the reason, to which we have already adverted, that the jury must determine, with great caution, whether the statements of the deceased are true, even after they have found that they are dying declarations.

[4] 4. It is stated by counsel for plaintiff in error in their brief that there was incorporated in the motion for a new trial a ground in which it was alleged that the judge erred in failing to instruct the jury as to the law governing the consideration of dying declarations. It is stated that this ground of the motion was stricken by the presiding judge, and we are referred to the charge of the court as embodied in the record as evidence of the fact that this objection to the charge is well sustained. Nothing is better settled than that this court cannot consider an exception which is not approved by the trial judge.

[5] If there was in fact such a ground of the motion for a new trial, it should not have been stricken by the judge. It should either have been approved and certified to be true, or disapproved as untrue. This is the proper practice, for the reason that the motion for new trial is the handiwork and property of the movant, and, though its value may be entirely dependent upon the approval of the trial judge, his only duty is to disapprove statements of fact which are untrue, and approve those which are true, either unqualifiedly or with such qualifications as will make the truth apparent. We have said this much in regard to the matter only because we know that the upright judge who presided at this trial is incapable of doing any one an injustice, and yet, as our attention has been several times directed to similar instances in other cases, we have thought it best to use this occasion to call the attention of our brethren of the trial bench to a practice more proper than that which has sometimes prevailed even without criticism. As was held in *Denton v. State*, 6 Ga. App. 3, 63 S. E. 1182, it is the duty of the judge to point out distinctly to the jury that they should observe caution in the use of dying declarations, and failure to do this is ground for a new trial. However, the exception that the verdict is contrary to law is not sufficient to present the point.

Judgment affirmed.

(69 W. Va. 244)

STATE v. HARRIS.

(Supreme Court of Appeals of West Virginia.
April 25, 1911. Rehearing Denied
June 17, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 918*)—NEW TRIAL—DISQUALIFICATION OF JUROR.

The general rule, inhibiting allowance of a new trial for matter constituting a principal cause of challenge to a juror, existing before the juror was elected and sworn, unknown to the complaining party until after verdict, not disclosed on a thorough voir dire examination, and undiscoverable by the exercise of ordinary diligence, unless it appears from the whole case that the complainant suffered injustice by reason of the disqualification, applies in criminal cases and to disqualification by reason of relationship to the prosecuting witness.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 918.*]

Poffenbarger, J., dissenting.

Error to Circuit Court, Marshall County.

Melvin Harris was convicted of unlawful shooting, and brings error. Affirmed.

D. B. Evans and James T. Miller, for plaintiff in error. Wm. G. Conley, Atty. Gen., and J. O. Henson, Asst. Atty. Gen., for the State.

POFFENBARGER, J. Melvin Harris, convicted of unlawful shooting, complains of the verdict principally on the ground of the disqualification of one of the jurors, by reason of his relationship to the wife of the prosecuting witness. The juror was examined as to his qualification and denied relationship, but it was ascertained, after verdict and before judgment, that it existed. Numerous affidavits were taken in support of the motion for a new trial, tending strongly to prove that he was not ignorant of the disqualifying fact. His affidavit, still protesting his ignorance thereof, was filed in resistance of the motion. Rulings of the court on certain instructions are also complained of.

The general rule applicable to motions for new trials, based upon disqualification of jurors, is stated by Judge Snyder in *Flesher v. Hale*, 22 W. Va. 44, as follows: "The verdict will not be set aside for objections to jurors on grounds which existed before they were sworn, unless it is made to appear that, by reason of the existence of such grounds, the party objecting has suffered wrong or injustice." This has been applied in cases in which jurors would have been excluded because of their having made up and expressed opinions as to the guilt or innocence of prisoners had they admitted the fact on their voir dire examinations. *State v. McDonald*, 9 W. Va. 456; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757; *State v. Greer*, 22 W. Va. 800; *State v. Howes*, 28 W. Va. 110; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224. It was also applied in one case in which a

juror was disqualified by relationship, a fact not known to the prisoner before the trial, denied by the juror on his examination, and afterwards discovered. *State v. Williams*, 14 W. Va. 851. A like application of the general rule has been made by some courts of other states. *State v. Congdon*, 14 R. I. 458; *Traviss v. Commonwealth*, 106 Pa. 597.

Relationship is a common-law disqualification, and the principle upon which it stands is very similar to that under which persons interested on one side or the other of a controversy are excluded. Its natural tendency and effect is to create bias and partiality in favor of the related party, and it is a maxim of the law that triers of questions of fact must be impartial and unbiased. For this reason, relatives to parties to trials are not permitted to act as jurors. On the same principle, the Constitutions and statutes of some states prohibit them from sitting as judges to ascertain and apply the law to the facts, a matter as to which errors are correctible by appeal. It is a personal disqualification, based upon the most harmful and insidious element conceivable. "Blood is thicker than water;" and it is utterly impossible for any person to determine how far the judgment or action of a person affected by it may be swayed or controlled. It operates upon the mind and heart of the individual secretly and silently. Its operation is not disclosed by any outward manifestation other than the result. It is utterly impossible to look into a man's mind and see its operation. Its effect is not general, like many other disqualifications. It is purely personal, operating between the related parties and to the prejudice of all others. In this respect it is wholly unlike many other disqualifications, relating to the character and standing of the juror, such as age, lack of citizenship, residence, or property qualifications. A man disqualified in any of these particulars may nevertheless be intellectually and morally as suitable and desirable as any other man not so affected. But one who has an interest in the subject-matter of the litigation or is related to one of the parties is palpably and wholly unfit for service as a juror. His disqualification is particular, not general, and extends into the litigation itself. For these reasons, it seems to me it ought to be excepted from the general rule, and in some states it is sufficient to set aside a verdict, if unknown to a prisoner who has not waived it by lack of diligence. *Smith v. State*, 2 Ga. App. 574, 59 S. E. 311; *State v. Williams*, 9 Houst. (Del.) 508, 18 Atl. 949; *Hudspeth v. Herston*, 64 Ind. 133; *Pearcy v. Ins. Co.*, 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673; *Coal Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214; *Gardner v. Arnett* (Ky.) 50 S. W. 840; *Tarpey v. Madsen*, 28 Utah, 294, 73 Pac. 411; *Bailey v. McCauley*, 13 A. & E. 815; *Jewell*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

v. Jewell, 84 Me. 304, 24 Atl. 858, 18 L. R. A. 473; *Cameron v. Railway Co.*, 32 Ont. 24. In *State v. Williams*, 9 Houst. (Del.) 508, 18 Atl. 949, the court said: "By the common law (and we have no statute on the subject) any one related by blood or marriage, as remotely as the ninth degree even, to a party in a trial, is subject to challenge propter affectum—that is, on account of the likelihood or suspicion of bias or prejudice—and no evidence to the contrary will be heard. The fact constitutes disqualification. It is evident, therefore, that an impartial trial, in contemplation of law in civil cases, cannot be had where such kinship exists, nor by the Constitution in criminal cases, treating the victim as in the light of a party." A valuable note to *Jewell v. Jewell*, 18 L. R. A. 473, shows the distinction here insisted upon has been made in many courts. The annotator says: "The want of purely statutory qualifications, such as citizenship, age, property, etc., which do not go to make up the necessary qualities to enable a juror to perform his duty with intelligence and impartiality, have never been treated with the same strictness as objections for bias, criminality, and like causes." He then cites a long list of cases to sustain this obviously reasonable and just proposition.

In classing disqualification on account of relationship and interest with others, this court has never at any time discussed their peculiarity in respect to nature and character. In *State v. Williams*, 14 W. Va. 851, the court followed *State v. McDonald*, 9 W. Va. 456, involving a disqualification of an entirely different kind, without any inquiry whatever as to whether the rule ought to be the same in the two classes of cases. Moreover, the assignment of error based upon it in that case was disposed of in a single short paragraph. Its summary disposition may be due to the fact that a new trial was granted upon other grounds; wherefore it was unnecessary to give the assignment extensive and careful consideration. In *Traviss v. Commonwealth*, 106 Pa. 597, in which relief was denied on account of relationship of a juror, the facts were peculiar and entirely different from those disclosed by this record. It was made clear that the juror did not know of the relationship for several days after the verdict, and had never seen the murdered woman or heard of her. That made it extremely improbable that the relationship had in any way influenced his conduct on the jury. The burden was recognized as having rested on the state to show no injury and as having been discharged by the facts disclosed. In *State v. Congdon*, 14 R. I. 458, the court said: "We do not think we ought to grant a new trial simply on account of the relationship, in view of the fact that the relationship was so remote, and that the juror himself swears that he was ignorant of it and is corroborated in so swearing, without some more counter evi-

dence than we have, and without some better reason than we have for thinking that the prisoner suffered an actual injury from the presence of the juror on the panel." Here also the court rested its decision upon the peculiar facts and circumstances of the case, and treated the state as being subject to the burden of proof. There are very few instances of the denial of relief on this ground that are not disposed of in a similar manner. I think, therefore, that the great weight of authority marks and recognizes the distinction I have mentioned.

Under the general rule, relief is denied unless the applicant for a new trial can show injury or injustice resulting from the irregularity. What amounts to injustice or injury in such a case, and how can it be shown? Under general principles of law, an undue advantage of one of the parties over the other in a trial, acquired in any way, other than by the negligence, waiver, agreement, or fault of the complaining party, has always been regarded as an intolerable injustice, and as constituting sufficient ground for the vacation of judgments and setting aside of verdicts. Disqualification in a juror from lack of citizenship, statutory age, ownership of property, and the like does not naturally give such an advantage, and there is therefore good reason for requiring something more of the applicant in such cases. Until more is shown, no injustice appears. But, when the disqualification arises from interest or relationship, the injustice is apparent on the face of the record, and nothing more should be required. This is a disqualification that obviously goes into the very trial of the case and in nature and reason operates prejudicially. When that appears, the burden should be upon the opposite party to show, as in the cases of *Traviss v. Commonwealth* and *State v. Congdon*, circumstances which negative the probability of injury. That is the rule applied by this court in cases of misconduct on the part of a jury, a thing naturally calculated to work prejudice and injury. Misconduct on the part of a jury presumptively vitiates the verdict. *State v. Cotts*, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *State v. Cartright*, 20 W. Va. 32. It does not seem to me that there can be the shadow of a doubt that misconduct of a jury in the trial of a case and disqualification by reason of interest or relationship naturally stand upon the same ground, and ought to be governed by the same rule. Prima facie, each amounts to injustice in the trial, and, if there is any difference, the rule ought to be the more strict in cases of such disqualification. Irregular conduct on the part of a juror does not on its face naturally import advantage to either party. It is entirely consistent with an altogether different hypothesis, but disqualification of the kind here con-

sidered naturally imports an advantage to the related party. To require any further evidence of injury is to ask that which universal law makes impossible. No court will permit jurors by their own testimony to impeach their verdict. Their testimony will be received as to facts and circumstances, bearing upon the inquiry as to the effect of misconduct, but not as to whether the inculpat- ing facts had any influence or effect upon their conclusion. To this rule there is scarcely any exception. *Pickens v. Boom Co.*, 58 W. Va. 11, 50 S. E. 872; *Graham v. Bank*, 45 W. Va. 701, 32 S. E. 245; *State v. Cobbs*, 40 W. Va. 718, 22 S. E. 310; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523; *Probst v. Braeunlich*, 24 W. Va. 856; *State v. Cartright*, 20 W. Va. 32; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799. It is sometimes said a verdict will not be set aside for disqualification of a juror, if, upon an examination of the record, no erroneous ruling of the court or insufficiency of the evidence can be discovered. I do not know that this court has ever assigned such a reason for refusing a new trial for such cause. Injustice or injury from erroneous rulings of the trial court stands upon an entirely different basis. It has no connection in law or reason with injury resulting from a biased juror. This alone condemns the application of any such a test, but a still better reason can be given for not applying it. The question submitted to the jury is one of fact, and the verdict cannot be disturbed in the absence of errors of law. It is unalterable and irrevocable. In this respect it differs vitally from findings as to law. Errors of the latter kind are always correctible by appeal. To give a litigant an unfair jury is therefore ruinous to him. The jury may find either way in a case of conflicting evidence, and there is no possible relief from its decision, if the trial court has not erred as to the law. Hence it is clear that mere sufficiency of evidence to sustain a verdict constitutes no reason for saying injustice or injury has not been done. An unbiased juror might have found the other way and his verdict become unalterable and conclusive. The litigant has a legal right in such cases to the deliberation and determination of an impartial and unbiased juror, and not only of one such juror, nor 11, but 12 men of that class. To deprive him of the legal right to an unbiased and impartial finding on the evidence, which may be in his favor, is to inflict upon him injustice of the rankest kind, if he has not in some manner waived the departure from the legal course of procedure. Some courts say the question of a new trial for such cause is addressed to the discretion of the trial court. So we say of every application for a new trial, but never that it is made to an arbitrary discretion. That discretion is a sound reviewable discretion, and the exercise thereof is set aside, when it conflicts with law.

For these reasons, I would reverse the judgment and grant a new trial. The evidence submitted upon the motion makes it almost certain that the juror in question knew he was related by affinity to the prosecuting witness. There was no lack of diligence on the part of the prisoner. This juror was tested upon his voir dire as to his qualification, and denied the relationship. Not a thing in the evidence indicates that the prisoner knew or had any reason to suspect the disqualifying fact until after the verdict had been rendered against him. A majority of the court, however, are unwilling to grant a new trial. They say the case falls under the general rule, and are unwilling to distinguish between disqualification by relationship and the ordinary statutory disqualifications. This puts on the prisoner the burden of showing that he was injured, and they are of the opinion that he has not shown it.

Though nothing is said in the argument for the prisoner about the rulings upon instructions, we have examined them, and find no error therein. They are in perfect harmony with principles often declared by this court. The conclusion of defendant's instruction No. 5, saying, "If the jury from the evidence have any doubt as to the guilt of the accused, then evidence of his good reputation for peace and good order may be allowed to resolve the doubt in his favor and work his acquittal." The court modified this by striking out the words "and work his acquittal." This modification did not materially alter the instruction nor deprive it of any of its force or effect. "To resolve the doubt in his favor" means the same thing as "work his acquittal." We cannot reverse a trial court for a mere change of the phraseology of an instruction, which does not alter its meaning.

For these reasons, the judgment will be affirmed.

POFFENBARGER, J., dissents.

BRANNON, J. Four of the five judges of this court decline to set aside the verdict because of the relationship of a juror to a witness for the state. The juror was a second cousin to the wife of the witness. It is against public policy to frustrate criminal trials, unless substantial harm to the accused appears. It brings criminal proceedings into derision. I would justify our action by a rule long established in Virginia and this state. It is given in *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224. Older cases there cited will show how far back the rule runs. "A new trial will not be granted in a criminal case for matter that is a principal cause of challenge to a juror, which existed before he was elected and sworn as a juror, but which was unknown to the prisoner until after the verdict, and which could not have been discovered by the exercise of ordinary diligence, unless it ap-

pear from the whole case that the prisoner suffered injustice from the fact that such juror served in the case. In determining this the court should look only to the evidence touching such cause of challenge; not to the evidence on the trial as to the prisoner's guilt." We cannot ignore this rule so long followed, and so essential to the efficacy of criminal procedure. It is not made to appear that the accused suffered from the presence of the juror on the jury, unless we can deduce it from the fact of such relationship, and we cannot. If in any case the accused cannot prove harm, it is his misfortune. There stand the verdict and judgment, and error must be made to appear.

(112 Va. 387)

JESSIE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.

June 13, 1911.)

1. WITNESSES (§ 414*)—CORROBORATION.

Where, on cross-examination of a witness who had identified accused as the guilty party, the defense offered the stenographic report of his testimony given before the coroner on the day after the killing, in which he was alleged to have stated that the man who killed deceased did not show his face and that the witness could not identify him, the state was entitled to introduce in corroboration declarations of the witness to the police immediately after the murder that defendant killed deceased, which statement was corroborated by four policemen.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 414.*]

2. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—WEIGHT OF EVIDENCE—PREJUDICE.

An instruction that a statement coming from any witness that the jury believe to be true is reliable testimony was not prejudicial to accused, when read in connection with other instructions requiring that every material fact bearing on accused's guilt must be proved beyond a reasonable doubt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1992-1995; Dec. Dig. § 823.*]

3. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in a prosecution for homicide, there was no evidence to implicate any other person than accused in the crime, the court properly refused an abstractly correct instruction that the failure of the evidence to disclose any other criminal agent than accused was not a circumstance to be considered in determining whether he was guilty of the crime charged, but that he was presumed to be innocent until his guilt was established, and he was not to be prejudiced by the inability of the commonwealth to point any other criminal agency, nor was he called on to vindicate his own innocence by naming the guilty party.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1979-1987; Dec. Dig. § 814.*]

4. CRIMINAL LAW (§ 721½*)—TRIAL—MISCONDUCT OF ATTORNEY.

In a prosecution for murder, argument of the commonwealth's attorney, from the fact that accused's housekeeper, who had testified before the coroner, was absent from the state during the trial and had been induced to leave the state by accused, and that it was a fair inference that her evidence would have been detrimental to him, in the absence of any evi-

dence on which to base such imputation, was error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1673; Dec. Dig. § 721½.*]

Error to Corporation Court of City of Roanoke.

John H. Jessie was convicted of murder, and he brings error. Reversed.

Price & Kyle, P. H. Dillard, and E. S. Kines, for plaintiff in error. Samuel W. Williams, Atty. Gen., for the Commonwealth.

WHITTLE, J. Plaintiff in error, John H. Jessie, was indicted in the corporation court of the city of Roanoke for the murder of David F. Marshall, and upon his trial was found guilty of murder in the second degree and sentenced to confinement in the penitentiary for the term of 12 years. The case is before us upon a writ of error to that judgment.

The accused was the proprietor of a lodging house in Roanoke, known as the "Tip Top Hotel," on the ground floor of which building Tate's barroom was located. On the night of October 11, 1910, Marshall Angell and David F. Marshall, the deceased, both of whom had been drinking heavily, met in Tate's barroom, and were engaged in conversation, when Jessie, the accused, came in and joined in the conversation. Marshall invited his companions to drink with him, which they did, and on demand by the bartender of pay for the liquor, after searching his pockets he remarked that he had no money, and the bartender took possession of his eyeglasses. Jessie paid for his own drink.

Angell had lodged in the Tip Top Hotel the night before, and had engaged a room for the night in question. About 15 minutes to 10 o'clock, he left the barroom to go to his lodging room, and was followed by Marshall. He was assigned to a room on the second floor, which contained a bed and sofa and was lighted by a small electric light. Angell was an old man and a cripple, and walked with a crutch and cane. He was the only eyewitness to the homicide, his version of which is as follows:

He says that, when he and the deceased went into his room, he put his crutch under the bed, and was sitting on the side of the bed untying his shoes, preparatory to retiring, when a man entered the room and said to Marshall, "You are in here bothering these women (alluding to a white woman and a negro woman employed by Jessie about the establishment); you have no money, and you are fixing to rob this old man." Angell remarked, "No; I haven't a cent." But the man nevertheless set upon Marshall and commenced "striking him, knocking him down on the floor, and, while down, kicked him several times, and stamped him, and struck him with his fist. Marshall tried to get up, got about half way up, and he knocked him down and kicked him some more. He then picked him up by the leg and arm and threw him down

on the sofa and marched out of the room." Thereupon Angell called in the police, who upon examination discovered that Marshall was dead.

[1] Angell identified the accused as the guilty party, and on cross-examination the stenographic report of his testimony, given before the coroner the day after the killing, was introduced, in which he is alleged to have stated that the man who killed Marshall did not let him see his face, and he could not identify him. The newspapers also published an interview with Jessie, in which he was represented as saying that Angell might have been the man who committed the murder. But on re-examination Angell testified that on the night of the homicide he told the police that Jessie killed Marshall, and his statement was corroborated by the sergeant of police and three policemen.

The refusal of the court to exclude these statements of Angell to the police, and their substantiating evidence, constitutes the first assignment of error.

It is unquestionably the general rule that declarations of a witness made out of court are not admissible evidence for the purpose of corroborating his testimony in court; the reason for the rule being that such evidence is hearsay. *Oliver v. Commonwealth*, 77 Va. 590; *Howard v. Commonwealth*, 81 Va. 488; *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160.

In *Oliver v. Commonwealth*, Judge Lewis, after announcing the general rule, lays down an exception to the rule as follows: "Here the attempt by the defense was to discredit the witness by showing malice on his part, growing out of his arrest for larceny; and, to repel the attack thus made, it was competent for the prosecution to prove that, prior to his arrest, the witness gave the same account of the matter that he gave on the trial. The evidence was, therefore, not hearsay, but original; the point being, not the truth or falsity of the previous declarations out of court, but whether they had been made."

In *Repass v. Richmond*, Judge Buchanan, at page 515 of 99 Va., at page 163 of 39 S. E., observes: "It is a general and well-nigh universal rule that evidence of what a witness said out of court cannot be received to corroborate his testimony. * * * The only exception to this rule given by Mr. Greenleaf is that, where a design to misrepresent is charged upon the witness in consequence of his relation to the party or the cause, it may be shown that he made a similar statement before the relation existed. 1 Greenleaf on Evidence, § 469."

So in this case it was competent for the prosecution to meet the attempt to discredit Angell by showing that he himself had been charged with the murder of Marshall, and by proving that before the assertion of that charge the witness had made the same declaration as to the guilty agent out of court that he afterwards testified to in court.

[2] The second assignment of error is to

the giving of instruction No. 10, which told the jury "that the statement coming from any witness which they believe to be true, is reliable testimony."

It is not perceived how the accused could have been prejudiced by this instruction, especially when read in connection with other instructions which clearly informed the jury that every material fact bearing upon the guilt of the accused must be proved beyond a reasonable doubt.

[3] The third assignment of error is to the refusal of the court to give instruction No. 4, namely: "The court instructs the jury that the failure of the evidence to disclose any other criminal agent than the accused is not a circumstance which may be considered by the jury in determining whether or not he was guilty of the crime wherewith he is charged. The prisoner is presumed to be innocent until his guilt is established, and he is not to be prejudiced by the inability of the commonwealth to point to any other criminal agent, nor is he called upon to vindicate his own innocence by naming the guilty person."

This instruction, as an abstract proposition, is free from objection. The rule was so declared in *McBride's Case*, 95 Va. 818, 30 S. E. 454, and such an instruction was given by the court in *McCue's Case*, 103 Va. 870, 49 S. E. 623; but in both of those cases there was evidence tending to implicate some person other than the accused in the crime. In the first-named case, two other parties were indicted along with McBride. It was permissible, therefore, in those cases, to inform the jury that the accused ought not to be prejudiced by the failure of the prosecution to fix the crime on some other criminal agent. But no such element was present in this case, and the rejected instruction was, consequently, irrelevant.

[4] The fourth assignment of error takes exception to the action of the court in regard to the address of the attorney for the commonwealth to the jury. The record shows that a Mrs. Cody, who had been housekeeper for the accused and had testified before the coroner, at the time of the trial was absent from the state. The attorney for the commonwealth argued that she had been persuaded or influenced to leave the state by the accused, and hence it was a fair inference that her evidence would have been detrimental to the accused. Thereupon counsel for the defense, in reply, stated to the jury that there was no evidence before them to sustain the allegation that the accused had influenced Mrs. Cody to leave the state, and the statement of counsel that her evidence would have been detrimental to the accused was unfair, especially as she had testified before the coroner's jury, and the stenographic report of her evidence had been offered by the accused and excluded by the court. The prosecution objected to this line of argument, and requested the court to in-

struct the jury to disregard it, which motion the court sustained. The court, moreover, told the jury that they were to presume that its ruling in excluding the testimony of Mrs. Cody before the coroner was correct, and that they were not at liberty to consider for any purpose whatever the attempt of defendant's counsel to introduce that evidence, or to infer that it would not have been detrimental to the accused. The court also refused to instruct the jury to disregard the argument on behalf of the prosecution to the effect that Mrs. Cody "had been persuaded or influenced to leave the state by the defendant, and it was, therefore, a fair inference to infer that her evidence would have been detrimental to the defendant."

There was not a scintilla of evidence to sustain the assumption of the attorney for the commonwealth that the accused persuaded or influenced Mrs. Cody to leave the state. The accused was the only witness who testified on the subject, and on cross-examination stated that he had not seen Mrs. Cody since the coroner's inquest. Continuing, the witness said: "I had nothing whatever to do with her leaving, and, in fact, did not know she was going until several days after she left."

The argument of the commonwealth's attorney was manifestly improper in the circumstances of the case, and highly prejudicial to the accused; and the court erred in refusing his request to instruct the jury to disregard it. It is a familiar and well-settled principle of the law of evidence that, though an inference may be drawn from a fact, it cannot be drawn from a presumption. *N. & W. Ry. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *C. & O. Ry. Co. v. Heath*, 103 Va. 64, 48 S. E. 508; *Moore Lime Co. v. Johnson*, 103 Va. 84, 48 S. E. 557; *Va. Iron, Coal, etc., Co. v. Kiser*, 105 Va. 705, 54 S. E. 889.

The fifth and last assignment of error is to the refusal of the court to set aside the verdict of the jury as contrary to the law and the evidence. As the case has to be remanded for a new trial on another ground, we shall express no opinion as to the weight or sufficiency of the evidence.

The judgment must be reversed, the verdict of the jury set aside, and a new trial had, not in conflict with the views expressed in this opinion.

Reversed.

(112 Va. 479)

SEWARD v. CAMP MFG. CO.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. CHAMPERTY AND MAINTENANCE (§ 7*)—CHAMPERTOUS CONTRACTS—DEEDS.

A conveyance by devisees of undivided interests in real estate, previously conveyed without authority by the executor, is not champertous, where the devisees out of possession received a specified money consideration, without any agreement by the grantee to pay anything further in case he recovered the property.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 54-110; Dec. Dig. § 7.*]

2. CHAMPERTY AND MAINTENANCE (§ 7*)—CHAMPERTOUS CONTRACTS—DEEDS.

A conveyance by devisees of undivided interests in real estate, previously conveyed without authority by the executor, is champertous, where the consideration is nominal, and the grantee, for a further consideration, agreed, in the event of his suing for and recovering the land, to pay to the devisees out of possession an additional sum, not made a charge on the land itself, but merely a personal obligation.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 54-110; Dec. Dig. § 7.*]

3. CHAMPERTY AND MAINTENANCE (§ 7*)—CHAMPERTOUS CONTRACTS—REQUISITES—"CHAMPERTY."

A contract for the purchase of real estate need not stipulate for a division in kind of the land to be recovered in order to make the contract champertous, but it is sufficient if the champertor and the party with whom he contracts are to share in the fruits of a recovery; "champerty" being a bargain with plaintiff or defendant in a suit for a portion of the land or other matters sued for, in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 54-110; Dec. Dig. § 7.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1045-1050; vol. 8, pp. 7598, 7599.]

Error to Circuit Court, Brunswick County.

Ejectment by Walter M. Seward against the Camp Manufacturing Company. There was a judgment granting insufficient relief, and plaintiff brings error, and defendant assigns cross-error. Reversed and rendered.

E. R. F. Wells, for plaintiff in error. E. R. Turnbull, Jr., and E. P. Buford, for defendant in error.

KEITH, P. Miles B. Branch died in 1861, leaving a widow, five sons, and four daughters. In 1857 he made a will, which was admitted to probate shortly after his death, in which he bequeathed and devised to his wife, Elizabeth Branch, one-third of his estate during life, and subject to this disposition in her favor he gave to his four daughters—Ann, who married George W. Green, Rosa M. Branch, Susan E. Branch, and Mary E. Branch—all of his lands. The disposition of his personal estate is not material to this case.

The land which passed under this will contained 787½ acres, of which 286½ were set apart to his widow, and this dower tract is not involved in this litigation.

Under the will of Miles B. Branch his executor was given no power over the real estate, and had no authority to sell or dispose of it in any way; but by deed dated January 23, 1864, the executor did attempt to convey to William J. Branch, a son of Miles

B. Branch, the testator, all right and title to 521 acres which remained after setting apart the dower to the widow. This deed was admitted to record in the clerk's office of the county court of Brunswick on February 6, 1864. By deed dated October 24, 1878, William J. Branch conveyed this tract along with other parcels of land to which he had title to William J. Leake and Alexander Donnan, trustees for various purposes set forth in the deed. By deed of April 26, 1879, William J. Branch attempted to convey to Goodwyn Grain 50 acres of the above-mentioned tract, and by a subsequent deed to Sallie Penn another parcel of the said tract; and by deed of December 1, 1880, William J. Branch attempted to convey to Oscar Lewis 70 acres of the above-mentioned tract. These three last-mentioned deeds conveyed about 150 acres of the 521-acre tract, which had been devised to the four daughters of Miles B. Branch, leaving 371 acres undisposed of, except so far as affected by the deed of trust to Leake and Donnan already referred to. Grain, Penn, and Lewis entered into possession of their respective portions, and remained in adverse possession thereof thereafter, and have acquired valid title thereto by adverse possession. These three parcels of land are not involved in this litigation, which pertains solely to the residue of 371 acres.

By deed of August 26, 1882, Leake and Donnan, trustees, conveyed the 371-acre tract, along with other parcels of land, to Abel H. Bishop, administrator of Carter R. Bishop, deceased, which deed was admitted to record in the clerk's office of the county court of Brunswick county on June 25, 1883. Some time thereafter a chancery suit was instituted in the hustings court of the city of Petersburg, Va., for the settlement and partition of Bishop's estate, and in that suit R. B. Davis and Bernard Mann were appointed special commissioners to make sale of certain real estate owned by Bishop, including this tract of 371 acres in Brunswick county. On July 24, 1899, acting under a decree of that court, the special commissioners sold this tract of land at public auction to E. G. Temple, and by deed dated August 4, 1899, conveyed it to him; the deed being admitted to record August 18, 1899. Thereafter Temple conveyed this tract to the Brunswick Lumber Company, and by deed dated November 1, 1902, the Brunswick Lumber Company conveyed it to the Camp Manufacturing Company.

None of the parties who claim under William J. Branch have ever entered into possession of this 371-acre tract, and it has never been inclosed, cleared, or cultivated, but is covered with a dense growth of standing timber, and ever since the death of Miles B. Branch has been in a state of nature, and at this date is in the same condition as it was at the time of his death. William J.

Branch was never in possession of the tract. Shortly before the war he left Brunswick county, and has never since resided there.

In this state of affairs, Walter M. Seward, a grandson of Miles B. Branch, deceased, and a son of Susan E. Branch, one of his four daughters, some time during the year 1908, ascertained that the Camp Manufacturing Company made claim to this tract of land. He made inquiry in regard to it, investigated the title, and became satisfied that none of the four daughters of Miles B. Branch had ever conveyed away their right or title to this tract of land. He consulted counsel, and was advised that the executor of the will of Miles B. Branch, deceased, had no power or authority to sell or convey this real estate, and that his deed attempting to convey the land to William J. Branch was null and void, and passed no title whatever. He took the matter up with his mother, who, after the death of her first husband, Robert Merritt Seward, had married a Mr. Dunn, and with the other heirs at law of the daughters of Miles B. Branch, explained to them the situation, and told them that in his opinion they still had a valid title. The heirs did not care to enter into litigation, but were willing to convey their interest to Seward, and as the result of his efforts he obtained deeds to $\frac{175}{800}$ of the entire tract. The consideration mentioned in each of these deeds was \$1, cash in hand paid. In the case of his mother, Mrs. Dunn, there was no other consideration paid or promised. Seward was her only child, and for years had been contributing to her support. In the case of his aunt, Mrs. Rae, it appears that Seward, in consideration of her deed, paid her in cash at various times something less than \$100; but there was no agreement that he was to pay her any further consideration. She was his aunt, a childless widow, and the record shows that from time to time he had contributed something to her support.

The mother, Mrs. Dunn, and the aunt, Mrs. Rae, are the two surviving daughters of Miles B. Branch, deceased, and they each own an undivided interest of $\frac{9}{32}$ of this tract of land.

Rosa M. Branch, another daughter of Miles B. Branch, deceased, had died in Tennessee some time during the year 1865, unmarried and intestate. Her undivided fourth interest in this land passed by descent to her eight brothers and sisters, each of whom inherited from her an undivided interest in $\frac{1}{32}$ of this tract, and this $\frac{1}{32}$ added to the $\frac{9}{32}$ which they derived under the will of Miles B. Branch, gave to Mrs. Dunn and Mrs. Rae each $\frac{9}{32}$.

Ann R. Green, the other daughter of Miles B. Branch, deceased, died some years since, leaving heirs at law whose names are set forth in the record.

In addition to the deeds which Seward obtained from his mother and his aunt, he also

obtained deeds from some of the heirs of Rosa M. Branch, and Ann R. Green, and these latter deeds conveyed to him, in the aggregate, an undivided interest of $\frac{271}{300}$ of the whole tract. In addition to the consideration of \$1 mentioned in each of these deeds, Seward agreed with these heirs that in the event he decided to institute suit for the recovery of the land, and succeeded in recovering it, he would pay them an additional cash consideration estimated at about \$15 an acre for their interests.

The deeds were all absolute and unconditional. Seward could bring suit or not, as he saw fit. His agreement with them was that, if he succeeded in recovering the land, he would pay them an additional consideration, which was not a charge on the land itself, but a personal obligation on his part.

Having acquired title to an undivided interest of $\frac{275}{300}$ of this land, Seward, in August, 1909, instituted an action of ejectment in the circuit court of Brunswick county against the Camp Manufacturing Company, and at the trial there was a verdict for the plaintiff for the entire interest claimed in fee simple.

Under the plea of not guilty, the defense relied, first, upon adverse possession; and, secondly, and chiefly, upon the claim that the agreements whereby the plaintiff had obtained the deeds from the various heirs were illegal and void on account of champerty. These questions were submitted to the jury under instructions, and the result was, as already stated, a verdict in favor of the plaintiff for the entire interest claimed by him. The defendant moved to set the verdict aside, and the circuit court, being of opinion that all of the deeds to the plaintiff, with the exception of that from his mother, Mrs. Dunn, were void on account of champerty, rendered the judgment complained of, which required him to remit all his recovery, as ascertained by the verdict of the jury, except the undivided interest of $\frac{9}{32}$, acquired from his mother, or else submit to a new trial. The plaintiff, in accordance with the statute in such cases made and provided, remitted that portion of his recovery and accepted the judgment of the court for the undivided interest of $\frac{9}{32}$, under protest, and then and there protested against and excepted to the judgment of the court, and later on presented his bill of exceptions to the judge, setting forth the evidence, the instructions, and the action of the court, which was made a part of the record.

The defendant, the Camp Manufacturing Company, also moved the court to set aside the verdict and grant a new trial, upon the ground that it was contrary to the law and the evidence, which motion of the defendant was impliedly overruled by the court when it entered the judgment now before us.

Seward applied for and obtained a writ of error, and the Camp Manufacturing Compa-

ny assigns cross-error under rule 8 of this court, so that the whole subject is before us for review.

[1, 2] Upon the facts before the jury, we agree with the circuit court that the deed from Mrs. Dunn to her son is not void upon the ground of champerty; and, after a careful consideration of the evidence, we are unable to find any satisfactory ground upon which to base a different conclusion with respect to so much of the land sued for as passed under the deed of Mrs. Rae. We are, therefore, of opinion that the court erred in requiring him to remit the $\frac{9}{32}$ which the plaintiff in error derived under the deed from his aunt, Mrs. Rae. With respect to the remaining deeds, covering the interests for which suit was brought, we are of opinion that they are champertous.

Plaintiff in error seems to rely upon the proposition that there was no express and binding contract upon Seward's part to undertake and carry on this litigation at his own risk and cost. It may be conceded that there was no such term expressed in his contract, but it was necessarily implied. It is true that it was optional with him to sue or not to sue, as he saw fit; but the deeds by which he acquired the title could not of themselves secure to him the fruits of his bargain, and a suit was a necessary condition to the realization of any benefit to be enjoyed by him from the contracts.

[3] Nor do we think it necessary, to make good the plea of champerty with respect to the purchase of real estate, that the contract shall stipulate for a division in kind of the land to be recovered. It is sufficient if the champertor and the party with whom he contracted were to share in the fruits of the recovery.

In *Nickels v. Kane*, 82 Va. 309, it is said that "champerty may be defined to be a bargain with the plaintiff or defendant in a suit for a portion of the land or other matters sued for, in case of a successful termination of the suit, which the champertor undertakes to carry on at his own expense; and champerty avoids the contracts into which it enters."

In *Roller v. Murray*, 107 Va. 527, 59 S. E. 421, the law is thus stated: "A contract by an attorney to undertake and carry on litigation at his own risk, or without costs to his client, for a share of the recovery, is contrary to public policy and void. The law of champerty as affecting civil contracts is not obsolete and inoperative in this state, nor is it affected by the repeal by implication of the statute, declaratory of the common law, making champerty a criminal offense."

In *Bishop on Contracts*, § 121, it is said: "If the sealed undertaking is to do a thing unlawful, or against public policy or morals, or if the unexpressed consideration for it is in fact thus tainted, or if it was obtained by fraud or duress, the seal will not serve as a

screen for the wrong; but the real nature of the transaction, though it does not appear on the face of the instrument, may be shown, and a party may avail himself of this matter, the same as though there were no seal. And the general doctrine, that we may look into the real consideration of a written contract, already explained, applies as well to sealed contracts as to others. If the law were not so, the seal 'would,' in the words of Lord Ellenborough, 'be made a cover for every species of wickedness and illegality.'"

In *Webb v. Armstrong*, 5 Humph. (Tenn.) 880, it is said: "If it satisfactorily appear to the court in proof that the suit, in its origin and progress, is affected by champerty, it is a duty of the court not to permit itself to become the organ and instrument to consummate such agreements, but to repel the plaintiff and his suit."

In *Holloway v. Lowe*, 7 Port. (Ala.) 490, the court said: "The agreement in writing of the plaintiff in error, which is disclosed as the foundation of this action, is impeached as illegal; and it is clearly so, if champerty is an offense known to the laws of this state. As we have no statute defining this offense, we must recur to the common law, to ascertain what it is and to what cases it extends. It is defined by Hawkins as the unlawful maintenance of a suit, in consideration of some bargain to have a part of the thing in dispute, or some profit out of it, and has been held to cover all transactions and contracts, whether by counsel or others, to have the whole or a part of the thing or damages recovered."

In *Peck v. Heurich*, 167 U. S. 624, 17 Sup. Ct. 927, 42 L. Ed. 302, which was an action of ejectment, it was held that "a deed to trustees to enable one of them, who is an attorney at law, to conduct litigation for the title and possession of real estate on his own account and at his own cost and expense, in consideration of one-third of the property recovered, is void for champerty. The joinder of another person as cotrustee in a champertous deed, made to enable the other trustee to conduct litigation on his own account and at his own cost and expense, for a part of land to be recovered or the proceeds thereof, does not make the deed valid. An action of trustees claiming under a champertous deed cannot be maintained, although a similar action might be maintained by the grantors in their own name."

In the course of the opinion in that case it is said: "He agreed to pay the costs of the litigation. He agreed to take as his compensation a part of the land which was the subject of the suit, or a part of the proceeds of sale of it, which amounts to the same thing, and his compensation was not a fixed sum of money, payable out of the proceeds of sale, but a contingent share of the very thing to be recovered, or of the money that might be

received by way of settlement or compromise; and the character of the enterprise on the part of the attorney was so plainly a speculative one that in the deed the net results to him are mentioned as 'profits.' If this be not champerty, we fail to see wherein there can be champerty. We must regard an agreement by any attorney to undertake the conduct of litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the recovery, or of the thing in dispute, as obnoxious to the law against champerty; and that this was the character of the agreement in the present case we are entirely satisfied. The very thing in dispute was conveyed, or sought to be conveyed, in advance, to the attorney and an associate, for the express purpose of enabling the attorney to conduct the litigation on his own account and at his own cost and expense; and in consideration of this he was to retain at the end of the litigation one-third of what had been conveyed to him, and was to account to his clients for the other two-thirds. This was certainly an agreement on his part to take as his compensation a part of the thing in dispute, and it does not alter the case at all that the land when recovered was to be sold. That was the only practical mode for a division of the proceeds between the parties to the enterprise."

We think it plain from the evidence that in respect to the interests now under consideration there was a champertous agreement, which was the effectual moving consideration for the deeds to those interests, though not expressed upon the face of the deeds, and from the consequences of which plaintiff in error could not have escaped except by a breach of faith.

With respect, then, to the interest derived from Mrs. Rae, we think, as we have already said, that the right of the case is plainly with the plaintiff in error; that with respect to the other interests the right of the case is plainly with the defendant in error, upon the plea of champerty.

Upon the defense of adversary possession, we are of opinion that the jury was fairly and sufficiently instructed, and that the verdict was in accordance with the evidence.

Upon the whole case, we are of opinion that the judgment of the circuit court should be reversed, and this court will enter a judgment for the plaintiff in error for $1\frac{1}{2}\%$ of the land in controversy in fee simple, that being in our opinion the judgment which the circuit court should have rendered, and that, as to the residue of the land in the declaration mentioned, the defendant go thereof without day, and that the plaintiff in error recover his costs in this behalf expended.

Reversed.

HARRISON and WHITTLE, JJ., absent.

(112 Va. 311)

COLES' HEIRS et al. v. JAMERSON.

(Supreme Court of Appeals of Virginia.

June 8, 1911.)

1. TAXATION (§ 734*)—TAX TITLES—DEEDS—STATUTE.

The owner of land, who lived in another county, died, leaving a will devising it to be sold, and the will was not probated in the county where the land was located, so the records did not furnish the information contemplated by Code 1904, §§ 459, 460, and this information was not furnished by the parties in interest, as provided by section 463. The lands were assessed in the name of the owner, instead of to his estate, as required by section 474. Code 1904, § 473, declares that land correctly charged to one person shall not afterwards be charged to another, without evidence of record that such change is proper; and section 661 provides that the holder of a tax deed has the right or title, which was vested in the party assessed with the taxes, or in one claiming under him. *Held*, that a sale of these lands for delinquent taxes passed title, in spite of the noncompliance with section 474.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

2. TAXATION (§ 412*)—TAX TITLES—TAX DEEDS—ASSESSMENT—STATUTE.

A noncompliance with Code 1904, § 464, requiring separate lists to be kept for white and colored taxpayers, being a statistical measure only, does not vitiate an assessment.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 682-689; Dec. Dig. § 412.*]

3. TAXATION (§ 761*)—TAX TITLES—TAX DEEDS—ADVERTISEMENTS.

A tax deed, which recited that the land was sold by the county treasurer, a public officer, after due advertisement, as required by law, is valid, though not reciting the fact of the adjournment of the sale.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1510-1513; Dec. Dig. § 761.*]

4. TAXATION (§ 762*)—TAX TITLES—TAX DEEDS—SUFFICIENCY.

Under Code 1904, §§ 642, 645, 662, respectively requiring that the treasurer report the sales to court, that such reports be confirmed, and that reports be made when real estate is bought in the name of the auditor, and section 655, requiring a tax deed to set out all the circumstances appearing in the clerk's office in relation to the deed, the treasurer's report of sale and the order of court confirming the sale are circumstances appearing in the clerk's office in relation to the sale.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 762.*]

5. EXECUTORS AND ADMINISTRATORS (§ 129*)—REAL PROPERTY—SALE—TITLE TO STATUTE.

Code 1904, § 2663, providing that if land be devised to be sold, and no one be appointed, the executor may sell it, and if he fail to qualify, or, having qualified, dies, an administrator with the will annexed may sell, gives the executor or administrator no title independent of the will.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 533-536; Dec. Dig. § 129.*]

6. EXECUTORS AND ADMINISTRATORS (§ 129*)—REAL PROPERTY—SALE—WILLS—TITLE.

Where a will merely provided that land should be sold, and did not devise it to the executrix, she had only a power of sale, the heirs having the title; and hence an administrator appointed after her death, without the will annexed, had no title to support ejectment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 129.*]

7. ABATEMENT AND REVIVAL (§ 28*)—PARTIES PLAINTIFF—MISJOINDER—STATUTE.

In an action of ejectment, where an administrator who had no title to land was erroneously made a party plaintiff, the court should, under the direct provisions of Code 1904, § 3258a, order the action to abate as to the administrator, and proceed in the names of the other plaintiffs.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 163-165; Dec. Dig. § 28.*]

Error to Circuit Court, Buckingham County.

Ejectment by T. H. Dickinson, as administrator, and the heirs of J. M. Coles, deceased, against J. D. Jamerson. From a judgment for defendant, plaintiffs bring error. Reversed and remanded.

John M. Payne and Harrison & Long, for plaintiffs in error. Hubard & Gayle and A. B. Dickinson, for defendant in error.

WHITTLE, J. This action of ejectment was brought by the plaintiffs in error against the defendant in error, John D. Jamerson, to recover 342 acres of land in Buckingham county, formerly the property of J. M. Coles, deceased, who was the ancestor of the plaintiffs (except T. H. Dickinson), and was bought by the defendant's assignor at a sale for delinquent taxes, and is held by the assignee under a tax deed from the clerk bearing date February 10, 1896. There was a verdict and judgment for the defendant, to which judgment this writ of error was awarded.

The specific grounds of attack upon the title of the defendant are as follows: (1) Because the land was assessed for taxation in the name of J. M. Coles for several years after his death and when returned delinquent, when it should have been charged to his estate; (2) because the land was registered on the land book in the white list, when it should have been registered in the colored list, Coles being a negro; (3) because the tax deed does not recite the adjournment of the sale; and (4) because the deed also fails to show that there was a report by the county treasurer of the sale and the confirmation of such report and sale by the court. We shall consider these several contentions in the order stated.

[1] 1. It is true section 474 of the Code of 1904 provides that when the owner of land dies, having, as in this instance, devised the same to be sold, "It shall continue charged to the decedent's estate until a transfer thereof." Coles was not a resident of Buckingham county, and his will was probated in Prince Edward county, so that the records of the former county did not supply the information contemplated by sections 459 and 460; nor was such information furnished by the parties in interest, as provided by section 463. It would be an unreasonable construction of section 474 to hold that a failure

after Coles' death to charge the land to his estate would invalidate the assessment.

Section 473 declares that land correctly charged to one person shall not be afterwards charged to another person without evidence of record that such charge is proper.

In construing section 13, c. 183, 2 Rev. Code 1819, which is similar to section 474, supra, in *Usher's Heirs v. Pride*, 15 Grat. 190, Allen, P., at page 200, observes: "I think, however, the entry in the name of the patentees (who had died) concludes the heirs and purchasers claiming under them, and they were forfeited for the delinquency in failing to pay the taxes charged thereon."

So, in *Stevenson v. Henkel*, 100 Va. 591, 42 S. E. 672, a mistake in the name of the owner, if not calculated to mislead, is immaterial.

Again, section 661 provides that "the right or title to such estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made at the commencement of the year for which said taxes or levies were assessed, or in any person claiming under such party. * * *"

[2] 2. The requirement of section 464, with respect to separate lists for white and colored taxpayers, was intended as a basis for the apportionment of the school tax fund between the white and colored races in proportion to the amount of taxes contributed by them respectively. It was purely a statistical measure (which was never carried into effect), and its nonobservance could not affect the validity of the assessment.

[3] 3. The third assignment calls in question the validity of the tax deed because it does not recite the fact of the adjournment of the sale. The deed does state that the sale was made by the county treasurer at public auction at the front of the courthouse on February 10, 1896, "after due advertisement as required by law," and that, we think, was a sufficient recital with respect to the fact of the sale. *Flanagan v. Grimmet*, 10 Grat. 421.

[4] 4. The last assignment involves the failure of the deed to recite that the county treasurer made a report of the sale, or that the sale was confirmed by the court, or that it was recorded as required by sections 642, 645, 662.

It is provided by section 655 that the tax deed "shall set forth all the circumstances appearing in the clerk's office in relation to the sale."

In 2 *Minor on Real Property*, § 1383, the "circumstances" required to be recorded in the clerk's office are summarized as follows:

"(1) The *listing* and *valuation* of the land by the assessors and commissioners of the revenue, as contained in their returns to the court or the clerk.

"(2) The *levy* of the tax by the commissioner of the revenue.

"(3) The *list of delinquent taxes*, returned

by the county or city treasurer, recorded in the clerk's office in the 'delinquent tax book.'

"(4) The *treasurer's report of sales*, recorded in the clerk's office in the 'delinquent land book.'

"(5) The *notice or advertisement* of the sale, which appears by way of *recital* in the *treasurer's report of sales*.

"(6) The order of court confirming the sale.

"(7) The surveyor's report, with plat and certificate showing the metes and bounds of the tract sold, the names of adjoining owners, and giving such further description of the land as will serve to identify it and enable the clerk to describe it properly in the tax deed."

Minor on Tax Titles, 118, 119; *Delaney v. Goddin*, 12 Grat. 266; *Boon v. Simmons*, 88 Va. 259, 13 S. E. 439.

We are of opinion that the treasurer's report of sale and the order of the court confirming the sale constitute "circumstances appearing in the clerk's office in relation to the sale," the recital of which is essential to the validity of the tax deed under section 655.

[5] The only assignment of cross-error on behalf of the defendant in error, which we deem it necessary to notice, involves the ruling of the circuit court in regard to the right of T. H. Dickinson, sheriff of Prince Edward county, and as such administrator of J. M. Coles, deceased, to maintain this action.

The supposed devolution of title to the land in controversy on Dickinson is founded upon the hypothesis that, as administrator with the will annexed of Coles, he succeeded to the title vested in the executrix, Hannah Coles, by the will of her late husband under section 2663 of the Code.

In *Elys v. Wynne*, 22 Grat. 224, 230, it was held that the statute does not operate as a conveyance of the estate, or any interest therein, to the executor, but merely gives him power to make any sale of real estate which the will directs to be sold, without empowering any particular person to make the sale, and that the title vested in the heirs, who were the proper parties to maintain ejectment for the land.

In this case the provision of the will is that, after six months from the death of the testator, the land shall be sold by his executrix. The will does not devise the land to the executrix to be sold, but invests her merely with a qualified power of sale.

[6] In *Croswell on Executors and Administrators*, § 330, the author says: "The question often arises whether, under the words of the will, the executor holds the land in trust to sell, or whether he has a mere power to sell the land. The importance of this distinction is obvious, since in the one case the title to the land vests in the executor, while in the other it vests in the heirs, subject to be divested by the execution of the

power of the executor. It is said to be now settled that if the land is devised to the executor to sell, or devised subject to the debts of the testator, this passes the interest in the lands to the executor; but a direction that the executors shall sell the land gives them only a power of sale and no interest in the land." See, also, 18 Cyc. 302, 303.

11 Am. & Eng. Enc. of Law (2d Ed.) 1035, lays down the same rule as in accordance with the weight of authority.

In the instant case, however, T. H. Dickinson did not succeed even to the powers of the executrix with respect to the real estate under Coles' will, by virtue of section 2663. It affirmatively appears from the record that he was not appointed *administrator with the will annexed*, but administrator only. The validity of such appointment for any purpose, where there is a will, may well be questioned. In *Ewing v. Sneed*, 5 J. J. Marsh. (Ky.) 459, it was held to be void.

[7] Upon this branch of the case, we are of opinion that the legal title to the land devolved upon the heirs at law of J. W. Coles, deceased, subject to be divested only by a lawful execution of the power of sale. The circuit court ought, therefore, to have ordered the action to abate as to T. H. Dickinson, and to proceed in the name of the other plaintiffs, heirs at law of J. W. Coles, deceased, as if such misjoinder had not been made, in accordance with section 3258a of the Code.

The judgment of the circuit court, for the reasons stated, must be reversed, and the verdict of the jury set aside, and the case remanded for a new trial, to be had in accordance with this opinion.

Reversed.

(112 Va. 431)

SAUNDERS v. BALDWIN.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. PLEADING (§ 204*)—DEMURRER TO DECLARATION CONTAINING GOOD COUNT—EFFECT.

A demurrer to the declaration as a whole, containing a count stating a cause of action, is properly overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

2. MALICIOUS PROSECUTION (§ 24*)—TERMINATION OF CRIMINAL PROSECUTION—EVIDENCE—ADMISSIBILITY.

In an action for malicious prosecution, evidence of the acquittal of plaintiff is admissible merely to show the termination of the criminal prosecution, and not to show probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 50; Dec. Dig. § 24.*]

3. MALICIOUS PROSECUTION (§ 21*)—DEFENSES—RELIANCE ON ADVICE OF ATTORNEY.

The advice of a reputable attorney, sought and acted on in good faith, is probable cause as a matter of law, and is a complete defense to an

action for malicious prosecution for instituting a criminal prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 40-44; Dec. Dig. § 21.*]

4. MALICIOUS PROSECUTION (§ 24*)—DEFENSES—JUDGMENT OF CONVICTION—REVERSAL ON APPEAL—EFFECT.

A judgment of conviction by a justice or other trial court is conclusive evidence of probable cause for instituting the prosecution, though the conviction has been reversed on appeal or writ of error, unless the conviction was procured through fraud, or by means of testimony known to be false.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 53; Dec. Dig. § 24.*]

5. MALICIOUS PROSECUTION (§ 47*)—ACTIONS—DECLARATION—REQUISITES.

A declaration in an action for malicious prosecution, which alleges the conviction of plaintiff in a criminal prosecution instituted by defendant, must, to state a cause of action, aver that the conviction was procured by the defendant through fraud, or by testimony which he knew to be false.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 91; Dec. Dig. § 47.*]

Error to Circuit Court, Mecklenburg County.

Action by D. E. Baldwin against G. A. Saunders. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

E. P. Buford, for plaintiff in error. Faulkner & Faulkner, for defendant in error.

BUCHANAN, J. The defendant in error, D. E. Baldwin, was arrested, tried, and found guilty of petit larceny upon a warrant issued by a justice of the peace of the county of Mecklenburg, upon the complaint of G. A. Saunders, the plaintiff in error. Upon appeal to the circuit court of that county, the judgment of the justice was reversed, and the accused acquitted. He thereupon instituted his action of trespass on the case against Saunders for malicious prosecution.

Upon the trial of the cause there was a verdict and judgment against the latter. To that judgment this writ of error was awarded.

[1] The trial court overruled a demurrer to the declaration, and to each count thereof. This action of the court is assigned as error.

The declaration contains two counts. It is not denied here that the second count states a cause of action. The demurrer to the declaration as a whole, and to the second count, was therefore properly overruled.

The objection made to the first count is that although the want of probable cause is alleged for the complaint and proceedings mentioned therein, yet that the judgment of the justice of the peace, which is averred, although reversed, and the accused acquitted, is conclusive evidence of the existence of

probable cause, in the absence of averment that such judgment was procured by evidence known by the defendant (Saunders) to be false. This objection will be considered in disposing of the exception of the defendant to the action of the trial court in refusing to give instruction No. 3 offered by the defendant.

That instruction is as follows: "If the jury believe from the evidence that the defendant caused the warrant mentioned in the declaration to be issued against the plaintiff, and that the plaintiff upon his trial before the justice of the peace on said warrant was convicted by the judgment of the justice, such conviction is conclusive evidence of probable cause, and the jury should find for the defendant, unless they further believe from the evidence that the defendant procured the conviction of the plaintiff before said justice by means of evidence known to said defendant to be false, or that such conviction was procured through the fraud of the defendant."

That instruction, as does the demurrer to the first count of the declaration, raises the question whether or not, in an action for malicious prosecution, the conviction of the plaintiff of the offense charged, which judgment of conviction has been reversed upon appeal and the accused acquitted, is conclusive or only prima facie evidence that probable cause existed for such prosecution, unless such conviction was procured by the defendant through fraud or by means of evidence which he knew to be false.

This question has been passed on by many of the courts of this country, and different conclusions reached. Some of the courts, as in the state of North Carolina, seem to hold that such a judgment is conclusive evidence of probable cause, even though unfairly obtained. *Griffin v. Sellars*, 20 N. C. 315; *Price v. Stanley*, 128 N. C. 33, 38 S. E. 33, 34. In the courts of some of the other states, as in Connecticut, Iowa, and Minnesota, such a judgment is deemed merely prima facie evidence of probable cause. *Goodrich v. Warner*, 21 Conn. 432; *Moffatt v. Fisher*, 47 Iowa, 473; *Skeffington v. Elyward*, 97 Minn. 244, 105 N. W. 638, 114 Am. St. Rep. 711. In the great majority of the jurisdictions which have passed upon the question, such a judgment is held to be conclusive evidence of probable cause, unless (as is the rule in most of the cases) such judgment was procured by fraud or undue means on the part of the defendant. See *Crescent City, etc., Co. v. Butchers', etc., Co.*, 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614; *Bacon v. Towne*, 4 Oush. (Mass.) 217; *Morrow v. Wheeler & Wilson, etc., Co.*, 165 Mass. 349, 43 N. E. 105; *Herman v. Brookershoff*, 8 Watts (Pa.) 240; *Cooper v. Hart*, 147 Pa. 594, 23 Atl. 833; *Burt v. Place*, 4 Wend. (N. Y.) 591; *Palmer v. Avery*, 41 Barb. (N. Y.) 290; *Spring & Stepp v. Besore*,

12 B. Mon. (Ky.) 551; *Kaye v. Kean*, 18 B. Mon. (Ky.) 839; *Payson v. Caswell*, 22 Me. 212, 226; *Thomas v. Muehlmann*, 92 Ill. App. 571; *Adams v. Bicknell*, 126 Ind. 210, 25 N. E. 804, 22 Am. St. Rep. 578; *Holliday v. Holliday*, 123 Cal. 28, 55 Pac. 708; *Hartshorn v. Smith*, 104 Ga. 235, 30 S. E. 686; *Griffin v. Sellars*, 19 N. C. 492, 31 Am. Dec. 422; *Boogher v. Hough*, 99 Mo. 183, 12 S. W. 524; *Welsh v. B. & P. R. Corp.*, 14 R. I. 609; *Root v. Rose*, 6 N. D. 581, 72 N. W. 1022; *Hope v. Everett*, 17 Q. B. Div. 338; *Raynolds v. Kennedy*, 1 Wils. 232; *Newell on Malicious Prosecution*, pp. 299, 300; 1 Cooley on Torts (3d Ed.) 333, 334; 2 Greenleaf on Ev. (15th Ed.) § 457; *Freeman's note to Ross v. Hixon*, 26 Am. St. Rep. 142, 143; 3 *Lawson's Rights and Remedies*, § 1093; 26 Cyc. 89, 40; 19 Am. & Eng. Enc. L. (2d Ed.) 668-7; note to *Wells v. Parker*, 6 Am. & Eng. Ann. Cas. 261.

The precise question involved in this case and now under consideration has never been raised and passed upon by this court in any case officially reported. In the case of *Blanks v. Robinson*, 1 Va. Dec. 600, it was held that such a judgment was merely prima facie evidence of probable cause. That case was never officially reported and bears internal evidence, as it seems to us, that the question involved was not very carefully considered. If it had been, the learned judge who delivered the opinion of the court would not, we think, have supposed that the same question was involved in that case as was passed upon in *Womack v. Circle*, 32 Grat. 324, or that the conclusion reached was in accord with the weight of authority on the subject. The opinion is a very short one, and relies chiefly upon the reasoning of the dissenting opinion in the case of *Womack v. Circle*.

The question in the last-named case was not the same as that involved in *Blanks v. Robinson*. The action of the justice in *Womack v. Circle*, held to be conclusive evidence of probable cause, was a proceeding under statutes now found in chapter 191 of *Pollard's Code of 1904*; by which, upon complaint made to a justice or other conservator of the peace that there is good cause to fear that a person intends to commit an offense against the person or the property of another, the justice shall issue his warrant, and when the accused is brought before him and the witnesses heard, if he be of opinion that there is *good cause for the complaint*, he may require of the accused a recognizance to keep the peace and be of good behavior. The accused is, however, given the right of appeal to the court having jurisdiction of appeals from such justice, which court upon the hearing may affirm, or reverse the action of the justice and dismiss the complaint. In that case the justice was of opinion that there was *good cause for the complaint* and bound the accused over to

keep the peace, etc. Upon appeal the county court held that there was not good cause for the complaint, and discharged the accused. The only question involved before the justice and the county court was whether or not there was *good cause for the complaint*. The justice held that there was; the county court, that there was not. In such a case there is much to be said in favor of the view of the dissenting judges, that the opinion or judgment of the justice, that there was good cause for the complaint, ought not to be held as conclusive, but merely *prima facie*, evidence of probable cause, since the county court, in passing upon the identical question, had been of the opinion that there was not good cause for the complaint.

In the case of *Blanks v. Robinson*, where the warrant was for petit larceny, the justice was not merely of the opinion that there was probable cause for believing that the accused had committed the larceny, but was satisfied that he was guilty, and convicted him. The county court, upon appeal, although it may have been entirely satisfied that there was not only probable cause for the prosecution, but a strong probability of the guilt of the accused, was bound to reverse the judgment of conviction and acquit, unless it was satisfied that he was guilty beyond a reasonable doubt.

In the one case the trial court and the appellate court passed upon but one and the same question, viz., whether or not there was good cause for the complaint, and the judgment of reversal necessarily held that there was not good cause for it. But in the other case reversing the judgment of conviction did not show that the appellate court was of opinion that there was not probable cause for the prosecution. In the one case the courts differ as to the question of good cause; in the other, the reversal of the judgment of conviction shows that they differ as to the guilt of the accused, but it does not show or tend to show that there was not probable cause for the prosecution.

[2] The general rule is that the acquittal of the accused is not evidence of a want of probable cause. Such evidence is admissible merely to show that the prosecution has terminated. *Singer, etc., Co. v. Bryant*, 105 Va. 405, 418, 54 S. E. 320; *Newell on Malicious Pros.* 293, 294; 19 Am. & Eng. Enc. L. (2d Ed.) 665, 666; 26 Cyc. 40, 41; *Fox v. Smith*, 3 Am. & Eng. Ann. Cas. 110, and note. One of the reasons given why an acquittal of the accused is not evidence of a want of probable cause is that the prosecution must not only prove that the accused is probably guilty, which would show that there was probable cause for the prosecution, but it must prove that he is guilty beyond a reasonable doubt; and it would be manifestly unreasonable to hold that the failure of the prosecution to make out such a case is evidence of the want of probable cause for instituting the prosecution. An acquittal may

result from some technical error or irregularity, or other cause having no bearing upon the question of probable cause. The prosecution may be unable to produce a witness, and many other facts and circumstances may exist which, while having a bearing on the action of the trying court in acquitting, have no bearing whatever on the question of probable cause. See last case cited, and note to *Lindsey v. Couch*, 18 Am. & Eng. Ann. Cas. 65, 66, and cases cited.

The conclusion reached in *Blanks v. Robinson* is not only contrary to the current of authority, but is, as it seems to us, untenable upon principle. The court, in giving its reasons for that conclusion, says: "The ground upon which the cases which hold the contrary doctrine are rested is that the judgment of conviction is evidence of such high character that it constitutes an estoppel, which concludes all further inquiry into the facts and circumstances of the case. It leaves entirely out of view the facts that this very judgment may have been procured by the fraud of the prosecutor, or the ignorance and incompetency of the justice, and gives to a judgment which has been reversed and vacated the same force and effect as a judgment which has never been reversed or assailed. It not only ignores one of the cardinal doctrines applicable to estoppels, namely, that all estoppels must be mutual, but it violates the principle that the records of the proceedings in a criminal trial are never to be taken as conclusive of the facts upon which it is based in a civil action. For these reasons we regard any rule which would make such a judgment conclusive evidence of probable cause * * * as too arbitrary to effect justice between the parties."

[3] The true ground upon which such a judgment is held to be conclusive evidence of probable cause is not upon the principle of estoppel, within the ordinary or technical meaning of that term, but upon the principle that, when the prosecuting witness or the person who has started the prosecution acts upon facts which are of such a character as that, when they are stated to a calm and dispassionate person capable of judging, they lead him to believe that the person charged is guilty, they are such as make out a case of probable cause upon which the prosecuting witness or prosecutor has the right to act. It is upon this principle that the doctrine recognized in most jurisdictions, and in this state, that the advice of a reputable attorney at law, properly sought and acted on in good faith, constitutes probable cause as a matter of law, and furnishes a complete defense to an action of malicious prosecution. *Jones v. Morris*, 97 Va. 43, 33 S. E. 377; *Newell on Malicious Prosecution*, p. 309 et seq. See *Evans v. Atl. Coast Line Ry. Co.*, 105 Va. 72, 53 S. E. 3; note to *King v. Apple River Power Co.*, 11 Am. & Eng. Ann. Cas. 951, 954-956. "So," as has been said (*Newell on Mal. Pros.* at page 255), "where the judgment of convic-

tion is appealed from, and on acquittal had, if the prosecuting witness presented the facts to one court competent to try the cause, and the court found the defendant guilty, it makes out a case of probable cause, and exonerates him from liability, though the court erred in its judgment. This is undoubtedly the true rule. It is the duty of citizens, when they are in possession of facts which, when fully and fairly presented to a calm and dispassionate lawyer, capable of determining whether such facts constitute a crime, such as should be prosecuted and punished, or sufficient, when presented to a court having jurisdiction to try the offense, to lead the court to act upon them and find the defendant guilty, to take legal steps for the punishment of such offenders; and they should, when they act in good faith upon such facts, be exonerated from any liability in an action for malicious prosecution."

The reason why such advice of counsel or such judgment of conviction by a court having jurisdiction to try is held to be a complete defense to an action of malicious prosecution is no more upon the principle of estoppel in the latter case than in the former. The true ground upon which it is held that such advice or such conviction is a complete defense is because the attorney in the one case and the court in the other are persons, by reason of their capacity or their official position, presumed to be capable of judging of the facts in their legal bearing. It may be, and no doubt is, true in some instances that justices are not highly qualified for the performance of their important duties; but this court cannot on that account adjudge as incompetent and unfit for the performance of their duties that large class of judicial officers upon whom the General Assembly, in its wisdom, has seen proper to confer, not only jurisdiction for the trial of all cases of misdemeanor, but exclusive original jurisdiction of almost all such cases.

But if the reasoning of the court in *Blanks v. Robinson* were sound, that the judgment of the trial court cannot be regarded as conclusive evidence of probable cause, because to do so would violate the principles applicable to the doctrine of estoppel, then the reasoning applies with equal force to a judgment of conviction rendered in a circuit or corporation court, which has been reversed upon a writ of error to this court and the accused subsequently acquitted. If it be held to be the law that a verdict of guilty by a jury and a judgment of conviction in a circuit or corporation court, where that judgment is reversed upon a writ of error and the accused subsequently acquitted, is not conclusive evidence of probable cause, few persons would dare make the effort to put in motion proceedings to enforce the criminal laws of the state; for to do so would cause such person, wherever the final result was the acquittal of the accused, to run the risk of vexatious litigation and probably subject him to heavy damages. Few

men would be expected or willing to incur such hazards. Besides, it would be an anomaly, if not an absurdity, to hold that the advice of counsel properly obtained and followed in good faith before making an effort to set in motion criminal proceedings would be conclusive evidence of probable cause, and a complete defense, yet that, upon a full presentation of the facts by both the prosecution and the accused upon the trial, the verdict of guilty by a jury approved by the judgment of the trial judge is, if reversed and the accused finally acquitted, merely *prima facie* evidence of probable cause. By what process of reasoning or rule of logic is the judgment of the circuit or corporation court, upon a full presentation of all the facts by both sides, to be considered as of less weight as evidence of probable cause than the opinion of counsel upon an *ex parte* statement of the facts by the prosecutor? Yet such is the logical result of the reasoning in *Blanks v. Robinson*.

It would seem to follow necessarily, therefore, that either the advice of counsel, under the circumstances indicated, must be held not to be conclusive evidence of probable cause, or the judgment of the trial court must be, unless improperly procured.

Another ground relied on in *Blanks v. Robinson* to show that the judgment of the trial court should not be treated as conclusive evidence of probable cause is because the court in that case "left entirely out of view the fact that this very judgment may have been obtained through the fraud of the prosecutor." Neither the trial court in that case nor the opinion of the court in *Womack v. Circle*, which was overruled, holds that the judgment of the trial court should be considered as conclusive evidence of probable cause, if procured by the fraud of the prosecutor, but, on the contrary, the trial court in *Blanks v. Robinson* had instructed the jury in effect that the justice's judgment was not conclusive evidence of probable cause, if procured by the fraud of the prosecutor, and that was the view of this court in *Womack v. Circle*, as clearly appears from its opinion. See 32 Grat. 338, 339.

Another ground relied on in the dissenting opinion in *Womack v. Circle* why the judgment of the justice should not be treated as conclusive evidence of probable cause is that, in exhibiting articles of peace and in other criminal proceedings, the accused is bound over or convicted by the justice upon the testimony of the prosecutor alone, when the mouth of the accused is closed. Whatever merit there may have been in that reason at that time, it has lost much, if not all, of its force by the change in the law made since that decision was rendered, by which the accused, in all cases of felony or misdemeanor, is entitled to testify in his own behalf. Code 1904, § 3897.

[4] Upon principle, as well as upon authority, it seems to us that, if there be a conviction by a justice or other trial court hav-

ing jurisdiction of the case, which is reversed upon appeal or writ of error, and the accused acquitted, such judgment of conviction in an action for malicious prosecution should be held to be conclusive evidence of probable cause, unless it be shown that it was procured by the defendant through fraud or by means of testimony which he knew to be false.

This is substantially the doctrine approved in the case of *Crescent City, etc., Co. v. Butchers' Union, etc., Co.*, supra, by the Supreme Court of the United States, after a review of a number of the conflicting decisions on the subject. The conclusion reached by the court in that case, in our opinion, does to a great extent, as that court said, seem "to reconcile the apparent contradiction in the authorities, and states the rule which we think to be well grounded in reason, fair and just to both parties, and consistent with the principle on which the action for malicious prosecution is founded."

[5] It follows from what has been said that we are of opinion that the circuit court erred, not only in refusing to give instruction No. 3 offered by the plaintiff in error, but also erred in overruling the demurrer to the first count of the declaration. That count fails to aver that the judgment of conviction by the justice, which is alleged, was procured by the defendant through fraud or by means of testimony which he knew to be false. Having alleged such conviction in the count, an allegation which would destroy the conclusiveness of the conviction was indispensable; for, unless made, as was said in *Spring v. Besore*, 12 B. Mon. (Ky.) 551, 555, the other facts stated "establish the existence of probable cause, and the count is suicidal." See, also, *Carpenter v. Sibley*, 153 Cal. 215, 94 Pac. 879, 15 L. R. A. (N. S.) 1143, 126 Am. St. Rep. 77, 15 Am. & Eng. Ann. Cas. 484, and note on 486, and cases cited.

The other assignments of error need not be considered, as the precise questions raised by them are not likely to arise upon another trial.

The judgment of the circuit court must be reversed, the verdict of the jury set aside, the demurrer to the first count of the declaration sustained, and the cause remanded, with leave to the plaintiff to amend his declaration, if he be so advised, and for further proceedings not in conflict with the views expressed in this opinion.

Reversed.

(112 Va. 408)

NEWMAN v. McCOMB.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. DIVORCE (§ 236*)—ALIMONY—AGREEMENTS IN LIEU—REMEDY.

An action for the recovery of money payable under written agreements, in one of which

defendant, during the pendency of an action for divorce brought by plaintiff, agreed to pay plaintiff \$50 per week as alimony and a stated sum as counsel fees, and in the other writing plaintiff waived all marital rights in defendant's property, and released defendant from any demand for permanent alimony, and fixed a day at which the stipulated alimony should cease, is not an action of assumpsit to recover alimony, but an action on the contract.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 236.*]

2. DIVORCE (§ 236*)—ALIMONY—AGREEMENT IN LIEU—PLEADING—DECLARATION.

Code 1904, § 2852, provides that an action of debt may be maintained on a writing by which there is any promise or obligation to pay money; and section 3272 provides that on a demurrer, unless it be a plea in abatement, the court shall not regard any defect in the declaration, except the omission of something so essential to the action that judgment according to law could not be given. Plaintiff's declaration, in an action for money as to payment of which defendant was alleged to be in default, was based upon writings, one of which was an agreement between plaintiff and defendant, made during the pendency in another state of an action for divorce, whereby defendant agreed to pay plaintiff alimony, and on another writing in which plaintiff released defendant from any demand for permanent alimony and fixed a day at which the stipulated alimony should cease. Held that, under the Code provisions, the declaration sufficiently stated an action of debt for the recovery of sums payable under the terms of the agreement.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 236.*]

3. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF IMMATERIAL EVIDENCE.

In an action to recover sums payable in lieu of alimony, based on writings and stipulations between the parties during the pendency of a divorce action in another state, the admission of evidence as to proceedings had in the divorce case is not prejudicial, since it was immaterial to the issues involved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4166; Dec. Dig. § 1050.*]

4. LIMITATION OF ACTIONS (§ 25*)—PERSONAL ACTIONS—INSTRUMENTS FOR PAYMENT OF MONEY.

Under Code 1904, § 2920, relating to limitation of personal actions, an action to recover money in lieu of alimony, based on writings and stipulations made by parties during the pendency of an action for divorce, is barred by the five-year limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 118-131; Dec. Dig. § 25.*]

5. TRIAL (§ 251*)—INSTRUCTIONS—APPLICATION TO ISSUES.

That a plea which presents no defense is not met with objection or demurrer, but issue is taken thereto, does not require the court to instruct thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

Appeal from Circuit Court, Orange County. Action by Lelia M. McComb against W. G. Newman. Judgment for plaintiff, and defendant appeals. Affirmed.

F. O. Moon, Rixey & Hiden, and Jno. G. Williams for appellant. Grimsley & Miller, for appellee.

BUCHANAN, J. This is an action of assumpsit, based upon two writings, one of which is as follows:

"N. Y. Supreme Court, Kings County.

"Lelia Moore Newman, Plaintiff, v. Walter George Newman, Defendant.

"Whereas, the plaintiff has brought the above-entitled action against the defendant for an absolute divorce, and said action is now pending in the court above named: and

"Whereas, it is mutually desired that no application should at present be made in open court for an allowance of alimony and counsel fee:

"Now, therefore, it is stipulated and agreed between the plaintiff and defendant, and by and between their respective attorneys herein, that the defendant pay to the plaintiff the sum of fifty dollars (\$50.00) per week, as alimony, to begin May 12, 1902, and continue during the pendency of this action, or until such time as defendant defaults or elects to discontinue such payments for one week or more; then plaintiff to have the right to make a motion for alimony in manner and form as if this stipulation had not been made, except, however, that any allowance made by the court to plaintiff shall only begin from the date that payments herein agreed upon ceased.

"It is further stipulated and agreed that the defendant shall pay to the plaintiff the sum of three hundred and fifty dollars (\$350.00) as and for her counsel fee in this action.

"It is further agreed by the parties and attorneys herein that this stipulation is made without prejudice to the rights of either party, and that the same shall not be used upon any motion, or upon the trial of the action.

"Dated New York, May 29, 1902."

The other is an agreement between the parties, entered into on the 17th of September, 1902, in reference to their family differences and property rights, and contains, among other provisions, the following:

"Seventh. In view of this contract settling all the property rights of said parties, each party hereto waives all marital rights in the property of the other, whether said property has already been acquired or may hereafter be acquired, and the said Lelia Moore Newman hereby expressly releases the said W. D. Newman from any demand for permanent alimony or support, that she may now have or may hereafter have or acquire, whether by virtue of a judgment or decree of any court or otherwise; and it is further expressly stipulated that the temporary alimony now being paid by W. G. Newman to said Lelia Moore Newman by reason of a stipulation to that effect in the above-mentioned suit for divorce in New York shall cease on October 15, 1902, whether said divorce suit be then decided or not, unless the said W. G. Newman take some step or steps to prevent the said suit being heard before that time, or take an appeal."

[1, 2] The court is of opinion that the demurrer to the amended declaration was properly overruled by the trial court. This is not an action of assumpsit to recover alimony, as argued, but is an action to recover certain sums in lieu thereof, which became due and payable under the terms of the agreements of May 29, 1902, and September 17, 1902. The declaration, though inartificially drawn, is sufficient. We think, under the provisions of sections 2852 and 3272 of the Code of 1904.

[3] The court is further of opinion that, even if the court erred in permitting the introduction of oral evidence as to the proceedings had in the divorce case between the parties in one of the courts of Kings county and state of New York, it furnishes no sufficient ground for reversing the judgment complained of, since that evidence was wholly immaterial to the decision of the issues involved, and its admission, as clearly appears, could not have prejudiced the plaintiff in error. *N. & W. Ry. Co. v. Birchfield*, 105 Va. 809, 54 S. E. 879.

[4] The court is further of opinion that the court properly refused to instruct the jury that the claim sued for was barred by the statute of limitations, if they believed that the cause of action had accrued more than three years before the institution of this action.

Two pleas of the statute of limitations were filed—one that the demand sued for had accrued more than five years, and the other that it had accrued more than three years, before this action was instituted. The right to recover was founded upon a contract evidenced by writings, and the five-year, not the three-year, statute of limitations was applicable to the case. Code, § 2920.

[5] The court, upon motion of the plaintiff, had so instructed the jury. Since the declaration asserted a demand based upon a promise in writing, the plaintiff ought to have demurred to or objected to the plea relying upon the three-year statute of limitations, instead of taking issue upon it; but, since that plea constituted no defense to the action, the court did not err in refusing to instruct upon the issue raised by it.

It would be a strange rule of pleading and practice which would require a court to give an instruction contrary to law and in conflict with one already given upon another and a material issue in the case, because the plaintiff, instead of objecting to a plea based upon a ground which furnished no defense, took issue upon it, or, after taking issue upon it, failed to have it stricken out. See *United States v. Dashiell*, 4 Wall. 182, 18 L. Ed. 319; 2 *Thomp. on Trials*, § 2312.

The court is further of opinion that the instructions numbered 1 and 2, given upon the motion of the plaintiff, fairly submitted the case to the jury, and that there was no error in refusing any of the instructions offered by the defendant.

The court is further of opinion that the agreement of May 29, 1902, and of September 17, 1902, and the other evidence, independent of the oral evidence as to the proceedings had in the divorce case between the parties pending in Kings county, in the state of New York, fully sustain the verdict of the jury, and that the trial court did not err in refusing the motion of the defendant to set that verdict aside.

The judgment complained of must be affirmed.

Affirmed.

(112 Va. 280)

BAKER et al. v. BERRY HILL MINERAL SPRINGS CO.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. PRINCIPAL AND AGENT (§ 181*)—NOTICE TO AGENT—CONSTRUCTIVE NOTICE.

The rule that knowledge of the agent is knowledge of the principal does not apply where the agent, in order to commit a fraud upon a third person, perpetrates a fraud upon the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 690; Dec. Dig. § 181.*]

2. BANKS AND BANKING (§ 112*)—ACTS OF OFFICERS—FRAUD.

Where the president of a bank, in seeking to defraud certain persons, told them that the bank would accept their notes, would renew them indefinitely, and under certain circumstances would not enforce payment, the bank is not charged with the knowledge of the president, and therefore, being innocent, may enforce the notes.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 271, 272; Dec. Dig. § 112.*]

3. BANKS AND BANKING (§ 114*)—AUTHORITY OF AGENT—RATIFICATION.

Where the president, seeking to defraud third persons, told them that they could give the bank their note, and such note would not be enforced, and the bank, without knowledge of such promise, discounted the note, giving full value, there was no ratification of the president's acts.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 277-280; Dec. Dig. § 114.*]

4. INJUNCTION (§ 26*)—GROUNDS—RESTRAINING ENFORCEMENT OF NOTES.

The president of a bank, in furthering certain fraudulent schemes of his own, told third persons that the bank would discount their notes secured by certain stock of a corporation which he was organizing, and that if he could not sell the stock taken by these persons the bank would not enforce payment. The bank as an ordinary commercial transaction discounted the notes, and the stock was given as collateral. It proved worthless, and the bank offered to return it, and demanded payment of the notes. *Held*, that an injunction to restrain collection of the notes until there was an end to the litigation between the makers and the president of the bank was properly refused, where all parties to the transaction are not put in statu quo, and where the makers of the notes may not be entitled to relief against the

bank, even if they succeed against the president.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.*]

5. APPEAL AND ERROR (§ 1194*)—REMAND—SUBSEQUENT PROCEEDINGS.

Complainants in a suit seeking an injunction first filed an original, then an amended, and last a supplemental, bill. The defendants demurred, and a decree sustaining the demurrer was reversed and remanded on appeal, leaving an injunction in force. Upon motion in the trial court to dissolve the injunction, complainants claimed that the motion was heard as on demurrer, because the defendant had not answered the supplemental bill and that the decree on appeal was conclusive on defendants. The defendant had answered the original and the amended bill, and before its motion to dissolve was heard had, over complainants' objection, filed an answer to the supplemental bill. The supplemental bill alleged nothing new, and the answer already in the record put in issue all the matters set up in any of the bills. *Held* that, under those circumstances, the motion was not heard as on demurrer, and that the decree on appeal did not conclude defendants.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1194.*]

Appeal from Circuit Court, Culpeper County.

Suit by K. M. Baker and others against the Berry Hill Mineral Springs Company of Virginia. From a decree dismissing an injunction, complainants appeal. *Affirmed*.

Rixey & Hiden, John S. Barbour, and E. Hilton Jackson, for appellants. Grimsley & Miller and Waite & Perry, for appellee.

CARDWELL, J. This is a second appeal of this case to this court. The original and amended bills filed by appellants seek a rescission of a contract which it is alleged they were fraudulently induced to enter into by S. R. Smith and W. E. Coons, to enjoin the Culpeper National Bank, Virginia, from collecting by suit certain negotiable notes executed by the appellants as a part of the alleged fraudulent scheme, and which notes, according to the allegations of the bill, were discounted by said bank with actual notice and actual participation of the bank in the wrong and fraud perpetrated by Smith and Coons upon appellants.

The facts and circumstances alleged in the original and first amended bills, and all that had been done to the injury of appellants pursuant to the alleged fraudulent purposes of Smith and Coons, are fully and clearly set out in the opinion of this court by Whittle, J., on the former appeal (109 Va. 776, 65 S. E. 656), and need not be repeated at length here. The decree entered by this court at the former hearing of the cause reversed the decree of the circuit court sustaining the demurrer of the Culpeper National Bank to the original and first amended bills, dismissing the same as to the bank, and dis-

solving the injunction theretofore awarded, and remanded the cause for further proceedings therein, to be had not in conflict with the views expressed in this court's opinion.

The cause having been remanded, the defendant bank gave notice to appellants of a motion to dissolve the injunction which had been granted against it on the original bill, which injunction restrained the bank from collecting of complainants the notes above referred to, aggregating about \$4,500, discounted by the bank, and which were then due and payable. This motion, according to the notice, was to be made before the circuit court on the 26th day of June, 1909; but by a consent decree entered on that day the motion was ordered to be docketed and the hearing thereof continued to the 4th day of September, 1909, when it was heard upon the notice, the original and two amended bills of the complainants, the answer of the defendant bank to the original and first amended bills, and its answer to the second amended bill, filed over the objection of the complainants, said answer being substantially the same as its answer to the original and first amended bills, the affidavits of complainants and others as to the value of certain lands involved in the litigation, and upon an agreed statement of facts and certain record evidence—the complainants, appellants here, relying also on the answers of S. Russell Smith, W. E. Coons, the defendant bank, and the Berry Hill Mineral Springs Company; the defendant bank, appellee here, upon the answers of Smith, Coons, and the Berry Hill Mineral Springs Company, affidavits of the present cashier of the bank and all of its directors, except T. C. Smith, and other affidavits as to value of the land, etc., tender of stock, and certain statements agreed upon. Whereupon the case was fully argued and by consent submitted to the court for decision in vacation, and at the December term, 1909, the decree from which this appeal is taken was entered, dissolving the injunction which had been theretofore awarded against the defendant bank.

Quite a number of questions have been raised and argued on this appeal; but in the view we take of the case it is only necessary for us to consider the relation of the appellee to the appellants with respect to the transaction which it is alleged the latter had with S. Russell Smith and W. E. Coons, and by which it is claimed they were defrauded, of which fraud appellee had knowledge and participated in.

The original and amended bills contain substantially the same allegations, and the affidavits read by appellants in resisting the motion to dissolve the injunctions practically reiterate the allegations of the original and amended bills. The facts charged in the bills and stated in the affidavits are that appellants were, prior to and during the year 1904,

the owners of three notes, aggregating \$45,000, which were secured by a deed of trust on 169 $\frac{1}{4}$ acres of land in Culpeper county, Va., belonging to the Berry Hill Mineral Springs Company of Virginia, a corporation, and 600 shares of stock in said corporation, and that on the last-named date S. Russell Smith, who was president of the appellee bank, and treasurer of Culpeper county, and W. E. Coons, clerk of the circuit court of Culpeper county, both of whom are well known and prominent men, called upon appellants at their home in Culpeper county, Va., for the purpose of fraudulently inducing them to enter into a reorganization scheme, whereby the Berry Hill Mineral Springs Company would be reorganized upon a certain plan, which is set out in appellants' original bill; that in order to induce appellants to accept the proposed scheme, and to mark satisfied the deed of trust securing their said notes, aggregating \$4,500, and to surrender the 600 shares of stock in the company, the said Smith and Coons made the representations and promises set out in the original bill, and which are stated in the opinion on the former appeal of this case, supra; that appellants, relying and acting solely upon said representations, during the month of March, 1905, surrendered their stock and the notes, and marked the said deed of trust satisfied; that the new company, which Smith and Coons were to organize, was afterwards organized, and \$40,000 worth of its stock issued to appellants; that Smith and Coons, and each of them, expressly represented and promised that within two years all the stock to be issued to appellants in the new company would be redeemed or purchased at its par value by Smith personally, and he reserved the right to do so, none of which promises made by Smith and Coons were kept, but were all broken, and appellants were deceived and defrauded out of their property. With respect to the appellee bank's connection with and participation in the fraud charged against Smith and Coons, it is charged in the amended bills and stated in the affidavits for appellants, read on the motion to dissolve the injunction, that appellee, through the said S. Russell Smith, its president, agreed that if appellants would go into this reorganization scheme with Smith and Coons, and surrender their 600 shares of stock in the old company, and accept \$40,000 worth of stock in the new company which Smith and Coons proposed to organize, to lend them (appellants) \$4,500 and accept their notes for that amount, and to carry the said notes upon renewals of the same from time to time until Smith, in his individual capacity, sold for appellants enough of their \$40,000 worth of stock in the new company at par to pay off the loan of the \$4,500 by the bank.

Practically the claim made against the appellee bank is that it agreed, through Smith,

its president, that if Smith were unsuccessful in selling a sufficient amount of appellants' stock in said new company to pay off the notes given by them to the appellee for the loan of the \$4,500, payment of said notes was not to be demanded of appellants. Appellee made the loan of \$4,500 to appellants, by discounting their notes for the same, which notes became due and were several times renewed; but finally appellee refused to renew the notes any longer, and demanded their payment, which being refused, a suit against appellants was instituted for the collection of the notes, and solely upon the allegation of an agreement on the part of appellee, made through Smith, its president, not to attempt to collect said notes until enough of the stock of appellants in said new company should be sold, and from the proceeds of said sale the notes could be paid off, the injunction in this cause, staying the hands of the appellee in said suit for the collection of said notes, was awarded.

The sum and substance of the relief prayed in the bills in this cause is: (1) That appellants' contract with Smith and Coons be rescinded, their deed of trust given by the old company securing them re-established, and that their stock in the old company be given back to them (i. e., that they be placed in statu quo); and (2) failing in their demand to be placed in statu quo, they ask that their contract with Smith and Coons be specifically enforced (i. e., that with respect to appellee its hands shall be stayed as to any effort on its part to collect the notes given for the loan of the \$4,500 until Smith and Coons fully perform their contract with appellants).

[1] Actual notice to appellee of the alleged fraud of Smith and Coons upon appellants is not even claimed; but their sole reliance in resisting the dissolution of the injunction awarded in the case was that constructive notice to appellee is to be imputed, for the reason that Smith was, at the time of the alleged fraudulent transaction, appellee's president and its controlling and managing officer, and presumed to have had authority to act for appellee in his said transactions with appellants. The controlling question, therefore, for our determination, is whether or not constructive knowledge of the alleged fraud can be rightly and legally imputed to appellee from the fact that Smith was the president of the appellee bank and alleged to be the sole manager of its affairs, and in order to carry out the alleged fraud on the appellants it became necessary, on Smith's account, to discount the notes in question for appellants in the bank, in which latter transaction a fraud was also perpetrated on the bank.

Undoubtedly it is a well-established general rule that knowledge of the agent is knowledge of the principal, and that the principal is ordinarily chargeable with the knowledge

acquired by his agent in executing his agency, and is subject to the liabilities which such knowledge imposes, and by some authorities it is maintained that this rule is especially applicable to corporations, which can deal alone with the public through their officers and agents, and could not otherwise be affected with notice; but this rule has its exceptions, one of which applies to this case. The agent here is alleged, and by the affidavits and agreed facts is proved, to have engaged in an independent fraudulent transaction on a third person for his own benefit, and, at the same time, in order to accomplish the fraud, has also perpetrated a fraud upon his own principal.

In *Pomeroy's Eq. Jur.* vol. 2 (3d Ed.) § 675, the author says: "It is now settled, by a series of decisions possessing the highest authority, that when an agent or attorney has, in the course of his employment, been guilty of actual fraud, contrived and carried out for his own benefit, by which he intended to defraud, and did defraud, his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney, and thus fraudulently concealed. In other words, if in the course of the same transaction in which he is employed the agent commits an independent fraud for his own benefit, and designedly against his principal, and it is essential to the very existence or possibility of such fraud that he should conceal the real facts from his principal, then the ordinary presumption of a communication from the agent to his principal fails. On the contrary, a presumption arises that no communication was made, and consequently the principal is not affected with constructive notice. The courts have carefully confined the operation of this exception to the condition described where a presumption necessarily arises that the agent did not disclose the real facts to his principal, because he was committing such an independent fraud that concealment was essential to its perpetration."

In *Santiago Innerarity v. Merchants' National Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710, the opinion says: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in cases of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of the fraudulent transaction which the agent was engaged in perpetrating."

There are cases which seemingly sanction the view that the exception to the general rule does not apply to directors, presidents, and other such managing officers of a corporation, through whom alone the corporation can act; but in the well-considered case of *Barnes v. Trenton Gas L. Co.*, 27 N. J. Eq. 33, the opinion says: "The rule based on the presumption that the agent has communicated the facts to his principal does not apply where the agent's (though an officer of a corporation) interest is opposed to that of his principal, for in such a transaction the officer stands as a stranger to the company. His interest being opposed to the interest of the company, the presumption is, not that he will communicate his knowledge to the company, but that he will conceal it; that where an officer of a corporation is dealing in his own interest, opposed to theirs, he must be held not to represent them in the transaction, so as to charge them with the knowledge he may possess, but which he has not communicated to them, and which they do not otherwise possess"—citing a number of decisions by both English and American courts.

Another instructive case in point is that of *Brookhouse v. Union Pub. Co.*, 73 N. H. 368, 62 Atl. 219, 2 L. R. A. (N. S.) 993, 111 Am. St. Rep. 623, 6 Am. & Eng. Ann. Cas. 675, to which there is an extended note, reviewing a great number of decided cases; the conclusion being that the exception to the broad proposition that notice to the agent is notice to the principal, viz., where the knowledge is acquired by an officer of a corporation, while not acting for the corporation, but while acting for himself, is not imputable to the corporation, finds support in the decisions of the highest courts of England, the United States courts, and the courts of 27 states of the Union, citing the cases.

In *Gunster v. Scranton Illuminating Co.*, 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650, the question is elaborately and ably discussed, and a number of the cases relied on by counsel for appellants to sustain their side of the question are criticised.

The opinion of this court in *Martin v. South Salem L. Co.*, 94 Va. 58, 26 S. E. 600, is in line with the long list of cases to which the above cited belong, and says: "A corporation is not affected by the knowledge of an agent, when he himself contracts with it, or otherwise deals with it in a transaction in which his interests are opposed to the interests of the company, for in such a transaction he could not represent the company."

It is believed that no case can be found deciding that when the agent was acting for himself in a transaction, and in that same transaction defrauded his principal, and the principal received no advantage from the transaction, notice to the agent was notice to the principal.

[2] Upon the allegations of the bills in this cause, leaving out of view the denial of

Smith in his answer and his affidavit, and in the affidavits of all the officers and directors of the appellee bank, of the truth of the allegations with respect to the knowledge of appellee of the fraud charged against Smith and Coons, it is made clearly to appear that Smith, in the transaction, was dealing in his own interest, which was distinctly antagonistic to the interest of the appellee. Assuming it to be true that, in perpetrating the alleged fraud upon appellants, Smith told them, "as an inducement to get us to go into this fraudulent scheme, the bank would let us have \$4,500, and not require us to pay it back until Mr. Smith sold certain stock for us and from the proceeds of the sale paid off the notes"—i.e., if the stock was never sold by Smith, then this money was never to be paid back—can the doctrine that knowledge of the agent is to be imputed to his principal be carried to the extent of holding appellee bound by such a contract, especially when it had no actual knowledge of the transaction, and received no benefits from it? Surely not.

[3] The argument that appellee has ratified Smith's alleged unauthorized agreement is unsound; for there was nothing for appellee to ratify. It has obtained no advantage over appellants; but, to the contrary, they received a quid pro quo for everything appellee has received from them.

In *Swindell & Co. v. Bainbridge State Bk.*, 3 Ga. App. 364, 60 S. E. 13, it is said: "Before a corporation should be held as having ratified a verbal agreement of its agent to relieve the makers from the payment of notes amounting to \$10,000, both knowledge and acts of ratification ought to be alleged and proved. When ratification by the bank of an unauthorized agreement, made by its president, to relieve its debtor, is relied upon, some specific acts of ratification should be alleged. If acquiescence in and benefits from such unauthorized agreement are relied upon as an estoppel, knowledge of such agreement by the directors of the bank, and the beneficial results accruing to the bank under such agreement, must be alleged and proved."

[4] The actual transaction in this case between appellee and appellants is simply this: The latter presented their notes to the former for discount, attaching thereto 60 shares of stock as security for the notes, which notes were taken by the appellee bank in the usual course of business, and appellants received therefor the face value of the notes, less the ordinary discount upon the loan of the money. It has a number of times renewed the said notes, and finally demanded their payment, tendering the return of the stock deposited as security for the notes, and appellee is claiming nothing of appellants for which it has not rendered a full and fair equivalent. On the other hand, appellants refuse to pay back the money they have received of appellee in this trans-

action, decline to receive back their 60 shares of stock proven to be worthless, and say that the hand of appellee should be stayed in its efforts to collect the money loaned them until appellants can litigate to an end the controversy as to whether or not appellants are entitled to the relief they are asking as against Smith and Coons and the Berry Hill Mineral Springs Company, which relief is that the alleged fraudulent contract be rescinded or reformed, when in either event a court of equity could not grant the relief asked without requiring all parties to the transaction to be put in statu quo.

Appellants cannot succeed in this litigation, unless they succeed against Smith and Coons, and, even if they make a case against Smith and Coons, it does not follow that they will succeed against appellee, as to whom the injunction awarded in the cause alone applies; on the contrary, the record, as we have seen, negatives the right of appellants to the relief they are asking as against appellee. Under these conditions and circumstances, it would be manifestly unjust and inequitable to hold that appellee shall not collect of appellants the money it lent them in an ordinary banking transaction, until they have litigated with other parties matters of which appellee had no knowledge and with which it is not concerned.

[5] There is no merit in the contention of appellants that the motion to dissolve the injunction awarded in the cause was heard as upon a demurrer to appellants' bills, and therefore the decision of this court upon the first appeal was conclusive and binding upon the lower court, and it should have overruled the motion and declined to dissolve the injunction. This contention is made upon the ground that, although appellee had answered the original and first amended bills, it had not, when the motion to dissolve the injunction was made, answered the second amended and supplemental bill. We have observed that, while appellee had not, previous to the hearing of the motion, formerly filed its answer to the second amended bill, it was presented and filed at the time the motion was heard, though over the objection of appellants; but if such were not the case, the three bills are practically the same in their averments, there being nothing new in either of the amended bills, and therefore the answer of appellee, already in the record, put in issue all the matters set up in both the original and amended bills. The motion to dissolve the injunction was made and heard in accordance with the general practice in the courts of the state, upon the pleadings and affidavits read as depositions on behalf of the respective parties.

The decree of the circuit court is right, and therefore is affirmed.

Affirmed.

(112 Va. 419)

CITY OF PORTSMOUTH v. LEE

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. MUNICIPAL CORPORATIONS (§ 755*)—ACCIDENT IN STREET—CARE REQUIRED OF MUNICIPALITY.

A municipal corporation is not an insurer against accidents upon its streets and sidewalks; but it is bound only to use due care to see that its streets and sidewalks are reasonably safe to persons passing on them when exercising ordinary care, and it is only liable for injuries from defects where it has negligently failed to do that which it could be reasonably required to do in the particular case.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587-1590; Dec. Dig. § 755.*]

2. MUNICIPAL CORPORATIONS (§ 775*)—NEGLECT—CLEANSING SEWER.

Where a sewer which was clogged was being cleansed by forcing water through it from a hose pipe, which was not only the usual way, but the only way it could properly be done, the city had the right to put the hose there for that purpose, and allow it to remain there as long as necessity required, using only such precaution against injury to persons using it as required under the circumstances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1630; Dec. Dig. § 775.*]

3. MUNICIPAL CORPORATIONS (§ 798*)—DEFECTS IN STREETS—WARNING TO TRAVELERS.

Where the city found it necessary to clean out a clogged sewer by allowing water to run all night through a fire hose from a hydrant into a catch-basin at a street corner, and the hose was laid in the gutter close to the curb, and a lighted lantern placed on the curb, and there was an arc light at the corner over the catch-basin, all the necessary precautions for the safety of travelers were taken, and it was not necessary to take extra precautions, such as stationing a watchman, to warn passers of the presence of the hose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1657, 1658; Dec. Dig. § 798.*]

4. MUNICIPAL CORPORATIONS (§ 755*)—DUTY TO HEALTH AND WELFARE OF CITIZENS.

It is as much the duty of a municipal corporation to take proper precautions for the health and welfare of its citizens as it is to keep its streets and all parts of them in reasonably safe condition for public travel.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587-1590; Dec. Dig. § 755.*]

5. MUNICIPAL CORPORATIONS (§ 791*)—DEFECTS IN STREETS—NOTICE TO CITY OF DEFECT.

Where it was necessary to run water all night through a fire hose into a catch-basin, and the hose was left in the gutter close to the curb at 5:07 p. m., the interval between that time and 7:45 p. m. was not sufficient to charge the city with constructive notice that the hose was not in the gutter, but two or three feet out in the street, where a traveler fell over it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1647-1651; Dec. Dig. § 791.*]

6. MUNICIPAL CORPORATIONS (§ 819*)—DEFECTS IN STREETS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action against a city for injuries received by falling over a fire hose left in the

street to flush a sewer, evidence held to show that plaintiff's own negligence was the proximate cause of her injury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 819.*]

Error to Circuit Court of City of Portsmouth.

Action by Margaret Lee against the City of Portsmouth. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

Jno. W. Hopper and Frank L. Crocker, for plaintiff in error. S. Burnell Bragg and Jeffries, Wolcott, Wolcott & Lankford, for defendant in error.

CARDWELL, J. Mrs. Margaret Lee, a married woman, brought this action against the city of Portsmouth, and recovered a verdict and judgment for \$3,000 as damages for personal injuries alleged to have been caused by reason of the plaintiff's stumbling over a hose pipe lying in the street, against or close to the curbing, at the intersection of High and Green streets in said city.

The gravamen of the declaration in the case is the alleged negligence of the defendant city in placing or permitting to be placed the said hose pipe in the street. It appears that High street runs east and west, and is paved with asphalt. Green street runs north and south, and is 60 feet wide. The accident to the plaintiff is alleged to have occurred at the southeast intersection of High and Green streets. On the day of the accident, which was the 6th day of November, 1908, the street inspector and some of the street hands had been engaged in flushing out one of the sewers of the city, which had become stopped up, and in order to flush out this sewer it became necessary to attach one end of a piece of hose pipe about 3½ inches in diameter and about 23 or 24 feet in length to the water hydrant located at the edge of the sidewalk on Green street, a little south of the south building line of High street, and place the other end in a catch-basin situated at the southeast intersection of the sidewalks of Green and High streets, allowing the water at full pressure to run through the hose pipe into the catch-basin, thence through the sewer. This sewer was so badly clogged that it became necessary, in order to clear it out, to let the water run through it, not only during the day, but also all of the night, and the accident here complained of occurred about 15 or 20 minutes to 8 o'clock in the evening. There was an electric light pole at the southeast intersection of the sidewalks of High and Green streets, with an arm or bracket extending from the pole about 6 feet in a northwesterly direction, and attached thereto was an arc street electric light, which light burned all of that night.

The plaintiff lived on the west side of Green street, about 2½ blocks from the scene of the accident, and on the evening of the accident she left her home about 20 minutes to 8 o'clock to go to a theatrical performance about 5 blocks away, and which was to begin at a quarter to 8 o'clock. She was accompanied by her brother and a little girl. It was a cold and windy night, and she was holding her coat around her neck and was walking fast in order to get to the theater in time. She was somewhat ahead of her brother and the little girl. Her course was down the west side of Green street to High street, and thence to the east sidewalk of Green street at its intersection with the south sidewalk of High street. There, as is alleged, she came in contact with the hose pipe, and, stumbling, struck her knee against the curbing of the sidewalk, and thereby received the injuries of which she complains.

With respect to the foregoing facts there is no conflict of evidence, and the only material facts about which there is any conflict of testimony are, first, whether the hose pipe was lying up against the curbing of the sidewalk, as testified to by the defendant's witnesses, or lying two or three feet away from it, as testified to by some of the plaintiff's witnesses; and, second, whether the city's servants put a red lantern on the curbstone on Green street, as testified to by several of the defendant's witnesses, or there was no lantern there, according to the testimony of several of plaintiff's witnesses.

The questions for our determination are: (1) Was the defect in the street complained of actionable negligence on the part of the city? and (2) if the evidence be sufficient to sustain the charge of negligence, as found by the jury, was defendant in error, plaintiff below, free from contributory negligence concurring with the negligence of the city and causing her injury?

[1] It has been repeatedly held by this court, and is the well-recognized rule of law in the courts of many of the states, as well as in the federal courts, that a municipal corporation is not an insurer against accidents upon its streets and sidewalks; nor is every defect therein, though it may cause the injury sued for, actionable. It is bound only to use due and proper care to see that its streets and sidewalks are reasonably safe to persons passing on or along them, when exercising ordinary care and prudence to that end. It is only liable for injuries resulting from defects in its streets or sidewalks, where it has negligently failed to do that which it could be reasonably required to do under the circumstances of the particular case. *City of Richmond v. Courtney*, 32 Grat. 798; *Same v. Mason*, 109 Va. 546, 65 S. E. 8; *Same v. Lambert*, 111 Va. 174, 68 S. E. 276, 28 L. R. A. (N. S.) 380; *Same v. Schonberger*, 111 Va. 168, 68 S. E. 284, 29

L. R. A. (N. S.) 180; *City of Portsmouth v. Houseman*, 109 Va. 554, 85 S. E. 11.

[2] Conceding for the sake of the argument that there is a conflict in the evidence, and, therefore, it has to be taken as true that the hose pipe in question here was lying in the street two or three feet from the curbstone, and that there was no lighted lantern there to disclose its presence, was this hose pipe an unlawful or an unreasonable obstruction in the street? It was unquestionably being used by the city in the performance of a public duty in cleansing one of its sewers, which had become clogged, and thus protecting the health and welfare of its citizens. This sewer was being cleansed in not only the usual way, but in the only way in which it could be properly done, and unquestionably the city had the right to put the pipe there for the purpose of cleaning the sewer in the manner in which it was being done, and for that purpose to allow it to remain there as long as the necessity existed, using only such precaution against injury to persons using the street as ordinary prudence would dictate under the circumstances. When this hose pipe, 3½ inches in diameter, was from necessity left in the street for the night, not only was it under an arc electric light, which burned all night, but the hose was filled with running water, and the noise of the water as it poured into the catch-basin was such that no one not deaf could fail to hear it. Unless it could reasonably have been expected by the city's officials in charge of the work that one in the possession of his faculties would fail to see a hose pipe 3½ inches in diameter filled with water and directly under an electric arc light, clearly the failure of the city to take other precautions under the circumstances would not render it guilty of actionable negligence. Certainly ordinary prudence would not have dictated that a policeman should be put there to warn travelers of the presence of the hose pipe.

[3] It is to be borne in mind that it is as much the duty of a municipal corporation to take due and proper precautions for the health and welfare of its citizens as it is to keep its streets and all parts of them in reasonably safe condition for public travel, and the principles of law fixing the liability or nonliability of the city in damages, where an injury on the street is sued for, and where the suit is for neglect of duty in the protection of health and general welfare, are the same and apply alike in both cases.

In the case of *Elam v. Mt. Sterling*, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512, the opinion says:

"Without passing upon the correctness of the rulings of the trial court in respect to the evidence offered and rejected, we will proceed to consider the question whether or not placing the stones in the street and permitting them to remain there for the time mentioned was an actionable nuisance. It

is elementary doctrine that cities and towns must keep their streets, and all parts of them, in reasonably safe condition for public travel; but streets can only be kept in reasonably safe condition for public travel by improving and repairing them. And, if it becomes necessary to improve or repair streets, the municipal authorities must of necessity have the right to put in the streets the material needed to improve and repair them, as well as the implements and machinery that it is requisite or proper to use in this kind of work. It would be most unreasonable to impose upon a city the duty to improve and repair, and at the same time hold it liable for accidents happening on account of horses becoming frightened at the material or implements or machinery used. In cases of this character the doctrine of nonliability should be applied, unless there is negligence independent of merely placing material in a proper place on the street. The city should, of course, exercise care in placing the material; and, if it is of an unusual character, the additional duty might be imposed of exercising reasonable care to prevent injuries growing out of the fright of horses using the street. * * *

"There is quite a difference between the liability of a city for placing or permitting to remain in its streets material or objects not necessary for the use of the city in the construction or improvement of its streets and its liability for occupying its streets with material that is needed for construction or repair. In the first-mentioned state of the case the city would not be keeping its streets reasonably safe for public travel if by its negligence it permitted them to become incumbered with articles or objects calculated to frighten horses of ordinary gentleness; whereas, in the other instances, no liability would attach if proper care was taken in the location of the usual material."

An extended note to that case, after a review of very many of the decided cases with respect to the liability of municipal corporations for defects or obstructions in streets, gives the writer's conclusions from them as follows: "Nor is the temporary obstruction of a street for the purposes of improvement thereof unlawful, when a reasonable necessity exists therefor; and municipal corporations are not answerable in damages for permitting it. But the duty of a municipal corporation to improve and repair its streets and keep them free from obstruction is coupled with a duty to protect the traveling public while the obstruction exists, so far as is compatible with the temporary interference of those intrusted with their care. And obstructions of this class can be made only when a matter of necessity, and can be continued only for a reasonable time commensurate with the reasonable prosecution of the work; and the municipal corporation is bound so to guard and light the obstructions as to render the street reasonably safe

for use, or to entirely close the street against the public if necessary to prevent accidents."

The case of *District of Columbia v. Moulton*, 182 U. S. 576, 21 Sup. Ct. 840, 45 L. Ed. 1237, is instructive as to when an obstruction left in a street is lawful or reasonable and when unlawful or unreasonable. In that case a steam roller which had been used in repairing the street was left close to the south curb of Park street, from 20 to 30 feet west of Pine street, and over the roller was placed a canvas cover. The plaintiff was injured as the result of his horse taking fright at the roller, and brought his suit to recover damages therefor. The trial court ruled that the facts did not present a case of negligence and directed a verdict for the defendant. In the opinion of the Supreme Court by Mr. Justice White (now Chief Justice), affirming the judgment of the trial court, it is said: "The steam roller in question had been brought to the place where the accident occurred for a lawful purpose, viz., that of performing a duty enjoined upon the district to keep in repair the streets subject to its control. The use of an appliance such as a steam roller was a necessary means to a lawful end—a means essential to the performance of a duty imposed by law. It must therefore follow that if in the legitimate and proper use of such machine, with reasonable notice to the public of such use, an injury is occasioned to one of the public, such injury is *damnum absque injuria*. *Lane v. Lewiston*, 91 Me. 292, 294, 39 Atl. 999; *Morton v. Frankfort*, 55 Me. 46; *Cairncross v. Pewaukee*, 78 Wis. 66, 47 N. W. 13, 10 L. R. A. 473, commenting upon and explaining *Hughes v. Fond du Lac*, 73 Wis. 880, 41 N. W. 407. Conceding that the roller was an object calculated to frighten horses of ordinary gentleness, yet at the most the liability of the municipality for negligently permitting such objects to remain within the limits of a highway, if it exists, must primarily be dependent upon the fact that they are unlawfully upon the highway.

"We shall assume that the period when the steam roller became serviceable while in use on Park street was the forenoon of the day prior to the accident, as claimed by the plaintiff. The right, however, to use a steam roller upon a public street for the purpose of the repair of such street we think necessarily includes the right to retain the roller upon the street until a reasonable time after the necessity for the use of the machine has terminated, in the meantime exercising due care in the deposit of the machine when not in use, and giving due notice and warning to the public of the presence of such machine if travel on the street is permitted. We can perceive no difference in principle between using and keeping a steam roller on the streets until the completion of a particular work, and the maintaining of a lawful excavation, such as for the construction of a sewer, or of an underground road, and the

use of an engine, derrick, etc., in connection with the hoisting of earth from an excavation. The appliances used in connection with such excavations, even though calculated to frighten horses of ordinary gentleness not familiar with such objects, undoubtedly may be retained at the place where needed until the necessity therefor has ceased."

In the case here, there is no conflict in the testimony given by plaintiff in error's witnesses, to the effect that the hose pipe in question was left lying close to the curbstone—I. e., "hugging the curbstone of the sidewalk along Green street from near its connection with the water plug to the catch-basin"—and that the city's servants placed at nightfall a lighted lantern on the curbstone on Green street, with that of defendant in error and her witnesses, to the effect that the hose pipe, at the time of the accident to her, was two or three feet out from the curb, and that they saw no lantern on the curbstone.

J. W. Wood, the street inspector, with an experience of twenty-odd years in that position, and C. E. Porter, the policeman on the beat where and when the accident occurred, both testify that the hose pipe was placed and left right up against the curb of the sidewalk, instead of two or three feet away; while defendant in error and her witnesses only saw the pipe after the accident, and in effect say nothing more with respect to the lighted lantern in question than that they did not see it. Therefore their testimony is simply negative in its nature.

Barrow, one of the city's street hands, testified positively that he had put the lighted lantern on the curbstone just south of the crossing at sundown on the night of the accident, that he went back there twice during the night, that it was still burning, that he took it away the following morning, and that it had not then gone out. Wood, the street inspector, states also that he saw the lighted lantern soon after supper, and that he usually ate supper at that season of the year about 5:30 o'clock.

[4] With the evidence of Wood, Porter, and Barrow before the jury and not in conflict with any evidence offered by defendant in error as to where the hose pipe was left at sunset on the evening of this accident, and what light or lights had been provided to disclose its presence, the jury, in order to find plaintiff in error guilty of actionable negligence, necessarily had to regard those city officials or servants as perjurers, or totally disregard their evidence; for, if the hose pipe was where these officials say it was left at sunset, 5:07 o'clock, and where no one could stumble over it, and the light to disclose its presence was what they say it was, plaintiff in error could not be held liable for negligence by reason of the location of the hose pipe, unless there was evidence sufficient to justify the conclusion that the city's officials, or some of them, knew

or ought to have known that the hose pipe had become displaced from where it was left at sunset, and should have replaced it before this accident happened, about 20 minutes to 8 o'clock. Instead of evidence even tending to sustain such a conclusion, there is none whatever, and in the absence of all evidence of actual notice, it was not an arbitrary right of the jury to say that between sunset on November 6, 1908, and 20 minutes to 8 o'clock of that evening, was a reasonable time within which the city should have known of the defect in its streets complained of in this action. *Portsmouth v. Houseman*, supra.

Even though it had to be taken as true that the hose pipe was lying in the street two or three feet from the curb of the sidewalk, and that there was no lighted lantern on the curbing at the time of the accident, it is not a necessary conclusion to be drawn from the evidence that the plaintiff in error not only left this obstruction in the street, but negligently failed to do, as a precaution against injury to travelers along the street, that which it could be reasonably required to do under the circumstances.

[5, 6] Practically the only excuse defendant in error gives for not seeing the hose pipe is that it was the same color as the asphalt pavement, that the pipe did not have water flowing through it, and that it was lying flat on the street; and this is claimed by her although all of her other witnesses, as well as those for the defense, testified that the water was flowing through the pipe, and according to the proof, with which there is no conflict, the noise of the water passing through the pipe into the catch-basin could be heard by any one not deaf at least 60 feet away, and, further, that the burning electric light directly over the pipe was sufficient to enable a traveler on the street to see it when 100 or more feet away. Just what the defendant in error meant by her statement that "the electric light was real low that night, in the shadow," is not clear, since there is no evidence in the case as to the light being obstructed by a shadow, and she only says that she noticed the shadow after she sat down on the steps, and all that she testified to as to the situation then is based upon what she noticed after her accident and after she sat down. It was a cold, windy night, and she admits that she was hurrying to the theater to be there on time, and holding her coat around her neck and looking straight to the front—I e., down the street beyond where she was walking; so that, even if it be true that there was no lighted lantern on the curbing of the sidewalk along Green street, and there was a shadow on the walkway along High street, reasonably fair-minded men would never draw the conclusion that the injury of which defendant in error complains was caused by

either of those conditions. Indeed, the only conclusion that can be reasonably drawn from her own evidence and the undisputed facts testified to on behalf of the defense is that defendant in error, by hurrying along the street, taking no precaution for her own safety, so directly contributed to the accident which caused her injuries that a recovery therefor is precluded, even though, as a matter of law, it could be held that the presence of the hose pipe in the street was an unlawful and an unreasonable obstruction therein.

In either view of the case, we are of opinion that the circuit court erred in not setting aside the verdict of the jury and granting plaintiff in error a new trial; and this court will enter here the judgment the circuit court ought to have entered.

Reversed.

(112 Va. 318)

CONSOLVO & CHESHIRE v. FERRIES CO.
(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. FERRIES (§ 16*)—LEASES—CONSTRUCTION.

The city of Portsmouth and the county of Norfolk were jointly entitled to the use of a certain ferry landing, though the county had legal title. This property had been leased for a long time, and previous lessees had extended the landing space by filling in a certain strip of land, and those lessees had used that land for over 20 years. Both the county and city leased the ferry and other joint property to the plaintiff's assignee, which lease included all of the ferry property belonging to both. On the same day the lease was made to plaintiff's assignee, the county leased the property filled in to defendant's assignee, which lease, after describing the property as part of the Norfolk county dock property, provided that, if the use of that property became necessary for the ferries, it should be released and given up. *Held*, that this land was part of the ferry property, and, as the defendants' lease recognized the paramount rights of the plaintiff, plaintiff was entitled to the use of this property when it became necessary for ferry purposes.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 38-40; Dec. Dig. § 16.*]

2. FORCIBLE ENTRY AND DETAINER (§ 8*)—TITLE TO SUPPORT.

Under Code 1904, § 2718, providing that an action of unlawful detainer may be brought by one ousted from the possession of land to which he is entitled, no matter what his title may be, the lessees of a ferry landing demised to them by the county of Norfolk and the city of Portsmouth may maintain such an action, though their right be only a license or a privilege.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 35, 36; Dec. Dig. § 8.*]

3. FORCIBLE ENTRY AND DETAINER (§ 18*)—PARTIES—NECESSARY PARTIES.

The city of Portsmouth and the county of Norfolk were jointly entitled to the use of a certain ferry landing, though the county had the legal title. Both united in a demise of this property, and their lessees brought an action of unlawful detainer against persons holding part of the landing adversely to them. *Held*, that it was unnecessary that the county of Norfolk be a party, for its title could not be affected, by judgment in favor of the lessee, to land

which rightfully belonged to the lessee under the terms of the demise.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 84-87; Dec. Dig. § 18.*]

Error to Corporation Court of City of Norfolk.

Unlawful detainer by the Ferries Company against Consolvo & Cheshire. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Edward R. Baird, Jr., for plaintiffs in error. R. Randolph Hicks, for defendant in error.

HARRISON, J. This action of unlawful detainer was brought by the Ferries Company against Consolvo & Cheshire to gain possession of a small strip of land constituting part of the wharf or landing of the Norfolk county ferries. The disputed strip of land lies immediately east of Campbell's wharf, and has a width of 5 feet and 5 inches at its northerly extremity, and a width of 11 feet and 5 inches at its southerly extremity. That portion of the county wharf which lies immediately adjoining this narrow strip is used as a station and driveway for the wagons, trucks, carriages, etc., that are to be transported across the river.

It appears that, from an early day in the history of the country until the incorporation of the city of Portsmouth in the year 1858, the Norfolk county ferries were maintained by the county of Norfolk. By an act of the Legislature, in March, 1858 (Acts 1857-58, c. 266), the maintenance of these ferries was imposed jointly upon the city of Portsmouth and the county of Norfolk. This act provided, among other things, as follows: "No wharf or other property belonging to the Norfolk county ferry now established by law, or purchased for its use, shall be sold or otherwise disposed of without the concurrent consent of the council of the city of Portsmouth, and the court of said county of Norfolk, but shall be held for the use of said ferry."

The creation of the city of Portsmouth gave rise to a controversy between the county and the city as to their respective rights in this county dock. Arbitrators were appointed to settle their differences, who, among other things, found as follows: "As to the fifth item of said submission, viz., the rights of the said parties in the real estate situate in the city of Norfolk, now used as a landing for the Norfolk county and Berkley ferries, we do award, adjudge, and decide that the title to the said real estate—that is to say, the title to the soil or land itself—is in the county of Norfolk only, which is the legal owner thereof, but that this title and ownership is subject to the joint right of the said county and city to the ferry landing, and right of way over the said soil or land, and

that the rights and interests of the said city of Portsmouth in the said landing, as now used, or as it may be hereafter used, are commensurate and coequal with those of the said county."

These findings of the arbitrators passed into judgment as the final determination of the rights of the parties.

[1] From 1858 to 1889 the city of Portsmouth and the county of Norfolk jointly operated these ferries; but in 1889, pursuant to an act of the Legislature (Code 1887, § 1371 [Code 1904, p. 762]), the ferries were leased by the county and city jointly to Gill & Thomas for a period of 10 years, from 1899 they were leased to T. J. Wool and others for a period of 10 years, and from 1909 they were leased for a like period to R. E. Jordan. The granting clause in these three leases, executed respectively in 1889, 1899, and 1909, is as follows: The lessors " * * * do hereby demise and lease unto * * *, subject to all and every of the terms and conditions set forth, the following property, to wit: The property owned jointly by the city of Portsmouth and Norfolk county, known as the 'Norfolk county ferries,' together with all the steamers, boats, their apparel and appurtenances, and the wharfs, docks, landings, buildings, and all other property now owned by said city and county, and now used, or subject to be used, for the uses and purposes of said ferries."

The last-named lease to R. E. Jordan, dated March 31, 1909, was for a period of 10 years from that date, in consideration of an annual rental of \$135,200, which, as compared with that paid under previous leases, is very suggestive of the enormous increase of traffic over these ferries in latter years. This lease by the city of Portsmouth and the county of Norfolk to R. E. Jordan was assigned by him on the 10th day of April, 1909, to the plaintiff in this action, the Ferries Company.

The strip in controversy was originally water, and was filled up by Gill & Thomas during their lease from 1889 to 1899, and was used by them for billboard and storage purposes. This strip, which is now a hard, substantial wharf, since it was filled up by the lessees, Gill & Thomas, was used by the respective lessees without question during the 20 years from 1889 to 1909, as part of the property passing to them under their respective leases; and no serious question can be made that it is a part of the wharf or landing of the Norfolk county ferries, which are owned, so far as their use and operation is concerned, jointly by the city of Portsmouth and the county of Norfolk, and no part of which can be sold or otherwise disposed of without the concurrent consent of the city of Portsmouth and the county of Norfolk, but must be held for the use of said ferry. Acts of Assembly 1857-58, p. 173.

When the city and county advertised the last lease to be sold March 30, 1909, they stated that they would lease "the property owned jointly by the city of Portsmouth and Norfolk county, known as the 'Norfolk county ferries,' together with all steamers, boats, their apparel and appurtenances, and the wharfs, docks, landings, buildings, and all other property now owned by the said city and county, and now used or subject to be used for the use and purposes of said ferries."

On the same day (March 31, 1909) that the lease under which the plaintiff claims the right to the possession of the strip of land in question was executed by the county of Norfolk and the city of Portsmouth, the county of Norfolk, acting alone and without the concurrence of the city of Portsmouth, leased the strip of land in controversy to George W. Blanchard for a term of 10 years. This lease was assigned by Blanchard to L. M. Sylvester, who assigned the same to Consolvo & Cheshire, the defendants in this action. So that the claim of the defendants to the possession of the land is under the lease mentioned from the county of Norfolk to Blanchard.

The strip of land in controversy being, as already seen, part of the Norfolk county ferries property, and owned, as to its use and enjoyment, jointly by the county and city, the county, under the express terms of the act of March 25, 1858, had no power to lease it to any one without the concurrent consent of the city of Portsmouth. If, however, the county had possessed the power to lease, without the consent of the city, any part of the property, subject to use for ferry purposes, the conditions have arisen under which, by the terms of the lease made by it, the defendants must surrender to the Ferries Company the strip of land in controversy.

The Blanchard lease, under which the defendants claim, after describing the property demised as part of the Norfolk county dock property, provides as follows: "It being, however, understood and agreed between the parties hereto that if it shall within the said period of 10 years become necessary for the use and conduct of the said Norfolk county ferries, in the said city of Norfolk, that any portion of the property hereby demised shall be found to be necessary for the use of said ferries, then, and in that event, such portion shall be released and given up by the said party of the second part, and the Norfolk county ferries be allowed to occupy and use the same."

This provision of the lease under which the defendants claim is a clear recognition by the county of Norfolk, the lessor therein, that the strip in controversy is part of the Norfolk county ferries property, and expressly provides that it shall be surrendered at any time during the lease that it may be needed for ferry purposes. It conclusively

appears from the evidence that the constantly increasing use of these ferries by the public has so congested the traffic as to make the use of the strip in question essential for ferry purposes.

The facts in this case impel the conclusion that the use of the property in controversy belongs jointly to the city of Portsmouth and the county of Norfolk, and that its use passed from them to R. E. Jordan under their joint lease to him of March 31, 1909, and by assignment from R. E. Jordan to the Ferries Company, the plaintiff in this case; that its present use by the Ferries Company is a necessity for the operation of the Norfolk county ferries and the public convenience; and, further, that the adverse claim, under the demise from Norfolk county, asserted by the defendants Consolvo & Cheshire, is wholly inadequate to defeat the superior rights of the plaintiff.

[2] It is difficult to appreciate the defendants' contention that the plaintiff is asserting a right to a franchise and cannot maintain an action of unlawful detainer, the effect of a judgment in which is, as claimed, to give it an unqualified and absolute possession, when it is only entitled to a qualified right and qualified possession. The plaintiff is asserting a right to the possession of land that was leased to it by the owners thereof under a clear and explicit lease, which land is wrongfully in the possession of another. The effect of the judgment of the lower court is merely to hold that, under the facts shown of record, the plaintiff is entitled to the possession of the land in controversy, to be held by him in accordance with the terms of his lease contract.

Section 2716 of the Code of 1904 provides that the action of unlawful detainer shall be brought against the party in possession. That the property right asserted in this case by the plaintiff can be recovered in an action of unlawful detainer, see *Norfolk City v. Cooke*, 27 Grat. 430; *Power & Kellog v. Tazewells*, 25 Grat. 786.

In the case last cited, the Tazewells, under authority of an act of the General Assembly, had leased for one year from the state inspector of oysters a lot covered by water below low-water mark for the purpose of planting oysters thereon. The Tazewells had staked off the lot, so as to designate it, but had planted no oysters thereon, when defendants took possession of the lot. An action of unlawful detainer was brought to recover the possession. It was insisted that the action could not be maintained; that the lease of the state was only a license or privilege; that the Tazewells had no title and no right of possession to the bed of the river covered by water, and therefore could not maintain an action of unlawful detainer. This court held otherwise, and declared that the lease to the Tazewells was not a mere license or privilege, but that it conferred rights of property in the soil covered by

water, to which the plaintiffs had the right of exclusive possession, and that the action of unlawful entry and detainer was a proper remedy.

[3] The defendant contends that the county of Norfolk should have been made a party defendant to this action.

The county of Norfolk was not formally made a party, but the record shows that it was represented by counsel, who defended this suit through the lower court and in this court. It was, however, not necessary that it should be a party. The county of Norfolk, it is true, was the holder of the naked legal title to the property in controversy, while it and the city of Portsmouth were the perpetual joint and equal owners of the use and enjoyment thereof. The county of Norfolk was not in the possession of the property. On the contrary, it had united with the city of Portsmouth in leasing the same to the plaintiff for a term of 10 years, and, therefore, neither its rights nor those of the city of Portsmouth could be affected by a judgment in favor of their lessee for land which rightfully belonged to that lessee under the terms of their demise. The plaintiff had no other or different rights against its lessors after the judgment in this proceeding was rendered than it had before. The judgment only settled the right of possession as between the lawful lessee of the property and the defendants, who are claiming the possession under another and different lease.

There is no error in the judgment complained of, and it must be affirmed.

Affirmed.

(113 Va. 260)

**ARMINIUS CHEMICAL CO., Inc., v.
WHITE'S ADM'X.†**

(Supreme Court of Appeals of Virginia.
June 8, 1911.)

1. CORPORATIONS (§ 507*)—SUMMONS—IDENTITY OF DEFENDANT.

"Arminius Chemical Company, Incorporated," was brought into court on summons served upon its authorized attorney, though directed to "Arminius Chemical Company"; there being but one company, the first mentioned, which succeeded the other.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-2000; Dec. Dig. § 507.*]

2. PROCESS (§ 36*)—RETURN—DATE.

A writ was not bad because returnable on the "third Monday in January," instead of the "third Monday in January next."

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 30, 31; Dec. Dig. § 36.*]

3. MASTER AND SERVANT (§§ 278, 279*)—INJURY TO MINER—EVIDENCE—WEIGHT.

In an action for death of a miner while being hoisted in a shaft, caused by sudden application of a brake, evidence held insufficient to show negligence concerning safety of the hoisting machinery or selection of the hoistmen.

[Ed. Note.—For other cases, see Master and Servant. Cent. Dig. §§ 954-980; Dec. Dig. §§ 278, 279.*]

Error to Circuit Court, Louisa County.

Action by Richard S. White's administratrix against the Arminius Chemical Company, Incorporated. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

The following instructions were given and refused, respectively:

Plaintiff's instruction No. 1, given:

"If the jury believe from the evidence that after the notices were posted by the defendant at different times, with respect to its employes using the skips, to be carried to and from within the mine at their own risk, the defendant did not refuse, but continued as before such notices were posted, to so carry its employes, including the plaintiff's intestate in such skips, then such notices, so far as relied on by the defendant as a defense to relieve it from liability in this suit for its negligence, if any such there be, do not constitute such a defense."

Plaintiff's instruction No. 2, given:

"That, when the plaintiff's intestate entered the service of the defendant, the law presumes that he contracted with reference to the dangers and hazards incident to the business of the employment as the defendant conducted it at the time he entered it, and that the compensation was adjusted accordingly; and

"The plaintiff's intestate, while engaged in the service of the defendant, in the absence of any notice or warning to the contrary, or the same being obvious to him, or discoverable by reasonable care and observation on his part, was warranted by law in presuming that such dangers and hazards had not been increased in any way, and, in determining what was reasonable care and observation on the part of the plaintiff's intestate, the jury must take into consideration that the servant is not under the same obligation as the master to know the nature and extent of the dangers and hazards which may exist, unless they are obvious to him."

Plaintiff's instruction No. 3, given:

"That it was the duty of the defendant to use ordinary and all reasonable care to provide hoisting machinery reasonably safe and suitable for use to which it was put by the defendant, and also to use ordinary and all reasonable care, skill, and supervision, forethought, and inspection to discover and repair defects, if any therein; and,

"If the jury believe from the evidence that the new hoisting machinery provided by the defendant as used by it before the death of the plaintiff's intestate was more dangerous and hazardous to his safety than the hoisting machinery which was provided and as used by the defendant at the time of the employment of the plaintiff's intestate, that this was, before the day plaintiff's intestate was killed, known to the defendant, or would

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

† Rehearing denied September 14, 1911.

have been known to it by the supervision, forethought, and inspection, before the death of the plaintiff's intestate, but was unknown to the latter, and was not obvious to and could not have been discovered by the latter by the use of ordinary and all reasonable care and observation on his part, that the defendant did not give any warning or notice to the plaintiff's intestate that there was any such increase of danger or hazard to his safety, that the fall of the south skip and the sudden stop and jar of same threw the plaintiff's intestate off therefrom and caused his death, and that this fall, sudden stop, and jar of such skip occurred by reason of such increase of danger and hazard, the jury must find for the plaintiff and assess her damages as provided in instruction No. 7 below."

Plaintiff's instruction No. 4, given:

"That it was the duty of the defendant to use ordinary and all reasonable care to make and give proper regulations and orders to its hoistmen in doing their work, and to see that such orders and regulations were obeyed and carried out by them; and,

"If the jury believe from the evidence that to use the hand levers to control the brakes on the new hoisting machinery, for the purpose of holding the skip in the shaft with the plaintiff's intestate thereon, and for the purpose of stopping the skip when in motion going rapidly down the shaft, was practically the same means as those used with the old hoisting machinery for such purposes when the employment of the plaintiff's intestate began, and that the use of the compressed air for such purposes by such hoistman as the defendant intended to provide was more hazardous and dangerous to the safety of the plaintiff's intestate than the use of the said hand levers therefor, that this was known to the defendant, or would have been discovered by it, before the day plaintiff's intestate was killed, had it used ordinary and all reasonable care and skill in supervision, forethought, and inspection of said new hoisting machinery and of its operation, but that the defendant gave no notice or warning of any increased danger or hazard to the plaintiff's intestate, and that same was unknown to the latter, not obvious to him, and could not have been discovered by him by the use of ordinary and all reasonable care and observation on his part, then it was the duty of the defendant to have used said care and give some proper order or regulation to its hoistman, operating said machinery at the time plaintiff's intestate was killed, to use said hand levers for said purposes, and not to rely entirely on the compressed air, when handling men, and to have seen that such order or regulation was obeyed and carried out by the hoistman; and,

"If the jury believe from the evidence that the defendant neglected to discharge such duty, that the compressed air was so used by said hoistman for said purposes, that it was due to the failure of the defendant to make

and give such order or regulation and to see that same was obeyed and carried out by said hoistman that the compressed air was used for said purposes, and that by reason thereof the plaintiff's intestate was killed, the jury must find for the plaintiff, and assess her damages as provided in instruction No. 7 below."

Plaintiff's instruction No. 5, given:

"That it was the duty of the defendant to use ordinary and all reasonable care to see that its hoistmen were reasonably careful in doing their work; and,

"If the jury believe from the evidence that to use the hand levers to control the brakes on the new hoisting machinery for the purpose of holding the skip in the shaft with the plaintiff's intestate thereon, and for the purpose of stopping such skip when in motion going rapidly down the shaft, was practically the same means as those used with the hoisting machinery for such purposes when the employment of the plaintiff's intestate began, that to use the compressed air for such purposes by such a hoistman as the defendant intended to provide, and did provide, was more hazardous and dangerous to the safety of the plaintiff's intestate than the use of said hand levers therefor, that this was known to the defendant, or would have been discovered by it, before the day the plaintiff's intestate was killed, and if it had used ordinary and all reasonable care and skill in supervision, forethought, and inspection of said machinery and of its operation, but that the defendant gave no notice or warning of any increased danger or hazard to the plaintiff's intestate, and that the same was unknown to the latter, not obvious to him, and could not have been discovered by him by the use of ordinary and all reasonable care and observation on his part, that the hoistman provided by the defendant, who was operating said machinery at the time plaintiff's intestate was killed, used compressed air for said purposes, that it was due to such use, instead of the hand levers being used therefor, that the plaintiff's intestate was killed, and that such hoistman before that day for a considerable time had habitually used the compressed air for such purposes, and had habitually not used the said hand levers for such purposes, in handling men, that this was known to the defendant, or could have been discovered by it, before the day plaintiff's intestate was killed, had it used ordinary and all reasonable care in supervision of such hoistman, and that such hoistman was not discharged, nor any effort made by the defendant to prevent such failure to use such hand levers, and such hoistman was continued in his employment until the plaintiff's intestate was killed, the jury must find for the plaintiff, and assess her damages as provided in instruction No. 7 below."

Plaintiff's instruction No. 6, given:

"That it was the duty of the defendant to use ordinary and all reasonable care to pro-

vide a hoistman sufficiently experienced in the use of the methods furnished by the new hoisting machinery for controlling the brakes, and in fit condition physically and mentally to operate such machinery with reasonable care and skill, having regard to the safety of the other employes of the defendant, including the plaintiff's intestate, and also to use such care to inform itself, by supervision and superintendence, up to the time plaintiff's intestate was killed, whether the hoistman, who was operating such machinery at the time, was thus sufficiently experienced, and was also in such fit condition to so operate such machinery; and,

"If the jury believe from the evidence that the hoistman provided by the defendant, who was operating said machinery at the time plaintiff's intestate was killed, was not, at such time, sufficiently experienced in using compressed air, or, if sufficiently experienced, was not in a fit condition, physically or mentally, by reason of his being sick with the pleurisy, to operate said machinery with reasonable care and skill, having regard to the safety of the other employes of the defendant, including the plaintiff's intestate, that the defendant knew, or could have discovered before the day plaintiff's intestate was killed, such lack of experience on the part of such hoistman, or, sufficiently long before the plaintiff's intestate was killed for the hoistman to have been put off duty before he was killed, so knew or could have discovered such unfit condition, physically or mentally, of such hoistman, by the use of ordinary and all reasonable care by the defendant to inform itself on these subjects; and,

"If the jury believe from the evidence that the loss of control of the skip and its subsequent stopping with a sudden and violent jar threw the plaintiff's intestate off down the shaft and killed him, and that such loss of control of the skip, and such subsequent stopping and violent jar of the skip, was due to said lack of sufficient experience by said hoistman in the use of compressed air, or to his not being in said fit condition, physically or mentally, by reason of his being sick of the pleurisy, or to either of these things, the jury must find for the plaintiff and assess her damages as provided in instruction No. 7 below."

Plaintiff's instruction No. 7, given:

"If you find for the plaintiff, in ascertaining the amount of damages, you should assess same with reference:

"First. To the pecuniary loss sustained by the widow and the two children of Richard S. White, by reason of his death, fixing the same at such sum as would be equal to the probable earnings of the deceased, taking into consideration his age, business capacity, experience, health, habits, energy, and perseverance, during what would probably have been his lifetime if he had not been killed.

"Second. By adding thereto compensation

for the loss of his care, attention, and society to his widow and children.

"Third. By adding such further sum as you may deem fair and just by way of solace and comfort to his widow and children for the sorrow, suffering, and mental anguish occasioned them by his death—the entire damages in such case not to exceed the sum of \$10,000."

And likewise, after the introduction of the foregoing testimony, the defendant moved the court to give the jury the following 24 instructions:

Defendant's instruction No. 1, given:

"The court instructs the jury that the negligence of the defendant in this case cannot be inferred from the mere happening of the accident by which the decedent, White, lost his life. That fact does not raise even a prima facie presumption that the defendant was guilty of negligence or a breach of duty to White.

"Negligence of the defendant is an affirmative fact, to be established by preponderating proof. The party who affirms negligence must establish it by proof sufficient to satisfy reasonable and well balanced minds. The evidence must show more than the probability of a negligent act, or else there can be no recovery. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established."

Defendant's instruction No. 2, given:

"The court instructs the jury that all employes serving a common master, drawing authority and compensation from the same source, although working in different grades and departments, are fellow servants, and assume the risk of each other's negligence."

Defendant's instruction No. 3, given:

"The court instructs the jury that under the evidence in this case, the hoistman, Schmitz, and the plaintiff's intestate were fellow servants, and if the jury believe from the evidence that the injury was caused by the careless manner in which Schmitz operated the machinery, and that said carelessness on his part was not due to incompetency or unfitness, or had not been habitual during the period after the installation of the new machinery up to the death of the plaintiff's intestate, then the jury must find for the defendant."

Defendant's instruction No. 4, given:

"The court instructs the jury that the defendant was not required in law to guarantee the absolute competency and fitness of its hoistman, Schmitz. It was only required to exercise ordinary care—that is, such care as a man of ordinary prudence would exercise under like circumstances—in the selection and retention of Schmitz as hoistman. And if the jury believe that the defendant did exercise such care in the selection and retention of Schmitz as a hoistman, then the defendant would not be responsible for the death of the plaintiff's intestate, White, if it was caused by Schmitz's incompetency or un-

fitness, and the jury should find for the defendant."

Defendant's instruction No. 5, given:

"The court instructs the jury that although they may believe from the evidence that at the time of the accident Schmitz was nervous and was suffering from pleurisy, and that the injury to White was due to these causes, still the defendant would not be responsible for White's death unless it knew, or ought to have known, prior to the accident, of Schmitz's condition, and did not likewise know, before the accident, that this condition rendered him unfit and incompetent to operate the hoist."

Defendant's instruction No. 6, given:

"The court instructs the jury that the happening of the accident by which the plaintiff's intestate, White, lost his life cannot be considered by the jury as evidence tending to show that the defendant knew, or should have known, of Schmitz's condition, or of his incompetency, if such incompetency existed. The burden is upon the plaintiff to show that Schmitz, the hoistman, was incompetent and unfit, and likewise to show that the accident was caused by his incompetency or unfitness, and that the defendant knew or should have known of the alleged incompetency or unfitness prior to the time the accident occurred."

Defendant's instruction No. 7, given:

"The court instructs the jury that the fact that the defendant, after the accident, may have adopted a different method for holding the skip in place, cannot be considered by the jury as evidence tending to show that the method adopted by the defendant prior to the accident was a negligent method."

Defendant's instruction No. 8, as modified by the court:

"The court instructs the jury that it was the duty of Mr. White to protect himself as far as he could, and take the safest place on the skip which the circumstances would admit, and that if he failed to do this, but took the more dangerous position, and that but for such position he would not have been thrown from the skip, then he was guilty of contributory negligence which proximately caused his death, and his administratrix cannot recover in this action, notwithstanding the fact that you may believe from the evidence that the defendant was guilty of negligence but for which the accident would not have occurred, *unless the jury shall believe from the evidence that the position taken on the skip by the plaintiff's intestate was his customary position, and that the defendant before said intestate's death had been accustomed to allow its employes to be carried in such position on its skip, in which case this paragraph of these instructions will not bar you from finding a verdict for the plaintiff.*"

(Underscored part being court's modification; such underscoring, however, not being there when given the jury.)

Defendant's instruction No. 9, given:

"The court instructs the jury that the defendant is not liable in this case, unless it had notice, either actual or constructive, of the unfit condition of Schmitz, if you shall believe from the evidence that he was unfit. Actual notice means knowledge of the fact that he was too ill to be safely entrusted with the work, and that to allow him to work would likely result in the death or injury of some third person."

"Constructive notice is that which the law imputes to the defendant from negligent ignorance; that is, its failure to observe some fact or facts which a person of ordinary prudence and forethought in a like situation would have seen and acted upon. In order to charge the defendant with negligence for failing to observe the symptoms of disease in evidence, it is essential that the plaintiff show that such symptoms did actually exist; that is, that the symptoms described in the evidence were exhibited and manifested by Schmitz. And this must be shown by affirmative evidence, and cannot be left to conjecture or presumption."

Defendant's instruction No. 10, given:

"The court instructs the jury that an employe assumes all risks from causes which are known to him, or which he could discover by the exercise of ordinary care, including the risks from the method of doing the work used by his employer. And even if there was a safer and better way to do it, if the danger was known to the plaintiff's intestate, or could have been known by him by the exercise of ordinary care, the jury must find for the defendant."

Defendant's instruction No. 11, given:

"The court instructs the jury that, no matter how dangerous the work in which a servant may be engaged, the duty imposed by law on the employer is to exercise ordinary care for the employe's safety, and by ordinary care is meant such care as a man of ordinary prudence would exercise under like circumstances; and if the jury believe from the evidence that the defendant company exercised ordinary care to provide for the safety of the decedent, White, then the defendant company would not be responsible for his death, and the jury must find for the defendant."

Defendant's instruction No. 12, given:

"The court instructs the jury that the defendant company was not an insurer of the safety of the decedent, White, and was not required in law to adopt the safest and best means of providing for his safety. The law required the defendant company to use such means for providing for the safety of the decedent, White, as are generally employed by reasonably prudent persons engaged in the same kind of work under like circumstances; and, if the jury believes from the evidence that the defendant company used such means for keeping its mine safe as are generally used by reasonably prudent persons

in the same kind of work under like circumstances, then the company would not be responsible for the decedent's death, and the jury must find for the defendant."

Defendant's instruction No. 13, given:

"The court instructs the jury that it is not negligence to fail to take a precautionary measure to prevent an injury, which, if taken, would have prevented it, when the injury could not reasonably have been foreseen; and if the jury believe from the evidence that the defendant company, taking into consideration the conditions as they existed at the time of the happening of the accident, could not reasonably have foreseen that such an accident was likely to occur, then it was not negligence on the part of the defendant in not taking precautionary measures, which, if taken, would have prevented the injury, and the jury must find for the defendant."

Defendant's instruction No. 14, given:

"The court instructs the jury that an employé who knows the unsafe condition of the place in which he is working is not compelled to continue the work, but, if he does continue it, he assumes the risk, not only of those dangers ordinarily incident to the work, but also dangers as become known to him during the progress of the work, or which were readily discernible by a person of his age and experience in the exercise of ordinary care; and, if the jury believe from the evidence that the decedent, White, knew of the danger of riding on the skip, or ought to have known of it, and continued in the work, then he assumed the risk of injury, and the jury must find for the defendant."

Defendant's instruction No. 15, given:

"The court instructs the jury that it is their duty to try this case without being influenced by sympathy, or the mere fact that the injury to White resulted in his death, and the jury must disregard all questions of the relative financial conditions of the parties, as the jury, as well as the court, are under the solemn obligation of an oath to decide according to the law and the facts, and without negligence by the defendant as the proximate cause of White's death the defendant cannot be held pecuniarily liable."

Defendant's instruction No. 16, given:

"The court instructs the jury that it is the duty of the employer to use ordinary care to provide and maintain in a reasonably safe condition the place where the employé has to work; but the employer is not an insurer of the employé, not a guarantor of his surroundings. The employer is not liable for the consequence of danger, but only for the direct consequence of negligence."

Defendant's instruction No. 17, given:

"The court instructs the jury that the employer is required to anticipate and guard against consequences injurious to his employé that may be reasonably expected to occur, but it is not compelled to foresee and

provide against that which reasonable and prudent men would not expect to happen."

Defendant's instruction No. 18, given:

"The court instructs the jury that the presumption is that the machine used by defendant was reasonably safe for the purpose for which it was used; and if the jury believe that there is in this case no evidence that the machine was not so, you cannot find for the plaintiff upon an alleged defect in the machine."

Defendant's instruction No. 19, refused:

"The court instructs the jury that if you shall believe from the evidence that said holstman sometimes operated said skips in a negligent and careless way, but that the plaintiff's intestate either knew or could by reasonable diligence have known of such habits, and made no complaint thereof to defendant's agents in charge, he assumed the risk of such negligent handling of the skip, if afterwards injured thereby."

Defendant's instruction No. 20, refused:

"The court instructs the jury that if you shall believe from the evidence that the skip descended the shaft with great rapidity from the point of starting therein, and this result could not have been accomplished except by throwing the brake left of center, then you are instructed that the proximate cause of the accident was not the leaking of the air brake; and if you so believe you will disregard the first, second, third, fourth, and fifth counts of the plaintiff's declaration, and consider only the fitness or unfitness of the holstman involved in the sixth count."

Defendant's instruction No. 21, refused:

"The court instructs the jury that under the first, second, third, fourth, and fifth counts of the plaintiff's declaration the burden is on her to show: (1) That the air brake was defective; (2) that such defective condition was the proximate cause of the accident. If, therefore, it appears from the evidence that the descent of the skip may have been due to the leakage of the air on the brake, or if it, on the other hand, may have been occasioned by the inadvertent act of the holstman in throwing the lever left of center, and you further believe that either of these theories is reasonably probable from the evidence, then you will disregard all of said counts, and consider only the sixth count of said declaration, involving the unfit condition of said holstman."

Defendant's instruction No. 22, refused:

"The court instructs the jury that where a person is confronted with two ways of doing his work, one safe and the other dangerous, it is his duty to adopt the safer course, irrespective of the degree of danger which may be in the unsafe course."

"And if the jury believe from the evidence that it was known to White that a ladder was provided for the men to go in and out of the mine, and that it was safer to use the ladder than to ride on the edge of the

skip, then the decedent, White, was guilty of contributory negligence in not using the ladder, and the jury must find for the defendant."

Defendant's instruction No. 23, refused:

"The court instructs the jury that it does not relieve the decedent, White, from the duty of adopting the safer way to get out of the mines, by showing that other employes also adopted a dangerous way of coming out of the mine, when they could have adopted a safer way."

Defendant's instruction No. 24, refused:

"The court instructs the jury that if they shall believe from the evidence that there was a notice posted in the shaft house of the mine, before the accident occurred, notifying the men that if they rode the skips in and out of the mine that they would do so at their own risk, but not forbidding them to do so, and that the defendant had no interest in their mode of ingress and egress, that there was and is a ladder in said mine furnishing a safer, but more laborious, method of going in and coming out of such mine, then Mr. White assumed the risk of riding such skip, as such notice was sufficient to advise him of the danger thereof, though he did not know or appreciate the method or manner in which the brakes were operated on the engine."

Gordon & Gordon and P. H. C. Cabell, for plaintiff in error. F. W. Sims, for defendant in error.

KEITH, P. White's administratrix brought suit against the Arminius Chemical Company, Incorporated, in the circuit court of Louisa county, to recover damages for the death of her decedent by the wrongful act of the defendant company. The jury rendered a verdict in favor of the plaintiff for the sum of \$5,000, upon which the court entered judgment, and the case is before us upon a writ of error.

[1] The case was tried upon an amended declaration, which contains six counts, and the defendant is described as the "Arminius Chemical Company, a corporation created by and existing under the laws of the state of Virginia." The Arminius Chemical Company, Incorporated, appeared and cravedoyer of the original writ, from which it appears that the sheriff of Louisa county was commanded to summon the "Arminius Chemical Company, a corporation created by and existing under the laws of the state of Virginia," and that it was executed by delivering a copy thereof to R. L. Gordon, Jr., the agent and attorney of the Arminius Chemical Company, whereupon the defendant company pleaded that R. L. Gordon, Jr., was not the attorney of the company named upon whom legal process could be served, but was the agent for the purpose of receiving service of process on the Arminius Chemical Company, Incorporated; that they were

separate and distinct legal entities; that the West Virginia corporation, the Arminius Chemical Company, expired on the 9th day of January, 1907, when it conveyed by deed of that date all of its property in the state of Virginia to the Arminius Chemical Company which was created a corporation under the laws of the state of Virginia on the 8th day of November, 1906, by the name of the Arminius Chemical Company, Incorporated.

The court rejected this plea and gave leave to the plaintiff to amend her declaration by inserting the word "Incorporated" after the word "Company"; and these two rulings of the court, refusing to allow the plea to be filed, and permitting the plaintiff to amend her declaration, are the subjects of the first and second bills of exceptions.

We think the rulings of the court were plainly right. There was at the time of the institution of this suit but one company which was the Arminius Chemical Company, Incorporated. It was the defendant in the suit. R. L. Gordon, Jr., was its attorney duly appointed under the laws of the state to receive service of process on its behalf. It was served upon him, and the Arminius Chemical Company, Incorporated, was thereby brought before the court.

[2] The defendant company also moved to quash the original writ in the case, because it was not made returnable in accordance with the law, in that it did not appear that it was made returnable within 90 days from its date.

The writ was issued on the 25th of November, 1908, and was made returnable to the rules to be holden "on the third Monday in January," to answer the administratrix of Richard S. White of a plea of trespass on the case; the objection being that the writ should have said "on the third Monday in January next."

We find no merit in this objection. Of course, it would have been better to have said "the third Monday in January next"; but the omission was immaterial. It could have misled no one who did not exercise some ingenuity to be deceived.

There was a demurrer to the declaration, and to each count thereof. Upon examination we find that, while the counts in the declaration are more elaborate than needful, containing much which might safely have been rejected as surplusage, yet in each, if the material facts which are well pleaded are proven, the plaintiff would be entitled to a judgment. In other words, each count states a sufficient cause of action.

The several preliminary exceptions and the demurrer to the declaration are therefore overruled.

With respect to the instructions given on behalf of the defendant in error, we find no objection, if there be evidence tending to prove the facts upon which they are predicated; nor do we find reversible error in the action of the court refusing to give certain

instructions asked for by the plaintiff in error.

[3] This brings us to a consideration of the motion of the plaintiff in error to set aside the verdict as contrary to the evidence.

The defendant company is engaged in the mining of pyrites, and employs about 300 men. The shaft of the mine is sunk at an angle of 30 degrees from the perpendicular and 60 degrees from the horizontal. It is 1,060 feet deep, and from it at various depths levels are run off on either side, from which the ore is taken. The ore is raised by a steam engine, by means of an ore car or skip. The car is moved by a wire cable attached to the ball of the car; the other end of the cable being attached to a large drum at the surface, which drum is connected by a clutch or cog wheels which fit into the wheels on the engine. This connection is made by a lever, which is moved to the right to disconnect, and to the left to connect, by the turning of a wheel at the engineman's stand. When the drum is thus connected with the engine, the car cannot descend, and when it is desired to lower the car the drum is disconnected from the engine and it is lowered—or it would, perhaps, be more correct to say that the speed by which it is lowered is regulated by means of a brake on the drum. This brake may be operated by hand or by compressed air, by which pressure is brought to bear upon the drum. The setting of the brake by hand is effected by forcing a lever back and catching it in a clutch, by means of which it retains the pressure thus secured. The air, when used, has a pressure three times as great as that which can be secured by hand. The car runs upon a narrow-gauge steel track, and in order to facilitate the work there are two of these tracks over each of which a car is moved, being attached to separate drums, but drawn up and lowered by the same engine. In the engine room, immediately in front of the hoistman or engineman, there is a gauge upon which there are two hands, one red and one black, like those on the face of a clock, which indicate at all times the exact pressure of air upon the brake cylinder or brake, and the air pressure on the air reservoir, which is connected with the brake cylinder. This pressure can be increased or decreased at the will of the operator. There is an air brake for each drum, and a gauge for each drum. Both drums are under the eye of the hoistman, and any movement of either can be instantly observed. There is also a shaft indicator, consisting of a large dial, the hands on which point to the depth of the skip in the shaft from the top of the dump to the bottom of the shaft. The air is turned on or off of the brake by a hand lever 8 or 10 inches long, which is moved easily by the operator, but is stationary unless moved by physical force.

The plaintiff's intestate was killed by fall-

ing from defendant's ore car or skip. The hoistman testified that after he had landed the men from the north skip he turned to raise those on the south skip, and saw the drum turning the wrong way, and knew that the skip had escaped control; that he applied the air brake suddenly, turning the lever to emergency; that he did not know how it escaped control, but that he might have struck it inadvertently and knocked the air pressure off.

The lever referred to, by which the air is controlled, moves through a space of about six inches. The point midway between the extremes of its movement is known as the center. If the air is to be turned on, it is moved to the right. Moved slowly, the air pressure is gradually generated; moved rapidly, the pressure upon the brake is correspondingly increased. When it is moved from the center to the left, the air escapes and the pressure is correspondingly diminished.

As has been said, there are two skips, moving on two separate tracks—one known as the "north skip," and the other as the "south skip." The accident, which is the subject out of which this suit grows, took place about half past 5 o'clock on the evening of October 7, 1908. The north skip was at the 900-foot level; the south skip was at the 400-foot level. A signal was given to the engineman of five bells from the lower level, which indicated that the skip was to be drawn up with men upon it. The skip was an iron bucket, and the usual complement which each skip could bring up was twelve men—six in the bucket itself, one upon each of the corners (that is to say, four upon the edge), one upon the ball, and one upon the rope, making twelve in all. The north skip was brought safely to the surface, when the hoistman observed that the drum of the south skip was moving in a direction that indicated it was descending. Thereupon he applied the air brake by moving it to the right, and the movement was so rapid and the action of the brake so violent that the car or skip was brought to a sudden stop, and the men standing upon the edge or rim of the skip were thrown off, and the plaintiff's intestate was killed.

Just how the occurrence took place is not shown by the evidence. The theory of the plaintiff is: (1) That the machinery, especially the brake, was not reasonably safe; and (2) that the defendant had not exercised due care in the selection of a suitable hoistman, and had not exercised due care to see that he properly discharged his duties, and that upon the evening of the accident especially, as a result of an attack of pleurisy, the hoistman was not in a physical condition properly to discharge his duties.

The Arminius Company and its predecessors have been for a long time engaged in the business of mining pyrites. Machinery of various types has been in use. For a great

while a brake operated by hand was used in regulating and controlling the movement of the ore cars or skips; but about two months before the accident a brake was installed, which was controlled by air pressure. The proof shows that this machinery was obtained from and installed by a manufacturing company in good standing; that the machinery itself was in perfect order, and that a man skilled in its operation came to the mine when it was installed, put it into position, and remained for two or three weeks instructing the hoistmen in its uses; that it was not a machine of great complexity, and that a man conversant with machinery of that general description could easily acquire the requisite skill safely to operate it.

It appears that Schmitz, who was the hoistman upon the occasion of the accident, had been engaged in that business for many years, and had shown himself to be a reliable and capable man. He had received instruction at the time the new brake was installed, and had operated it successfully. It does not appear that there had been any accident, or any circumstance to indicate his incapacity or unfitness for the service required of him, during the whole period of his connection with the company, during which, when the machine was equipped with hand brakes, the skip had been moved up and down, loaded most frequently with ore, but numberless times with men, without any accident or occurrence which caused his coemployees to question his fitness or give to his employers any reason to suspect such to be the fact.

On Saturday, October 3d, Schmitz went home. On Sunday there was no work at the mines, and he went down to his brother-in-law's, at Buckner station, to pay a visit, returning on the midnight train Sunday night. He did not go to work on Monday morning, because during that week he was on the night shift, and was due to go to work on Monday afternoon; but, not feeling very well, he did not go, and his condition at that time is thus described by him:

"The trouble bothering me has bothered me every time I catch cold in the last 32 years. I was struck by a tree 32 years ago, and whenever I catch cold I have a pain in my breast. I had broke in another hoistman, and I said I would stay at home. I helped my wife shuck corn Monday, and I didn't go to work. I sent a message to the mines that I was not coming down Monday night."

Tuesday evening Mr. Clearihue, who had charge of the mines, went to Schmitz's house, and according to the statement of Schmitz and of Clearihue the latter asked Schmitz how he was getting on, to which Schmitz replied that he was getting on fairly well. The manager then asked when he was going on. "I said I didn't feel like going that night, that I didn't want to go on until I felt like going, and he said, 'I don't want you to go on until you do feel like working.'" Wed-

nesday, about noon, they sent a messenger to him again, a Mr. Kennedy, and Schmitz told him that he would come to work that evening; and it seems that, for reasons which need not be particularly stated, it was quite necessary to the running of the mine that he should be there that night. When Kennedy went to Schmitz's house, he was accompanied by a man by the name of Thomas, and Thomas says that he heard the conversation between Schmitz and Kennedy, and that Schmitz said that he did not feel much better; that his side still hurt him, but, being urged, that Schmitz "agreed to go and do what he could." Another witness proved that on October 7, 1908, Schmitz stated to him that he was really not in a condition to go to work that night, but that he had been sent for and urged to come down; but this particular statement, it seems, was made after the accident. Other witnesses proved contradictory statements on the part of Schmitz as to his physical condition during Monday, Tuesday, and Wednesday, as contradicting the statement which he made upon the stand, the substance of which has been given. It is to be observed that the contradictory statements made by Schmitz are not substantive evidence of the existence of the facts thus stated by him. He was put upon the witness stand by the defendant in error, and the only effect of the proof of contradictory statements is that it may counteract in the minds of the jury the hostile testimony which he had given to the surprise of the party calling him.

A Mr. Lewis P. Trice, who went to Schmitz's on Tuesday evening with Clearihue, the manager, gives this report of the conversation that occurred between Clearihue and Schmitz: "He wanted to know how Schmitz felt, and Schmitz told him he 'was not feeling very good,' and, if he did not feel any better, that he would not be able to come to work the next day. Mr. Clearihue told him he was very much in need of him, and would like for him to come as soon as possible, and he would do all that he could towards getting him the extra quarter in the day," which he said, in reply to a question by a juror, meant extra pay.

This statement, for what it is worth, differs from other contradictory statements alleged to have been made by Schmitz as to his condition in this: That if made at all (and of this the jury, of course, were the judges) it was made in the presence of Clearihue, who occupied such a relation to the company as to make notice to him notice to the company.

We have the testimony of those who visited and met him in the interval between Saturday, the 3d, and Wednesday evening of the 7th. We have the testimony of his wife, and that of Mr. Clearihue, to whom he reported on his return to work on Wednesday evening, and of one or more of his coemployees, whom he met at that time, that they observed noth-

ing to excite suspicion as to his condition and his fitness to perform the duties for which he was employed. He was examined by physicians after the accident occurred, and was then in a highly nervous state; but that surely is not to his discredit. That he was broken down at the thought that, however innocently, he had been in some degree connected with a horrible accident resulting in the death of four human beings, was sufficient to unnerve any man of proper feeling. There was some effort to prove that he was drunk at the time, but it wholly failed. The physicians, who made a very cursory examination, say that they found him suffering from pleurisy, which extended over about four square inches of the surface of his left lung. The examination was superficial, and was made after the accident; and, while it may show that a prudent man would have remained at home, it does not tend to show any connection between his pleuritic condition and the accident, and is certainly not sufficient to bring home to the company such notice or knowledge of his condition as required it, in the exercise of reasonable care, to forbid his exercising his duties of hoistman.

It is said, however, that the air brake when left at center leaked, that the air gradually escaped and the pressure was thereby diminished, and the force of gravity set the skip in motion. The proof is that there would be an escape of air when the lever which controlled the air brake was at center; that air, being very attenuated and volatile in its nature, will escape when confined. A machine, we suppose, made so tight as to render the escape of air impossible, would be incapable of operation; but the proof is, and there is no contradiction of the evidence upon this point, that the machine, when properly operated, is safe and adequate to the perfect control of the hoisting apparatus. The force of the brake can be applied slowly, and the movement of the car will be gradually diminished; if applied rapidly, the force of the brake is such that the movement is suddenly stopped. All then depends upon the method of operation, and in the case before us the hoistman, finding the car descending, it already having fallen about 81 feet, and knowing, of course, that as it moved its descent would be accelerated, found himself in the presence of a sudden emergency. From center to the extreme right is only 3 inches, and in moving the lever from center to the right, where the extreme of movement was only 3 inches, he moved it so far as to bring to bear a pressure upon the brake which brought the car to a sudden stop.

But it is contended that the movement began as the result of the leakage of the air; that the leakage of air was an inherent quality which could not be overcome, and that it was improper to rely upon the air brake while the bucket or skip was swinging in the shaft, and in doing so the hoistman was violating

the express directions of his instructor, and had done so so continuously and habitually that the Arminius Company knew, or ought to have known, of his conduct and taken steps to apply a remedy.

We do not so read the evidence. Turning first to the evidence of Schmitz, who was a witness of the defendant in error, he says, speaking of the evening the accident occurred: "The first thing I did was to pull the north skip from the 800-foot level, which was our rule generally to pull the men down below first. We always took the men in the lowest part first. When I got that skip to the top and landed it, I turned around to take the south skip up, and found it going down, and my first thought was to put the emergency on to save those men, and when it stopped it threw those men off. I don't know what caused it to move. When I first saw it, it was going at a pretty good speed." With reference to the use of the hand brake he says: "We wasn't in the habit of using the hand brake, only when we stopped over Sunday or overnight we put that on for a lock. * * * I did not use the hand brake on this occasion to hold the south skip suspended in the shaft. I used the air brake, because the air brake was safer and easier to put on."

Hester, also a witness for the defendant in error and one of the principal hoistmen or engineers, testified upon the subject of the air brake as follows:

"Q. Now, after the new machinery was installed, and up to October 7, 1908, did you use the air brake alone when handling men to hold the skips suspended in the shaft? A. Yes, sir; I used the air brake.

"Q. I mean, did you use the air brake in handling the men? When you were going to hold a skip suspended in the shaft with men on it, and you had to wait some considerable time, did you rely on the air brake to hold the skip? A. Well, most of the time; of course, I used the lever, also, whenever I left the engine any time.

"Q. You did not use the lever, except when you left the engine? A. No, sir— Well, yes, sir; sometimes when I was standing by the engine I used it, pulled the lever in.

"Q. You did do that? A. Yes, sir; I did.

"Q. In your position there as hoister? A. Yes, sir; I did.

"Q. You did do that often? A. Mighty near every time when I had occasion for swinging in the shaft.

"Q. You did that nearly every time? A. Yes, sir.

"Q. Why did you do that? A. Because I thought it was best."

This witness, it will be remembered, was on duty immediately before Schmitz, and he testified, in addition to what has already been quoted, that when he left the engine and Schmitz took his place it was in good order, working properly, and there was no difficulty in controlling the air brake what-

ever, that he had observed no leaks or escape of air, and that when he came back after the accident he found everything all right, just as he left it; that he used the air brake after he returned, and it worked properly.

Mr. Harper, who installed the machinery and gave instructions as to its use, says:

"Q. Now, Mr. Harper, the engine is used to raise everything there, and the air only is used in practice as a brake? A. Yes, sir.

"Q. Or to control or retard motion; that is what a brake is intended for, isn't it? A. Yes, sir; that is what a brake is intended for. I will further state that in connection with these air brakes there are two auxiliary hand brakes that they use in case that they shut down over Sunday, or let the cages stand without any steam on the pumps, and they want to keep the engines from moving. They put the hand brakes on them. * * *

"I did not recommend the use of the hand brake in getting out ore, because it is slower naturally, and more laborious. A man has to get out of his position somewhat to handle it. It has a long leverage, and it takes considerable effort to pull it. In order to get out the product more rapidly, the air brake is quicker and more sure, and requires less effort on their part. So I recommended the air brake altogether. I only recommended the use of the hand brake when they were shutting down and had no air, and only as an auxiliary of safety to the air brake.

"Q. Now, when the engine was in operation, and the man was actively engaged in the work of the mine, which brake would he use under your instructions chiefly? A. The air brake."

It is plain from this that Schmitz correctly understood and applied the instructions which he had received. The hand brakes were auxiliary, not to the regular use of the machine in active operation, but when the mines were shut down on Sundays, or when the cages were left standing without any steam on the pumps and they wanted to keep the engines from moving. "I only," said Harper, "recommended the use of the hand brake when they were shutting down and had no air, and only as an auxiliary of safety to the air brake."

On the occasion in question, none of these conditions existed. They were in active and constant operation, there was steam on the pumps, and they had abundance of air, as was illustrated when, by accident or otherwise, the lever was moved to the right and the air turned in full force upon the brake. We have searched and searched in vain for any evidence that there was any increased danger in the operation of the air brakes over and above that which pertained to the operation of the machinery in use at the mines prior to the installation of the air brakes; on the contrary, the air brakes are

more powerful, more efficient, and more easily controlled than the hand brakes.

Leaving out of view for the moment responsibility for the beginning of the downward movement of the car, the situation called for prompt action. According to Harper, the use of the hand brake is slower and more laborious. "A man has to get out of his position somewhat to handle it." Under such conditions, the almost instinctive act in such an emergency was to apply the force most easily within reach. Had he waited to get out of his position in order to use the hand brake, the disaster might have been still more appalling.

There are some minor circumstances proved by the evidence, introduced for the purpose of showing the unfitness of Schmitz, the holstman, for his duties, but which we do not regard as at all material. For instance, that while the south skip was waiting at the 400-foot level it was suddenly run up a few feet, and then allowed to come back; that the usual habit was to bring the skip from the lower level up to a level with the upper skip, and then draw them both up to the surface together, which was not done upon the occasion in question; that the skips, upon being drawn up, were sometimes carried above the surface for a considerable distance—10 or 12 feet. From all of which the argument as to the unfitness of Schmitz is deduced, but which to us seem to be altogether trivial and of no probative value; and it is possible we have omitted to mention other circumstances of a like character.

After the case had been submitted to the jury, they came into court and propounded the following question: "If we should believe from the evidence that Mr. Harper, the man who installed the machinery, fully instructed the holstman, Mr. Schmitz, in the manner and mode of using said machinery, but the said Schmitz was negligent in not carrying out the instructions, and the defendant was negligent in not seeing that they were carried out, then would the law under such state of facts allow us to find for the plaintiff?" In answer to this query the court said: "Yes; provided you believe the other propositions of fact contained in instruction No. 4."

Now, instruction No. 4 is predicated upon the idea that the use of brakes operated by compressed air was more hazardous than the use of the hand levers; that this was known to the defendant, or could have been known, had it used ordinary care and skill in supervision; that it gave no notice or warning of any increased danger; that the same was unknown to the plaintiff's intestate and was not obvious to him; that it was the duty of the Arminius Company to have made some proper order or regulation which would have required its holstman operating the machinery to use the hand levers for stopping the skip; and that the accident

was due to the failure of the defendant to give such order or to make such regulation, and to see that the same was obeyed and carried out.

The defendant in error, in reference to what passed between the jury and the court, as above detailed, says: "Here is the very gist of the case, and the ground on which the verdict was based, namely, the concurring negligence of the hostman, a fellow servant, and of the defendant itself, which was the proximate cause of the intestate's death."

If we are correct in the conclusion we have reached, that there was no greater danger in the use of the air brake than of the hand brake, then the facts did not exist upon which instruction No. 4 was predicated, and the whole theory of the case upon which defendant in error relied falls to the ground.

Upon the whole case we are of opinion that the verdict should have been set aside and a new trial awarded, and this court will enter such judgment as the circuit court ought to have rendered.

Reversed.

(112 Va. 463)

SECURITY BANK OF RICHMOND v. EQUITABLE LIFE ASSUR. SOCIETY OF THE UNITED STATES.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. DEATH (§ 2*)—PRESUMPTION.

The presumption that one who has left home and who has not been heard from for seven years is dead does not arise until the end of the seven years; but there is no presumption as to the particular time of death, nor that he was living at any particular time, within that period.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1-3; Dec. Dig. § 2.*]

2. INSURANCE (§ 668*)—LIFE POLICIES—PRELIMINARY PROOFS OF DEATH—SUFFICIENCY—DETERMINATION.

In a suit on life policies, it is the duty of the court to determine in the first instance whether the preliminary proofs of death are satisfactory.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1732-1770; Dec. Dig. § 668.*]

3. INSURANCE (§ 543*)—LIFE POLICIES—PROOFS OF DEATH—SUFFICIENCY.

Provision for payment of life insurance on "satisfactory proof" of death entitles insurer to demand proof with reasonable certainty, and is complied with by proof sufficient, standing alone, to support recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1347; Dec. Dig. § 543.*]

4. INSURANCE (§ 550*)—LIFE POLICIES—PROOF OF DEATH.

A statement, submitted as part of a proof of death under life policies, showing that assured disappeared March 10, 1902, must be considered as of the time the proof was submitted April 22, 1903, and certainly not later than August, 1903, when suit was brought on the

policies, as affected by the legal presumption of death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1359-1361; Dec. Dig. § 550.*]

5. INSURANCE (§ 550*)—LIFE POLICIES—PROOF OF DEATH—SUFFICIENCY.

The presumption of death arising from seven years' disappearance and a statement showing that assured disappeared March 10, 1902, is insufficient to show his death before April 14, 1903, when the policies lapsed for nonpayment of premiums.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1359-1361; Dec. Dig. § 550.*]

Error to Law and Equity Court of City of Richmond.

Action by Security Bank of Richmond, Va., against Equitable Life Assurance Society of the United States. Judgment for defendant, and plaintiff brings error. Affirmed.

The following instructions were given:

"(1) That whilst the law presumes that a person who has left his home and has not been heard from for seven years has died, yet the presumption of death in such cases only arises at the end of the seven years; that is to say, that the presumption of law of death does not arise until the expiration of seven years. But there is no presumption of the law as to the particular time of death within the seven years, nor does the law raise any presumption that the party who has so left the state has continued to live, or that he is living at any particular time during the seven years; but the burden is on the party asserting such a claim to prove it by testimony satisfactory to the jury. And in this case the jury are instructed that the burden of proof is upon the plaintiff to show to your satisfaction that Charles H. Hudspeth died before the 14th day of April, 1903, and unless you are so satisfied from the evidence of the proof of this fact you must find for the defendant.

"(2) That if the policies sued on in this case had lapsed by reason of nonpayment of premiums before the bringing of this suit, or that suit was brought before satisfactory proofs of the death of the assured had been furnished to the defendant, then the jury must find for the defendant.

"(3) That the statements set forth in the paper signed 'Jackson Guy, Cashier,' and marked 'A,' with the claimant's statement, are not 'such satisfactory proofs of the death of the assured' as is contemplated by the policies sued on in this case; and unless the jury believe from the evidence that further proof of the death of the assured was furnished to the defendant before this suit was brought, then they must find for the defendant."

Meredith & Cocke, Jno. H. Guy, and Samuel A. Anderson, for plaintiff in error. Christian, Gordon & Christian and Hill Carter, for defendant in error.

KEITH, P. Three policies of insurance, amounting to \$17,500, were taken out by Charles H. Hudspeth in the Equitable Life Assurance Society of the United States. At the institution of this suit, the Security Bank of Richmond, Va., the plaintiff, was the undisputed beneficiary of the three policies, and brought its action to the first Monday in August, 1903, averring that Hudspeth, upon whose life the policies were issued, was dead, and asking judgment for the amount of the insurance.

These policies contain a provision which is as follows: "The Equitable Life Assurance Society of the United States hereby assures the life of Charles H. Hudspeth, of Midlothian, Va., hereinafter known as the assured, and on receipt of satisfactory proofs of the death of the assured, providing this policy is then in force, agrees to pay" the amount for which the policy is written.

The defendant pleaded non assumpsit, and for grounds of defense said: (1) That the policies of insurance sued on lapsed for non-payment of premiums on April 14, 1903; (2) that no proof of the death of the assured has been furnished to the defendant, as required by said policies of insurance, and that no presumption of his death arose until the expiration of seven years from the time he was last seen alive, which time is stated by the plaintiff to have been about 2 p. m. on Monday, March 10, 1902; (3) that the burden of proof is on the plaintiff to show that the assured died prior to the time when the policies lapsed, on the 14th of April, 1903.

There was a verdict and judgment for the defendant, to which the plaintiff applied for and obtained a writ of error.

Passing over the preliminary correspondence between the attorneys for the Security Bank and the Equitable Life Society, we come to the proofs of death furnished to the Society before the institution of the suit, in compliance with the stipulation in the policies above set forth.

The eighth clause of claimant's statement is as follows: "State all facts regarding cause and circumstances of death." Answer: "See paper hereto attached, marked 'A.'" The paper here referred to is as follows:

"He disappeared from Richmond about March 6, 1902, without warning to family and friends; was traced to Washington, D. C., by detective, who learned that he had been drinking very heavily. Since that his family have not had a line from him. We sent full description to all police bureaus and detective agencies, offering reward.

"It is said he was very ambitious to make money, was very despondent, and exceedingly dissipated. Had lost all of his means, which we think caused him to take his own life. Last time seen, as far as we know, was at Johnson Hotel, Washington, D. C., about 2 p. m. on Monday, March 10, 1902. After his departure, his room was searched, and in it were found a number of empty

whisky bottles, carried there by him. It was also proven that he drank very heavily at bar of said hotel.

"His family also have made every effort to locate him, but without success.

"Attached to and made a part of the proof of death of Charles H. Hudspeth by the Security Bank of Richmond.

"Jackson Guy, Cashier."

The paper marked "A" was dated April 22, 1903, and on April 27th the general agent of the Assurance Society informed Mr. Guy that the proofs submitted were not satisfactory to his company. It appears that the policies sued on were kept in force until April 14, 1903, by the payment of premiums, and, no further payment having been made, they lapsed upon that day.

[1] After the evidence had been submitted to the jury, the court refused to give certain instructions asked for by the plaintiff, but instructed the jury: "That whilst the law presumes that a person who has left home and has not been heard from for seven years has died, yet the presumption of death in such cases only arises at the end of the seven years; that is to say, that the presumption of law of death does not arise until the expiration of seven years. But there is no presumption of law as to the particular time of death within the seven years, nor does the law raise any presumption that the party who has so left the state has continued to live or that he is living at any particular time during the seven years; but the burden is on the party asserting such a claim to prove it by testimony satisfactory to the jury. And in this case the jury are instructed that the burden of proof is upon the plaintiff to show to your satisfaction that Charles H. Hudspeth died before the 14th day of April, 1903; and unless you are so satisfied from the evidence of the proof of this fact you must find for the defendant."

This instruction is in accordance with the decision of this court in *Evans v. Stewart*, 81 Va. 724, and correctly states the law.

The second instruction given was: "That if the policies sued on in this case had lapsed by reason of nonpayment of premiums before the bringing of this suit, or that suit was brought before satisfactory proofs of the death of the assured had been furnished to the defendant, then the jury must find for the defendant."

And the third instruction: "That the statements set forth in the paper signed 'Jackson Guy, Cashier,' and marked 'A,' with the claimant's statement, are not 'such satisfactory proofs of the death of the assured' as is contemplated by the policies sued on in this court; and unless the jury believe from the evidence that further proof of the death of the assured was furnished to the defendant before this suit was brought, then they must find for the defendant."

The case turns upon whether or not the second and third instructions correctly propounded the law. The case was argued ably and fully, orally and upon the briefs. A great number of cases were cited—a greater number than can be considered and criticised within the limits of an opinion; and we shall, therefore, refer specifically only to those which seem to bear most directly upon the points at issue.

[2] One of the principal controversies raised in the case is whether or not the preliminary proofs of death are to be passed upon by the court as constituting a condition precedent to the right to bring the suit, or whether it is for the jury to determine whether or not they comply with the provision of the policies, which required the plaintiff to furnish satisfactory proofs of death of the assured.

We are of opinion that the weight of authority imposes the duty upon the court to determine, in the first instance, whether or not the proofs are satisfactory.

In 25 Cyc. at page 947, note 27, in enumerating questions of law for the court, there is included: "The legal effect and sufficiency of the proofs of loss furnished in compliance with the requirements of the policy"—citing a number of cases.

In *Citizens' Fire Ins. Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360, it is said: "The preliminary proofs of loss required by an insurance company of the assured are not per se evidence to the jury of his loss. They are conditions precedent to his right to recover, and it is for the court, and not for the jury, to decide on their sufficiency."

In *Mutual Life Ins. Co. v. Stibbe*, 46 Md. 302, by the terms of the policy the amount insured was payable in 90 days after satisfactory proofs of death. At the trial the proofs of death furnished in compliance with this requirement were offered in evidence by the plaintiff, for the purpose of showing such compliance. Held, "that the same were admissible for that purpose, and for no other, and their sufficiency was a question for the court to determine."

In *Policemen's Association v. Ryce*, 213 Ill. 9, 72 N. E. 764, 104 Am. St. Rep. 190, it is said that while the questions of fact, whether proofs of loss or of death have been furnished, or whether the assured rendered as full proofs of loss or of death as the circumstances would permit, are for the jury, yet the legal effect of such proofs is a question of law for the court.

In *Gauche v. London, etc., Ins. Co. (C. C.)*, 10 Fed. 347, the court said that the sufficiency of preliminary proofs, there being no question of waiver involved, in a question of law for the court, and not a question of fact for the jury.

The case of *Charter Oak Life Ins. Co. v. Rodel*, 95 U. S. 232, 24 L. Ed. 433, is relied upon by the plaintiff in error; but we do not

think it bears out its contention. In that case the policy provided that payment should be made "ninety days after due notice and satisfactory evidence of the death of A. and of the just claim of the assured under this policy has been received and approved by the insurers," and it was held that the words "just claim of the assured" had reference to her claim or title to the policy, and not to the justness of her cause of action thereon. Mr. Justice Bradley, speaking for the court, said: "We think there was no error in the ruling of the court in admitting in evidence the proofs of death, which had been served on the defendant. Of course, the company could not justly contend that it might arbitrarily object to the sufficiency of the proofs; but it had an undoubted right to demand and insist upon such proofs as the law would adjudge to be reasonable and satisfactory. The objection to those furnished was that, whilst otherwise sufficient as proofs of the death of the insured, they disclosed at the same time a cause of death which exempted the company from liability, and hence could not be said to be sufficient proof of 'the just claim of the assured' as well as of the death of Rodel. * * * Proof of death was all that was required. This was given, and does not appear to have been objected to. If the proofs also disclosed facts of which the defendant could avail itself as a defense to an action on the policy, this would not derogate from the sufficiency of the proofs as proofs of death. But whilst the disclosure of such facts might well suggest to the company the propriety of refusing payment and standing suit, it would be no bar to the bringing of the suit; otherwise, no suit could ever be brought until the parties had gone through an extrajudicial investigation resulting favorably to the assured." We think it is to be inferred that if the proofs of death, as distinguished from the justness of the claim, had been the question at issue, and those proofs had been found insufficient by the court, the judgment would have been otherwise.

Noyes v. Commercial Travelers' Accident Ass'n, 190 Mass. 171, 76 N. E. 665, seems to support appellant's contention, and to hold that, under a provision in a policy for payment "within sixty days from the receipt by its board of directors of proof satisfactory to said board of the particular disability suffered by said member," it is a question for the jury whether the plaintiff furnished proof which reasonably should have satisfied the directors.

In *Buffalo Loan & Trust Co. v. Knights Templar, etc.*, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839, Judge Andrews, speaking for a unanimous court, said: "The words 'satisfactory proof' entitled the association to demand that the fact of death should be shown with reasonable definiteness and certainty, and if the proofs furnished failed to satisfy the association of the fact of the death, the association, acting reasonably and

in good faith, could require further evidence. But the insurer cannot, under guise that the requirement that 'satisfactory proof' of the death of the assured should be given, demand information of the cause of the death. This would be a different subject. The information, however important it might be in its bearing upon a death from the excepted causes, nevertheless has no relation to the one fact which alone the claimant is bound to embrace in his proofs." That is to say, in his preliminary proofs. In that case the proof of death was satisfactory, and the insurer had no right to demand more, and could not require information as to cause of death.

In *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18, it was held that: "Where the policy stipulates for preliminary proof of loss, and the declaration alleges that such proof was furnished, and where the whole declaration is denied by plea, the plaintiff is entitled to verify the allegation by submitting in evidence the affidavits which were furnished to the company as preliminary proof. But the affidavits are evidence for the sole purpose of showing compliance with the terms of the policy as to preliminary proof, and the better opinion is that their sufficiency is for the court. They are no evidence against the company of any fact stated in their contents. Though the policy stipulates that the preliminary proof of death, etc., to be furnished, shall be 'direct and affirmative proof,' any proof that ought to be satisfactory will suffice, although it may involve inference of the main fact from other facts, and therefore be properly denominated circumstantial, rather than direct, evidence."

From an examination of the authorities we have reached the conclusion that it was for the court to pass upon the sufficiency of the preliminary proofs.

[3] The question which next arises is: Did it correctly discharge that duty?

Every case seems to stand upon its own particular facts, and no precise standard, as far as we have been able to discover, is established for the guidance of courts in determining what is satisfactory proof of loss. As was said in *Buffalo Loan, etc., Co. v. Knights Templar*, supra: "The words 'satisfactory proof' entitled the association to demand that the fact of death should be shown with reasonable definiteness and certainty." But that is a variable standard. Perhaps as accurate a measure as we can apply is to say that if the preliminary proofs are such as, when introduced upon the trial of the case, standing alone and without further proof, would be sufficient to support a verdict of a jury in favor of the plaintiff, they should be held to be satisfactory proofs, as a condition precedent to the institution of an action.

It will be observed, in the case under consideration, that, when the claimant was 1 upon to state all facts regarding the

cause and circumstances of death, the reply was a reference to an attached paper, marked "A," which has already been copied into this opinion.

The instruction given by the court told the jury that statement A did not contain satisfactory proofs of the death of the assured, and that the jury should find for the defendant, unless they believed from the evidence that further proof of the death of the assured was furnished to the defendant before this suit was brought. The jury by their verdict, therefore, found that there was no such proof furnished to the defendant; and in the petition for a writ of error it is said that the proof offered upon the trial was but "an elaboration of the statements contained in the said proof of death." The whole case made by the plaintiff is, therefore, to be found in statement A.

[4] This brings us to inquire as to the probative value of the facts set forth in statement A; and here it must be borne in mind that the paper was prepared on the 22d of April, 1903, and that Hudspeth was last seen on March 10, 1902; that the suit was brought to August rules, 1903; and that the judgment complained of was rendered on the 10th of March, 1910. The evidence must, therefore, be considered as of the time the proof of loss was rendered, and certainly not later than the time of institution of the suit. In some of the cases it seems that the period elapsing between the institution of the suit and its determination was taken into consideration; but in that view we cannot concur.

[5] But, even if the period of absence down to the trial were to be considered in aid of statement A, it would not avail the plaintiff in error; for not only must it show that the assured is dead, which at the expiration of seven years would be presumed, and as to which the presumption would be strengthened as the period from his disappearance increased, but it is also necessary, in order to maintain an action in this case, to show that death occurred during the life of the policy—that is to say, prior to April 14, 1903. In other words, it would aid the presumption of death, but would be of no value as tending to fix the time of death. See *Evans v. Stewart*, supra.

In 2 Wharton's *Evidence* (3d Ed.) § 1277, the law is thus stated: "It has been incidentally observed that, aside from the general presumption of death arising from unexplained absence abroad for seven years, certain facts have been noticed by the courts as affording grounds on which inferences of death, more or less strong, may rest. Among these facts may be noticed: Presence on board a ship known to have been lost at sea, the inference of death increasing with the length of time elapsing since the shipwreck; exposure to peculiar perils, to which death will be imputed if the party has not been subsequently heard from; ignorance, as to

such person, after due inquiry, of all persons likely to know of him if he were alive; cessation of writing of letters, and of communications with relatives, in which case the inference rises or falls with the domestic attachments of the party. Thus death may be inferred by a jury from the mere fact that a party who is domestic, attentive to his duties, and with a home to which he is attached, suddenly, finally, and without explanation, disappears. On the other hand, it is admissible to explain such disappearance by putting in evidence pecuniary embarrassments."

In *Ryan v. Tudor*, 31 Kan. 366, 2 Pac. 797, Mr. Justice Brewer (afterwards of the Supreme Court) said: "In reference to the death of Ryan, it is clear that there was no direct proof. The matter rests mainly on presumptions. The general rule in respect thereto is that at the close of a continuous absence of seven years, during which time nothing is heard of the absent person, death will be presumed. Now at the time of the commencement of this action only five years and eight months had elapsed since Ryan left New Hampshire, and at the time of trial seven years' absence had not fully run; so that, with nothing but the mere fact of unexplained absence before it, the court was clearly right in its instructions. It is true, that, besides the mere fact of unexplained absence, there were one or two slight matters bearing upon this question. While a man of good health, Ryan was past middle life when he went away. He told his relatives in New Hampshire that he would be back in a month. He told his agent in Kansas that as soon as he got settled he would write. He neither returned nor wrote. * * * So that perhaps the court ought to have left it to the jury as a question of fact whether, considering Ryan's eccentric disposition, his lack of family, his expressed uncertainty as to his future residence on the one hand, and on the other his age, his promise to write and return, and his long absence, his death ought, or ought not, to be inferred. Be that as it may, under the instructions as given, the jury ought not to have found as they did. As more than seven years have now passed since Ryan's departure, if no tidings have been received from him, the presumption of death unquestionably arises. But, whether dead or alive, defendants' obligation to pay remains. If Ryan be alive, they should pay the money to the agent, that it may be by him remitted to Daniel Fish in accordance with Ryan's instructions. If, on the other hand, Ryan be dead, an administrator should be appointed to collect this money and distribute it among his heirs. It is unnecessary that this suit be dismissed; for, if an administrator be appointed, the death of Ryan can be suggested, and the suit revived in the name of such administrator."

Tisdale v. Connecticut Mutual Life Ins. Co., 26 Iowa, 170, 96 Am. Dec. 136, was

much relied upon by plaintiff in error. It seems to add but little to the force of the quotation from Wharton. There was evidence at the trial tending to prove the following facts: That the party upon whose life the policy was issued was a young man of exemplary habits, excellent character, of fair business prospects, respectably connected, and of the most happy domestic relations. He had the fullest confidence of his friends and the entire affection of his wife, and was living in apparent happiness, with no cause of discontent with his condition, which would have influenced him to break the domestic and social ties with which he was so pleasantly bound to life. Visiting Chicago, September 25, 1866, upon business, he was last seen by an acquaintance on the corner of Lake and Clark streets in that city, about 3 o'clock p. m. of that day. No trace of him was afterward discovered, though his friends made every effort to find him and ascertain the cause of his mysterious disappearance. A large reward was offered through the newspapers for information that would lead to his discovery, either dead or in life. The detective police were employed to search for him without results. No tidings have been received of him, and not the faintest trace of the cause or manner of his disappearance has been discovered. He gave no intimation to any one of an intention to absent himself, and the latest declaration of his intentions was to the effect that he expected to leave Chicago the day of his disappearance to join his wife at Dubuque. He owed no debts amounting to any considerable sum, and had made payment of some small ones about the day of his disappearance. His valise, containing clothing and other articles commonly carried by travelers, was found at his hotel. His bill there was unpaid. The reporter says that a further statement of the evidence is not necessary for a proper understanding of the points ruled. It is said in the opinion: "Any facts or circumstances relating to the character, habits, condition, affections, attachments, prosperity, and objects in life, which usually control the conduct of men, and are the motives of their actions, are competent evidence, from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence. A rule excluding such evidence would ignore the motives which prompt human actions, and forbid inquiry into them in order to explain the conduct of men. The true doctrine may be readily illustrated thus: An honored and upright citizen, who, through a long life, has enjoyed the fullest confidence of all who knew him, prosperous in business and successful in the accumulation of wealth, rich in the affection of wife and children, and attached to their society, contented in the enjoyment of his possessions, fond of the associations of his friends, and having that love of coun-

try which all good men possess, with no habits or affections contrary to these traits of character, journeys from his home to a distant city and is never afterward heard of. Must seven years pass, or must it be shown that he was last seen or heard of in peril, before his death can be presumed? No greater wrong could be done to the character of the man than to account for his absence, even after the lapse of a few short months, upon the ground of a wanton abandonment of his family and friends. He could have lived a good and useful life to but little purpose, if those who knew him could even entertain such a suspicion."

In *Seeds, Executor, v. Grand Lodge of Iowa*, etc., 93 Iowa, 175, 61 N. W. 411, the court held that where a married man leaves home because his wife declines to live with him, and later professes to be unmarried and states that he is going to Dakota, is in good health when last seen, and six years after his disappearance he is advertised for to receive a legacy, "there is no presumption of death by reason of the fact that he has not been heard from in seven years. At any rate, it will not be presumed that he dies within two years after disappearing, so as to render valid an insurance policy which lapsed at the end of said two years for non-payment of dues and assessments." In that case, while the law of *Tisdale v. Insurance Co.*, supra, is not questioned, the facts of the two cases are differentiated, and Rowell, the beneficiary in the case in 93 Iowa, 175, 61 N. W. 411, is shown to be a very different man from *Tisdale*. The court states that "he was wanting in the character, habits, condition, affections, attachments, and objects in life which usually draw men to their families, their homes, and the society in which they have lived. It was evidently not his purpose to return and dwell with his family; but, cast off as he was for his own fault, and with the character and inclinations which he evidently possessed, his object was to entirely withdraw himself from them. There is nothing in the condition of his health from which to infer death, for it is shown that when last seen he was in usual good health."

Contrast the proof furnished in statement A with the facts in *Tisdale's Case*, supra, and one cannot but be impressed with the fact that the two cases differ in almost every circumstance. We have given statement A our most careful consideration, and we are of opinion, first (as before stated), that it was the province of the court to determine whether or not it furnished sufficient proof of death; second, that the court correctly held that it did not furnish sufficient proof of death; and, third, that if the court had submitted that question to the jury, and they had found for the plaintiff upon the faith of the facts stated in state-

ment A, which we have seen contained all the facts of probative value introduced before the jury, it would have been the duty of the court to have set aside the verdict; and therefore we are of opinion, from every point of view, that there is no error in the judgment of the lower court, which is affirmed.

Affirmed.

(112 Va. 347)

GORDON v. JOYNER.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. TAXATION (§ 748*)—TAX DEED—LIMITATION.

To entitle a purchaser at a tax sale to the benefit, of Code 1904, § 661, providing that where a purchaser of real estate, sold for taxes under section 666, has obtained a deed therefor and the same has been duly recorded, the title shall be vested in the grantee, subject to be defeated only by proof of specified facts in a suit brought within two years, his deed must have been executed by the proper clerk after the expiration of two years from the date of the tax sale, and after the purchaser has given the four months notice required by section 655.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1494-1499; Dec. Dig. § 748.*]

2. TAXATION (§ 749*)—TAX DEED—EXECUTION—POWER OF CLERK.

The authority conferred on a clerk to execute a tax deed to a purchaser after two years from the date of the tax sale and after four months' notice to redeem, conferred by Code 1904, § 655, is a naked power not coupled with an interest, and must be strictly complied with in order to render a deed executed by him of any validity.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1496; Dec. Dig. § 749.*]

3. TAXATION (§ 746*)—TAX DEED—EXECUTION—PERSON AUTHORIZED.

In the absence of a curative statute, a tax deed executed by a person other than the official designated by law to make the same is a nullity.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1491, 1492; Dec. Dig. § 746.*]

4. TAXATION (§ 750*)—TAX DEED—NOTICE—FAILURE TO SERVE—EFFECT.

Code 1904, § 655, provides that after two years from the date of a tax sale the purchaser may obtain a deed from the proper clerk, and declares that in no case shall a deed be executed to a purchaser until after he has given to the person or persons therein mentioned, who are supposed to be interested in the land as owners or lienors and entitled to redeem, four months' notice of the purchase, etc. Held, that a tax deed issued to a purchaser without such notice was a nullity, and was not cured by any of the provisions of section 661, providing that the deed of a purchaser of land sold for taxes pursuant to section 666 shall not be set aside, except on specified grounds, and that no suit shall be brought to vacate the same, except for fraud, after two years.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1497; Dec. Dig. § 750.*]

Error to Corporation Court of Newport News.

Action by Collins Joyner against Harris Gordon. From a judgment for plaintiff, de-

fendant brings error. Reversed and rendered.

Allan D. Jones and R. M. Lett, for plaintiff in error. Samuel R. Buxton, for defendant in error.

BUCHANAN, J. The only question to be determined on this writ of error is whether a deed made to a purchaser at a delinquent land tax sale before he has given the notice required by section 655 of Code Va. 1904 is void, or whether the failure to give such notice is an irregularity which is cured by section 661 of the same Code.

Section 655 provides that, after two years have expired from the date of a tax sale, such purchaser may obtain a deed from the proper clerk, but declares that "in no case shall a deed be made to any such purchaser of any such real estate until after such purchaser has given" to the person or persons therein mentioned, who are supposed to be interested in the land as owners or lienors and entitled to redeem the same, "four months' notice of his said purchase, * * * and the person entitled to redeem said real estate shall have the right to redeem the same at any time before the expiration of the said four months, although such time extend beyond the two years first mentioned herein."

Section 661 provides that where the purchaser of any real estate so sold, or sold in pursuance of section 655, has obtained a deed therefor, and the same has been duly admitted to record in the proper clerk's office, the right or title to such estate shall stand vested in the grantee in such deed as was vested in the party assessed with the taxes or levies on account of which the sale was made, etc., subject to be defeated only by proof (1) that the taxes, etc., for which it was sold were not properly chargeable thereon; (2) that the taxes, etc., properly chargeable on such real estate had been paid; (3) that the notice of the tax sale, where made to a person other than the commonwealth, or notice of the application to purchase, in case the sale was made under section 655, had not been duly given; or (4) that the payment or redemption of said real estate was prevented by fraud or concealment on the part of the purchaser. That section further provides that no suit shall be brought to set aside, cancel, or annul such deed, except for fraud, as therein provided, unless within two years after the same is properly admitted to record.

[1, 2] In order for a purchaser at a tax sale to be entitled to the benefit of the provisions of section 661, he must have obtained his deed in accordance with the provisions of section 655; that is, his deed must be executed by the proper clerk (unless the clerk himself be the purchaser) after the expiration of two years from the date of the tax

sale, and after the purchaser has given the notice required by that section. The authority conferred upon the clerk to execute the deed is a mere naked power not coupled with an interest, and must be strictly complied with. No rule of law is more firmly settled than that in the case of a naked power, every prerequisite to its exercise must precede it. *Sulphur Mines Co. v. Thompson*, 93 Va. 203, 316, 25 S. E. 232, and authorities cited; *Reusens v. Lawson*, 81 Va. 226, 236, 21 S. E. 347; *Flanagan v. Grimmet*, 10 Grat. 421, 435, and cases cited.

[3] In the absence of a curative statute, if the deed be executed by a person other than the official designated by law to make the deed, it is, of course, a nullity. If authorities be needed for so plain a proposition, they can be found in Judge Allen's opinion in *Flanagan v. Grimmet*, supra. If the official be authorized to make the deed after a time named, and he execute it before that time elapses, the deed is also a nullity. *Bowe v. City of Richmond*, 109 Va. 254, 260, 64 S. E. 51; *Bradley, Tr., v. Patterson*, 112 Va. —, 70 S. E. 540, decided at March term, 1911; *Minor on Tax Titles*, p. 111, and cases cited. And, a fortiori, the deed must be a nullity when the purchaser not only obtains it without complying with the conditions which entitle him to a deed—i. e., giving the notice required—but when executed by an official in plain violation of the statute which prohibits him from making the deed until four months after the required notice has been given.

[4] It may be true, as argued, that the Legislature has the power to authorize a conveyance to be made to a purchaser at a tax sale without requiring some such notice as that provided for by section 655; but it has not done so. On the contrary, the Legislature has declared that the purchaser shall give notice of his purchase, and that he is not entitled to a deed until he has done so.

There is nothing, as it seems to us, in section 661 which validates a deed executed to a purchaser at a tax sale in violation of section 655. The deed must be made by the clerk. It cannot be made until after two years expire from day of sale, nor until four months after the notice required by that section has been given. The purchaser at a tax sale must comply with the provisions of section 655 before he is entitled to a deed which will give him the benefit of curative provisions of section 661. See *Va. Coal Co. v. Thomas*, 97 Va. 557, 34 S. E. 486; *Va. Building, etc., Co. v. Glenn*, 99 Va. 460, 39 S. E. 136; *Bowe v. City of Richmond*, supra; *Bradley v. Patterson*, supra.

The provision in section 655 requiring the purchaser to give notice of his purchase as therein provided was not in that section when section 661 was enacted as it now stands, March 7, 1900 (Acts 1899-1900, pp. 1234, 1235), but was afterwards enacted by

amending section 655 of the Code of 1887 by an act approved April 2, 1902 (Acts 1901-02, p. 779). Section 661 as found in Code Va. 1904 (not as it was when the deed under consideration in the case of *Va. Building, etc., Co. v. Glenn*, supra, 99 Va. 460, 462, 39 S. E. 136, was executed) does provide that the deed of a purchaser at a tax sale or under the provisions of section 666 of the Code may be set aside, annulled, or canceled by a suit brought for that purpose within two years from the recordation of the deed, upon the ground, among others, that "the notice of the tax sale where made to a person other than the commonwealth, or notice of the application to purchase in case the sale was made under section 666, has not been duly given." Whatever may be the effect of that provision in section 661, as amended, upon the rights of a purchaser under section 666 where the notice required by that section has not been given (*Va. Building, etc., Co. v. Glenn*, supra), it has no reference to the failure to give the notice required by section 655, because at the time that provision was inserted in section 661 the purchaser at a tax sale was not required to give notice of his purchase before obtaining his deed, as he now is under section 655 (Code 1887, and Acts 1901-02, p. 779), and because the language of the provision in section 661 shows that it refers to the "*notice of the tax sale*" when bid off by such purchaser, and not to the "*notice of his said purchase*," as provided for in section 655, as amended.

There are several reasons of public policy why a tax deed obtained by a purchaser who has complied with all the requirements of section 655 should cure irregularities in the proceedings which led up to the sale, and for which such purchaser is in no wise responsible; but there is no reason in a sound public policy or in good morals why a purchaser at a tax sale, who has failed or refused to comply with the conditions upon which he is entitled to a deed and has obtained it in express violation of law, should be permitted to take advantage of his own negligence or wrong and have the same curative effect given the deed as if it had been obtained in accordance with law.

The court is of opinion that, the deed in question having been executed not only without authority, but in plain violation of the positive prohibition of section 655 of the Code, under which it was obtained, is a nullity, and that the trial court erred in not so holding. Since the plaintiff's right to recover depended upon the validity of that deed, it follows that the judgment of the trial court, to whom all matters of law and fact were submitted, must be reversed; and this court will enter such judgment as that court ought to have entered.

Reversed.

(89 S. C. 131)

STATE v. BATES.

(Supreme Court of South Carolina. June 16, 1911.)

CRIMINAL LAW (§ 1084*)—DEATH SENTENCE—STAY PENDING APPEAL.

A stay of execution of a death sentence pending appeal from an order denying a motion for a new trial will not be granted, where only a question of fact relating to the sanity of accused is involved, and an examination of the record discloses abundant evidence to support the finding of the trial judge.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1084.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; J. S. Wilson, Judge.

Application by J. B. Bates for a stay of execution of a death sentence pending an appeal from an order refusing a motion for a new trial, etc. Denied.

See, also, 69 S. E. 1075.

Stanyarne Wilson, for appellant. J. C. Otts, Sol., for the State.

PER CURIAM. This is an application for a stay of the execution of a sentence of death imposed in this case, pending appeal from an order refusing a motion for a new trial and from the sentence of the court.

The general rule is that no appeal lies from an order of a circuit judge refusing a motion for a new trial, where questions of fact only are involved. In this case the sole question of fact involved is the sanity of the defendant. Upon careful examination of the record, we find that there is abundant evidence to support the finding of the circuit judge, and no errors of law are shown in the record. It follows, therefore, that no *prima facie* case has been made out for the interference of this court.

The motion for a stay of the sentence is refused.

(89 S. C. 117.)

VERNER et al. v. MULLER et al., County Com'rs.

(Supreme Court of South Carolina. June 14, 1911.)

1. STATUTES (§ 123*)—TITLE—SUBJECTS OF ACT—"ACQUISITION."

Act Feb. 20, 1908 (25 St. at Large, p. 1431), is entitled "An act to provide for free bridges across the Congaree and Broad rivers between Columbia township, in Richland county and the county of Lexington, the acquisition thereof by Columbia township, and the issue of bonds, if approved by the electors of Columbia township, for the purpose of such acquisition." Section 7 of the act declares that authority is given to build or purchase and to maintain such bridges, etc. *Held*, that the word "acquisition," as used in the title, meaning the act of getting or obtaining something already in existence or that may be brought into existence through the means employed to acquire it, included the acquiring of a bridge by construction as well as by purchase; and hence the act was not unconstitutional as containing matter not expressed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

in its title, in that it authorized the construction of new bridges as well as the purchase of those already in existence.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 130-132, 176-183; Dec. Dig. § 123.*]

For other definitions, see Words and Phrases, vol. 8, p. 7562.]

2. TOWNS (§ 52*)—TOWNSHIP BONDS—ELECTION—MANAGERS—APPOINTMENT—DE FACTO OFFICERS.

Act Feb. 20, 1908 (25 St. at Large, p. 1431), provided for an election to authorize or reject the issuance of township bonds to pay for certain bridges, and declared that the managers of the election should be appointed by the board of county commissioners. The managers were appointed by the chairman of the board and approved by the board, which authorized the chairman to fill any vacancy which might occur, and some vacancies were so filled. *Held* that, though original appointment by the board was essential, those appointed in the absence of any proof of fraud or unfairness in the conduct of the election were de facto officers, and the election fairly conducted by them valid.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 90-94; Dec. Dig. § 52.*]

3. ELECTIONS (§ 203*)—POLLING PLACE—STATUTES—"NEAR."

Civ. Code 1902, § 203, provides that at all general elections held in the state the same shall be conducted at the polling precincts fixed by law in the various counties, cities, and towns, the location of which shall be as designated, and then declares that, at the Waverly precinct, in R. county, the polling place shall be "at or near the fork of the Rice Creek spring and Camden road." *Held*, that it could not be said as a matter of law that a polling place located a quarter of a mile from the crossing of the stream and road was not properly located "near" such point.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 179; Dec. Dig. § 203.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4687-4690.]

4. TOWNS (§ 52*)—ELECTION—ISSUANCE OF BONDS—IRREGULARITY.

Improper location of a polling place in a precinct was insufficient to invalidate an election to determine whether township bridge bonds should be issued, where a rejection of all the votes in such precinct would not change the result.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 90-94; Dec. Dig. § 52.*]

5. TOWNS (§ 52*)—BONDS—ELECTION—CERTIFYING RESULT.

Under Act Feb. 20, 1908 (25 St. at Large, p. 1431), authorizing an election for the issuance of bridge bonds by a township in R. county, and providing that the managers of the election shall conduct, direct, and declare the result thereof, and make returns in writing to the county board of commissioners, and that the county board shall issue the bonds if a majority of the votes cast at the election shall be in favor of issuing the same, it was not essential to the validity of the election that a certificate be filed with the Secretary of State and Governor by the board of county canvassers.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 90-94; Dec. Dig. § 52.*]

6. TOWNS (§ 52*)—TOWNSHIP BONDS—STATUTES—TAXATION.

Act Feb. 20, 1908 (25 St. at Large, p. 1431), authorizing the issuance of bonds by C. township to acquire bridges, provided that, on the issuance of the bonds or any part of the same, it should be the duty of the officers

charged with the assessment, levying, and collection of taxes to levy and collect annually from all property, real and personal, within the township a sum sufficient to pay interest on the bonds, and one-twentieth of the principal to constitute a sinking fund to retire the bonds at maturity. *Held*, that such act sufficiently provided for the levy of a tax with which to meet the interest and sinking fund requirements when the same should become due.

[Ed. Note.—For other cases, see Towns, Dec. Dig. § 52.*]

7. TOWNS (§ 52*)—BONDS—INJUNCTION—SINKING FUND.

That a statute under which town bonds were issued did not contain a sufficient provision for the levying of a tax with which to meet the interest and sinking fund requirements when the bonds should become due was no ground for enjoining the issuance of the bonds.

[Ed. Note.—For other cases, see Towns, Dec. Dig. § 52.*]

Petition by James S. Verner and another to enjoin W. F. Muller and others, as members of the Board of County Commissioners of Richland County, from issuing certain township bonds for bridge purposes. Injunction denied, and petition dismissed.

Weston & Aycock, for petitioners. Clarkson & Clarkson, for respondents.

JONES, C. J. The petitioners, as taxpayers, seek to enjoin the board of county commissioners of Richland county from issuing certain coupon bonds of Columbia township in Richland county about to be issued under alleged authority of the act of February 20, 1908 (25 St. at Large, p. 1431).

[1] It is contended, first, that the act is in violation of section 17, article 3, of the Constitution, providing: "Every act or resolution having the force of law shall relate to but one subject and that shall be expressed in the title." The title of the act is: "An act to provide for free bridges across the Congaree and Broad rivers in this state, between Columbia township in Richland county and the county of Lexington, the acquisition thereof by said Columbia township, and the issue of bonds, if approved by the electors of Columbia township, for the purpose of such acquisition." Section 7 of the act provides: "That authority is hereby given to build or purchase, and to maintain said bridges," etc. The point made is that the title authorizes only the purchase or acquisition of bridges now standing, while the body of the act permits the construction of new bridges as well as the purchase of those now standing. The mandate of the Constitution is complied with if the title states the general subject of legislation and the provisions in the body of the act are germane thereto as means to accomplish the object expressed in the title. *Connor v. Railroad*, 23 S. C. 427; *State v. O'Day*, 74 S. C. 448, 54 S. E. 607. The provision in the body of the statute is not only germane to the subject expressed in the title, but is clearly within the meaning

of the words of the title. "Acquisition" is the act of getting or obtaining something, which may be already in existence, or may be brought into existence through the means employed to acquire it. A bridge may be acquired by construction as well as by purchase. Moreover, the object was to provide free bridges. This contention cannot be sustained.

[2] It is next alleged that the election was invalid because some of the managers were appointed by the chairman of the board of county commissioners, whereas the statute required the appointment to be made by the board. It appears that the board of county commissioners approved all the managers, and authorized the chairman to fill any vacancies that might occur, and that the chairman made some appointment to fill vacancies. There is nothing to show that the board did not approve the appointments made by the chairman under their authority. If we should concede that original appointment by the board was necessary, there is nothing to show that there were not sufficient appointees at each precinct to hold a legal election. No fraud or unfairness in the conduct of the election is suggested. An election fairly conducted by de facto officers may be valid. *Wilson v. Cox*, 73 S. C. 398, 53 S. E. 613; *Stackhouse v. County Board*, 86 S. C. 425, 68 S. E. 561.

[3] It is also alleged that Waverly precinct, where votes were taken, was stationed at a point about one-quarter of a mile from the fork of Rice Creek spring and Camden road, whereas section 203, Civil Code 1902, provides that said voting place shall be "at or near" the said fork. We cannot say as matter of law that a country precinct a quarter of a mile from the crossing of a stream and a road may not be characterized as located "near" such point.

[4] But it appears that the votes cast at Waverly precinct were 32 "for bonds," and 13 for "no bonds," and that the votes in the whole township were 453 "for bonds," and 82 for "no bonds." Hence the vote at Waverly could be thrown out without affecting the result. A mere irregularity not sufficient to affect the result will not vitiate an election. *Welsh v. Board*, 79 S. C. 246, 60 S. E. 699; *State v. Board*, 86 S. C. 461, 68 S. E. 676.

[5] Another objection made against the legality of the election is that no certificate of the election was filed with the Secretary of State and the Governor by the board of county canvassers. The statute authorizing the election provides that the managers "shall conduct, direct and declare the result of said election and make returns thereof in writing to the said county board of commissioners," and further authorizes the said county board to issue the bonds, "if a majority of the votes cast at said election shall be for the issuing of bonds." The board of county commis-

sioners had power to canvass the returns and declare the result. This was done. Out of abundance of caution the board of county canvassers also canvassed the returns, and made like declaration as to the result. There was no contest. Certificates of the findings of said boards were filed with the clerk of the court of common pleas and general sessions of Richland county, and a certificate of the county board of commissioners was tendered for filing with the Secretary of State, who declined to receive it on the ground that the law did not require the filing of the result of such an election with him. For this reason no certificate of the county board of canvassers was tendered for filing with the Secretary of State. But in this case it was not necessary to file the returns with the board of county canvassers. Nor was it necessary for that board to file a certificate with the Secretary of State and the Governor, as the act authorizing the special election provided a different method which contemplated that the returns should be made to the board of county commissioners, and that such board should have authority to declare the result.

[6] The issuance of the bonds is further opposed on the ground that there is no provision made for the levying of a tax with which to meet the interest and sinking fund requirements when the same shall become due on July 1, 1912. The statute provides: "Upon the issuance of said bonds, or any part of them, it shall be the duty of the officers charged with the assessment, levying and collection of taxes to levy and collect annually from all property real and personal, within the limits of said township, a sum sufficient to pay the interest on said bonds, and also one-twentieth of the principal to constitute a sinking fund with which to retire the said bonds at maturity," etc.

[7] We think this confers ample power for the assessment, levy, and collection of the necessary tax; but, if it did not, that would not constitute ground for enjoining the issuance of the bonds. *Welch v. Getzen*, 85 S. C. 163, 67 S. E. 294. It is alleged that it is the purpose of the board of county commissioners to permit street or railway cars to use the bridges acquired under the provisions of said act upon payment of a reasonable toll by the owners of said cars, and it is sought to restrain the Commissioners from so doing. Petitioners seek to have the court construe the provision in section 8 of said act, requiring that said bridges "shall be open forever for the passage of all persons, animals driven or ridden, and vehicles, not including street or railway cars, coming into or going out of Columbia township, free of toll or charge." We would not undertake to determine in this proceeding whether street or railway cars may be absolutely excluded from the use of said bridges, or may be used upon the same upon the payment of

reasonable toll. Such a question is premature. The county commissioners as yet have not acquired any control over said bridges, and there can be no injury threatened in the premises warranting injunction. Our opinion on the subject would not be authoritative, in the absence of a real issue between proper parties. The matter in no way affects the right to issue the bonds in question.

Injunction is denied, and the petition is dismissed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(89 S. C. 113)

ELLEDDGE et al. v. WHARTON et al.
(Supreme Court of South Carolina. June 14, 1911.)

1. COUNTIES (§ 62*)—APPOINTMENT—OFFICERS DE JURE.

Act Feb. 18, 1911 provided for the establishment and maintenance of a rural police system in G. county, and declared that, on the approval of the act, it should be the duty of the Governor, "on the recommendation of the legislative delegation of G. county, to appoint three able-bodied men of that county to serve as county policemen for four years." The act was approved on Saturday night, February 18, 1911, the last day of the session, and the Governor, on the same night, appointed petitioners as rural policemen on the recommendation of only one member of the delegation from G. county without the knowledge of the others that any appointment was to be made. The petitioners were commissioned, took the oath of office, and gave bond, incurred the expense of providing the required equipment, and in good faith discharged the duties of the office. *Held*, that petitioners were not officers de jure, but were officers de facto.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 87-90; Dec. Dig. § 62.*]

2. COUNTIES (§ 62*)—APPOINTMENT—COMMISSION—EFFECT.

Where rural policemen, appointed to serve in G. county under authority conferred by Act Feb. 18, 1911, in a proceeding to compel the county officers to pay accrued salary, produced their commissions, executed by the Governor, such commissions were prima facie evidence of appointment until declared invalid by a court of competent jurisdiction.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 87-90; Dec. Dig. § 62.*]

3. COUNTIES (§ 74*)—DE FACTO OFFICERS—SALARY.

Where petitioners were appointed rural policemen for G. county by the Governor under authority conferred by Act Feb. 18, 1911, but without recommendation of the legislative delegation from G. county as required, petitioners, having qualified and performed services under such appointment, being officers de facto, were entitled to recover salary, in the absence of any other appointment or persons entitled to and claiming the office.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 87-90; Dec. Dig. § 74.*]

Petition by L. C. Elledge and another for mandamus against J. B. Wharton, foreman of the grand jury, and certain other officers of Greenwood county to compel payment of salary of petitioners as rural policemen for

the two months ending May 7, 1911. Writ granted.

D. H. Magill, for petitioners. Giles & Ouzts, for respondents.

JONES, C. J. The petitioners, claiming to be rural policemen duly commissioned by the Governor and qualified under the rural police act of February 18, 1911, seek by mandamus to compel respondents to pay the salary, \$166.66, alleged to be due each for the two months ending May 7, 1911. By their return respondents deny that petitioners had been duly appointed and commissioned, in that they were appointed by the Governor without the recommendation of the legislative delegation of Greenwood county, as required by the act.

[1] It appears that the act was approved Saturday night, February 18, 1911, the last day of the legislative session, and that the Governor on the same night appointed petitioners as rural policemen upon the recommendation alone of Hon. D. H. Magill, one of the Greenwood delegation. It is stated by the affidavit of Senator C. A. C. Waller and Representatives W. H. Nicholson and J. W. Bowers, the other members of the Greenwood delegation, that the appointments were made without their recommendation before they had knowledge of the approval of the act or opportunity to recommend. Section 1 of the "Act to provide for the establishment and maintenance of a rural police system in Greenwood county," approved February 18, 1911, provides: "That upon the approval of the act it shall be the duty of the Governor upon the recommendation of the legislative delegation of Greenwood county to appoint three able bodied men of the county of Greenwood * * * and shall commission them as county policemen for a term of four years," etc. Appointment to office not being inherently an executive prerogative, it is competent for the Legislature in conferring the power of appointment to attach such limitations and conditions to its exercise as may be deemed proper. The statute expressly provides that the appointment of rural policemen for Greenwood county shall be upon the recommendation of the legislative delegation of Greenwood county. No such recommendation having been made, the appointment was made without authority, and the petitioners cannot be held to be officers de jure.

The petitioners, however, were commissioned by the Governor on the recommendation of a member of the Greenwood delegation, have taken the oath of office, have given bond for the faithful performance of duty, have incurred expense of \$350 each in providing the equipment required by the act, and have in good faith discharged the duties of rural police. Having acted in good faith under color of title to the office, they are officers de facto.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[3] The general rule is that an officer de facto cannot sustain an action to recover the fees or salary attached to the office, and this rule is usually enforced when there is another who has the right to the emoluments. 29 Cyc. 1393; Mechem on Public Officers, § 331. In *Dolan v. Mayor*, 68 N. Y. 274, 23 Am. Rep. 168, it is declared to be the settled law of New York "that the right to the salary and emoluments of a public officer attach to the true and not to the mere colorable title, and, in an action brought by a person claiming to be a public officer for the fees or compensation given by law, his title to the office is an issue, and if that is defective and another has the real right, although not in possession, the plaintiff cannot recover." "The principle is that the right follows the true title, and the courts will not aid the intruder by permitting him to recover the compensation which rightfully belongs to another." In the present case, however, there is no other person claiming or having a right to claim the salary in question. In *Kottman v. Ayer*, 3 Strob. 95, the court uses this language: "To entitle one to claim the emoluments of an office or the privileges conferred by it, he must show, if his right be questioned, that he is the officer de jure, as in the case of *Allen v. McNeel*, 1 Mill, Const. 459, where one claimed prize money as an officer it was held he ought to prove himself such. His having acted would not be sufficient where his being an officer is the very gist of his action." In the case of *Allen v. McNeel*, supra, the claimant produced no commission or other competent evidence of his appointment, and there was evidence that another person was really the officer and that the money had been paid to him.

[2] In the case at bar, the claimants produced the commissions of the Governor, which were prima facie evidence of appointment, and until now have not been declared invalid. In the case of *Eubank v. Montgomery County*, 127 Ky. 261, 105 S. W. 418, 32 Ky. Law Rep. 91, 128 Am. St. Rep. 340, the Supreme Court of Kentucky, not unanimously, however, denied the right of a de facto officer to the emoluments of the office without regard to whether there was another entitled to and claiming the office, but in *Behan v. Prison Commissioners*, 3 Ariz. 309, 31 Pac. 521, and *Adams v. Insane Asylum*, 4 Ariz. 327, 40 Pac. 185, the Supreme Court of Arizona held that a de facto officer was entitled to the emoluments of the office of which he was the incumbent when there was no de jure officer. In a case where no de jure officer was acting, the Supreme Court of New Jersey held that one who became a public officer de facto without dishonesty or fraud and who has performed the duties of the office may recover the compensation fixed by law for such services. *Erwin v. Jersey City*,

60 N. J. Law, 141, 37 Atl. 732, 64 Am. St. Rep. 584.

The petitioners are not usurpers of office by force or fraud, and have in good faith, with prima facie evidence of right, performed the duties of the office. We think it not only just, but consonant with sound law, to hold them entitled to the salary claimed. The statute provided for each policeman an annual salary of \$1,000 payable in monthly installments upon the order of the foreman of the grand jury and the warrant of the county commissioners on the treasurer of Greenwood county, and the services for which compensation is sought were for the two months ending May 7, 1911. The only matter of defense submitted to the court was the right of petitioners to the compensation claimed; all other issues originally raised by the return being waived.

The judgment of this court is that respondent J. B. Wharton, foreman of the grand jury, forthwith issue the necessary order, that respondents T. C. Burnett, supervisor, and G. B. Riley and George Dorn, constituting the board of county commissioners, draw their warrant on the county treasurer in favor of each petitioner for \$166.66, and that respondent F. Graham Payne, county treasurer, pay said warrants.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(126 Ga. 283)

WINN v. MILLER.

(Supreme Court of Georgia. June 14, 1911.)

(Syllabus by the Court.)

ARBITRATION AND AWARD (§ 68*)—EXCEPTIONS TO AWARD—"OATH."

The requirement of Civil Code 1910, § 5049, that exceptions to the award of arbitrators be made "on oath," is not met by an affidavit of the party filing such exceptions that they are true to the best of the knowledge and belief of affiant.

[Ed. Note.—For other cases, see *Arbitration and Award*, Dec. Dig. § 68.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4871-4874; vol. 8, p. 7735.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Submission to arbitration between Courtland S. Winn, administrator, and L. R. Miller. From an order dismissing objections to the award, plaintiff brings error. Affirmed.

Lewis W. Thomas, for plaintiff in error. Evins & Spence, for defendant in error.

HOLDEN, J. The plaintiff in error and the defendant in error (hereinafter called, respectively, plaintiff and defendant), by virtue of an agreement in writing signed by them, submitted to arbitrators the decision of certain matters in controversy between them, and provided that the award of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

arbitrators might be made the judgment of the superior court of Fulton county, in which county both parties resided. Each of the parties selected an arbitrator, and the two arbitrators selected the third arbitrator. An award in writing was made, finding that the plaintiff owed the defendant certain amounts, aggregating a total of \$2,714.40. This award was returned to the clerk of the superior court, and the plaintiff filed certain objections thereto. The court dismissed the objections on the motion of the defendant's counsel, and also refused to allow an amendment offered by the plaintiff to the objections, and the plaintiff excepted.

Counsel for the defendant contend in their brief that neither the exceptions, nor the amendment offered, were properly verified, and that this fact justified the court in dismissing the former, and in refusing to allow the latter. The record does not disclose upon what grounds the motion of the defendant to dismiss the exceptions was predicated, nor upon what ground the court dismissed the exceptions and refused to allow the amendment thereto; and if the failure properly to verify the exceptions and the amendment justified the court in making the rulings complained of, his judgment should be sustained. The affidavit to the exceptions filed was made by Courtland S. Winn, and, after stating that he was administrator of the estate involved and was a party to the arbitration, contained only the following averment: "That the above and foregoing suggestions and exceptions filed by deponent at the return term at which said award was made, to the best of deponent's knowledge and belief, are true." The body of the affidavit to the amendment is as follows: "Personally appeared before me, Courtland S. Winn, who on oath says that the facts stated in the foregoing amended petition are true to the best of his knowledge and belief."

Civil Code 1910, § 5049, omitting a provision in the latter part as to the time of trial, is as follows: "When said award shall have been returned to said court and entered upon its minutes, as provided in the previous section of this Code, either of the parties may suggest, on oath, at the term to which said award is returned, that the award was the result of accident, or mistake, or the fraud of some one or all of the arbitrators or parties, or is otherwise illegal. Whereupon the court shall cause an issue to be made up, which issue shall be tried by a special jury under the same rules and regulations as are prescribed for the trial of appeals." This section of the Code does not permit of objections being made to an award unless they are filed "on oath." An affidavit wherein the party filing exceptions swears that they are true to the best of his knowledge and belief does not meet the requirement of this section that the ex-

ceptions be "on oath" of the party filing them.

Civil Code 1910, § 5305, provides that when an execution shall issue or be proceeding illegally against the property of any person and be levied thereon, "such person may make oath in writing, and shall state the cause of such illegality." We can see no reason for permitting an oath under a requirement that exceptions to an award of arbitrators be "on oath" to be different from an oath under the requirements of the section above referred to, providing that the person filing an illegality to an exception "may make oath in writing"; and in the case of *Sprinz v. Vannuck*, 80 Ga. 774, 6 S. E. 816, it was ruled: "The grounds of an affidavit of illegality must be verified positively. An oath qualified by the words 'to the best of his knowledge and belief' is not sufficient, though the oath be made by an executor to an affidavit of illegality filed to an execution against his testator." See *Stancel v. Puryear*, 58 Ga. 445; *Sharp v. Kennedy*, 50 Ga. 208; *Bryan v. Ponder*, 23 Ga. 480; *Thompson v. Davitte*, 59 Ga. 473 (14); 1 Enc. Pl. & Pr. 321, 322; 2 Cyc. 24, 25. In the case of *Martin v. Lamb*, 77 Ga. 252, 3 S. E. 10, it was decided that "a plea of non est factum, or of nonpartnership, sworn to by the defendant 'to the best of his knowledge and belief,' does not cast the onus upon the plaintiff, but only entitles the defendant to go to the jury and establish his defense"; and on page 256 of 77 Ga., page 11 of 3 S. E., *Bleckley, C. J.*, said: "Before the Constitution of 1868, a plea of non est factum had to be sworn to—not to the best of one's knowledge and belief, but sworn to. An affidavit 'to the best of his knowledge and belief' commits the affiant to almost nothing." It has been held that, when the plaintiff in attachment makes an affidavit for an attachment to issue thereon, the grounds of the attachment must be sworn to positively, and it is not sufficient for affiant to state that he swears to such grounds to the "best of his knowledge and belief." See *Bruce v. Conyers*, 54 Ga. 678.

Civil Code 1910, § 5085, provides that "the party seeking the attachment, his agent or attorney at law, shall make affidavit" among other things, as to "the amount of the debt claimed to be due." It further provides: "When the affidavit is made by the agent or attorney at law, he may swear that the amount claimed to be due is due according to the best of his knowledge and belief." This section seems to recognize a difference between an oath positively stating something to be true and one stating it to be true "to the best of the knowledge and belief" of affiant. In the exceptions filed it is complained that the award is the result of a mistake on the part of the arbitrators and is otherwise illegal. Many of the exceptions relate to the alleged illegal admission of evidence over objections, and a copy of the

entire evidence introduced upon the hearing before the arbitrators is attached to the exceptions and amendment thereto as a part thereof. Whether the legal inferences of the party filing the exceptions should be verified, the alleged existence of facts upon which such inferences are based should be verified positively, and not simply to the best of the knowledge and belief of the party filing the exceptions. The requirement of the law that exceptions to the award of arbitrators be "on oath" is not met by an affidavit that the exceptions are true to the best of the knowledge and belief of the party filing the exceptions, and we cannot say that the court committed error in dismissing the exceptions and refusing to allow the amendment offered thereto.

Judgment affirmed. All the Justices concur.

(186 Ga. 372)

NATIONAL BANK OF WEBB CITY, MO.,
v. J. H. EVERETT & SON.

(Supreme Court of Georgia. June 13, 1911.)

(Syllabus by the Court.)

CARRIERS (§ 58*)—TRANSFER OF BILL OF LADING—RIGHTS OF TRANSFERREE.

Where a customer of a milling company orders flour, which is consigned by the milling company to itself, with a memorandum on the bill of lading to notify the customer, and contemporaneously the milling company draws a draft for the price of the flour on the customer, payable to a bank, to which is attached the bill of lading indorsed in blank, and deposits with the bank the draft with bill of lading attached, and the amount of the deposit is credited to the depositor's general account and drawn against by him, the bank becomes the purchaser and owner of the draft and bill of lading; and the title of the bank to the flour is superior to a subsequent lien against the milling company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. H. Everett & Son against the Boyd & Gunning Milling Company. On levy of attachment, the National Bank of Webb City, Mo., filed a statutory claim. Verdict against claimant. From an order denying a new trial, it brings error. Reversed.

Brown & Randolph and Hugh M. Scott, for plaintiff in error. C. D. Maddox, for defendant in error.

EVANS, P. J. J. H. Everett & Son sued out an attachment against the Boyd & Gunning Milling Company, and caused the same to be levied on a certain lot of flour contained in a railway car. The National Bank of Webb City, Mo., filed its statutory claim. The verdict of the jury was adverse to the claimant, and its motion for a new trial was overruled.

The flour upon which the attachment was levied was consigned by the milling com-

pany to itself, with direction in the bill of lading to notify the plaintiffs. The bill of lading was indorsed by the milling company and attached to a draft, drawn by the milling company for the purchase price of the flour, on the plaintiffs in favor of the claimant. The draft with bill of lading attached was deposited by the milling company with the bank, and the amount thereof placed to its credit. The draft with bill of lading attached was duly presented to the plaintiffs, who refused to pay it. At the time of the deposit of the draft the milling company had overdrawn its account with the bank. The milling company deposited other items that day, and drew several checks against the same. The milling company has not reimbursed the bank for the dishonored draft. The bank has not charged or received interest on the amount represented by the dishonored draft.

The foregoing is a fair résumé of all the testimony bearing on the bank's acquisition of the bill of lading. We do not think this testimony sufficient to justify the contention of the plaintiffs that the bank had no title to the flour, but was simply acting as the agent of the milling company in the collection of the draft drawn by it on the plaintiffs. Prima facie the passing to the credit of a depositor of a check drawn in favor of the bank, not indicating that it was deposited merely for collection, passes the title to the bank. 2 Morse on Banking, § 569 et seq. This general rule will yield to the intention of the parties as reflected in the transaction. If a regular customer of a bank deposits with the bank his draft, payable to his own order or to the bank, and the same is entered to his credit on the books of the bank, and the drawer by course of dealing has the right to draw against such deposit, and in fact did draw against it, and his checks are honored, the title to the draft passes to the bank. Fourth Natl. Bank v. Mayer, 89 Ga. 108, 14 S. E. 891. The bank may indicate its intention not to receive the draft as money, by receiving the draft deposited, not as cash, but as a check for collection. Baillie v. Augusta Savings Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74.

In the instant case the evidence discloses that at the time of the deposit the drawer had overdrawn his account, and the deposit was entered as cash to his credit; that the drawer was not only accustomed to draw against deposits of this character, but actually did draw. These circumstances evince the parties' intention to treat the draft as a deposit of money, and therefore the title to the draft and the bill of lading attached is in the bank. The effect of the indorsement of the bill of lading and its delivery to the bank was a pledge of the flour to the bank. Delivery of the property is ordinarily es-

essential to the validity of this species of bailment, but bills of lading or other commercial paper symbolic of property may be delivered in pledge and constitute constructive delivery of the physical property. Civil Code 1910, § 3528; *Farmers' Bank v. Allen-Holmes Co.*, 122 Ga. 67, 49 S. E. 816; *Central Georgia Land & Lumber Co. v. Exchange Bank*, 101 Ga. 353, 28 S. E. 863. It follows that the title to the flour under the undisputed facts was in the bank. *American Nat. Bank v. Lee*, 124 Ga. 863, 53 S. E. 268; *Farmers' Bank v. Allen-Holmes Co.*, supra; *Tilden v. Minor*, 45 Vt. 196; *German Nat. Bank v. Grimstead (Ky.)* 52 S. W. 951. Judgment reversed. All the Justices concur.

(136 Ga. 501)

DARSEY v. STATE.

(Supreme Court of Georgia. May 10, 1911.
Rehearing Denied June 23, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1182*)—APPEAL—EQUALLY DIVIDED COURT.

This case came on before the Supreme Court upon a writ of error. The same being for decision by a full bench of six justices, who are evenly divided in opinion (Justices Lumpkin, Beck, and Atkinson being in favor of a reversal, and Chief Justice Fish, Presiding Justice Evans, and Justice Holden being in favor of an affirmation), the judgment of the court below stands affirmed by operation of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3206; Dec. Dig. § 1182.*]

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Joe Darsey was convicted of involuntary manslaughter, and he brings error. Affirmed.

The bill of exceptions recited as follows:

"Thereupon [i. e., after the close of the evidence] his honor, J. H. Martin, judge presiding, delivered his charge to said jury, and concluded said charge by instructing the jury: That if they found said defendant guilty of murder, and did not wish to recommend him to life imprisonment, their verdict should be: 'We, the jury, find the defendant guilty.' That if they found said defendant guilty of murder, and wished to recommend him to life imprisonment, the form of their verdict should be: 'We, the jury, find the defendant guilty, and recommend him to the mercy of the court.' That if they found said defendant guilty of voluntary manslaughter, the form of their verdict should be: 'We, the jury, find the defendant guilty of voluntary manslaughter.' That if they found said defendant not guilty, the form of their verdict should be: 'We, the jury, find the defendant not guilty.' Thereupon the jury retired to their room, and, after deliberating upon said case for some time, they returned into court and announced to said judge that they had agreed

upon a verdict, and said judge directed the clerk of said court to receive the bill of indictment and read the verdict. The clerk received the bill of indictment from the jury and read the verdict written upon said bill of indictment, which was as follows, to wit: 'We, the jury, find the defendant guilty of involuntary manslaughter.' February 3, 1911. J. H. Holcomb, Foreman.' Whereupon said judge of said court returned the bill of indictment to said jury, who still remained impaneled and in the jury box, where they were seated when the bill of indictment was handed the clerk, having never separated or left the jury box, with the following statement, to wit: 'I cannot receive that verdict'—which was made as soon as verdict was read. Thereupon defendant's counsel in open court made the following oral objections, to wit: 'We interpose an objection on the ground that the verdict had been rendered by the jury, received by the clerk and published in open court, after the court had asked the jury if they had agreed on a verdict and the foreman stating that they had. We object to the jury further considering the case, and to the court refusing the verdict tendered, on the grounds mentioned.'

"Thereupon the judge instructed the jury as follows, to wit: Gentlemen, I shall return that [referring to the indictment] to you, and you go back and enter upon your deliberations again. I cannot receive that verdict. No such charge was given you by the court in regard to a verdict. The court did not charge you anywhere involuntary manslaughter as a form of verdict. The court charged you the different forms of verdict that you could find in this case; that if you find it for murder, that you say, 'We, the jury, find the defendant guilty,' and that would mean the death penalty, or if you find the defendant guilty of murder and recommend him to mercy, that would mean that he be punished by imprisonment in the penitentiary for life. I further charged you that, if you found him guilty of voluntary manslaughter, the form of your verdict would be, 'We, the jury, find the defendant guilty of voluntary manslaughter.' If you find the defendant not guilty, then the form of your verdict would be, 'We, the jury, find the defendant not guilty.' I nowhere charged you anything about involuntary manslaughter. You may retire and find a verdict. The court further instructed the jury to strike from the indictment the verdict for involuntary manslaughter written thereon, stating that it was not in proper and legal form. The said jury returned to their room and further deliberated upon said case, and so continued to deliberate until the following morning, at which time said judge called said jury into court and inquired whether or not they had agreed or were likely to agree upon a verdict, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

said jury informed the court that they had not agreed and could not agree upon a verdict in said case.

"Thereupon counsel for the defendant, anticipating that the court was going to declare a mistrial, submitted the following oral objection, to wit: 'I suppose your honor is going to declare a mistrial. I make the point that the jury has already found the defendant guilty of involuntary manslaughter, and the verdict of the jury has been published, and afterwards the court instructed the jury to go to the jury room and make a verdict. We now come in behalf of the prisoner at the bar and object to the court declaring a mistrial and withdrawing the case from the jury, on the ground that the jury in this case has already found a legal verdict, to wit: "We, the jury, find the defendant guilty of involuntary manslaughter." The defendant contends that this is a legal verdict, and has been so construed by the Supreme Court of Georgia, and it means the highest grade of involuntary manslaughter. The defendant also contends that there is evidence submitted by the state that the prisoner, just immediately after the shooting, said to two or three of state's witnesses that he killed him in fun, meaning that there was no intention to kill, and where there is any doubt about the intention to kill the judge should always give in charge to the jury the law on involuntary manslaughter. For these reasons the defendant contends that the verdict of the jury was correct in law, and the evidence authorized it, and it was error for the court to send the jury back to their room, and the defendant now objects to the court declaring a mistrial, and insists that a verdict has already been found and published against him, which was legal. That is all the point I want to make.' Whereupon said judge of said court declared a mistrial."

When the case was again called for trial, the accused filed a plea of former conviction and former jeopardy. The issue was submitted to the presiding judge on an agreed statement of facts. He decided the issue in favor of the state. The defendant excepted.

Jno. R. Cooper and Howard & Hightower, for plaintiff in error. E. D. Graham, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

PER CURIAM. Justices LUMPKIN, BECK, and ATKINSON are of the following opinion on this point:

In this state it is the duty of the judge to charge the law in a criminal case, and the duty of the jury to accept the law given them in charge as correct. Nevertheless, the jury have it in their power to find a verdict of not guilty, and the judge cannot properly refuse to receive it because it may not accord with his charge or the evidence.

Under an indictment for murder, a finding of guilty of a lesser grade of homicide is an implied acquittal of murder. Whether or not the jury ought to have found this, under the evidence and the law applicable thereto, the judge can no more refuse to allow a partial acquittal than he can refuse to allow a total acquittal. This is entirely different from a case where the verdict is informal, or does not express the finding of the jury clearly, or is for an offense not covered by the indictment. The judge having, over objection of defendant's counsel, refused to receive a verdict of guilty of involuntary manslaughter, because the law of that grade of homicide was not given to the jury in his charge, having required them to return to their room to further deliberate and find a verdict, and, after they could not agree on another verdict, having, over objection, declared a mistrial, when the case was again called for trial a plea of former jeopardy was a good plea in bar. A verdict of guilty of involuntary manslaughter was a verdict of the higher grade of involuntary manslaughter. *Thomas v. State*, 121 Ga. 331, 49 S. E. 273.

Chief Justice FISH, Presiding Justice EVANS, and Justice HOLDEN are of the opinion that the facts relied on to support the plea of former jeopardy are insufficient as a bar to the further prosecution of the case. They are of the opinion that on a trial for murder, where neither the evidence nor the charge of the court authorize a verdict of involuntary manslaughter, the judge may refuse to accept a finding of the jury that the defendant is guilty of that grade of homicide, and if the jury subsequently are unable to agree upon a verdict of guilty of another grade of homicide authorized by the law and the evidence, or of not guilty, a mistrial may be legally declared.

(126 Ga. 297.)

LAWSON v. STATE

(Supreme Court of Georgia. June 14, 1911.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

None of the grounds of the motion for a new trial show the commission of any material error by the court below in the trial of this case, and the verdict is supported by the evidence.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Robert Lawson was convicted of crime, and brings error. Affirmed.

Henry S. Jones, for plaintiff in error. J. S. Reynolds, Sol. Gen., Jno. M. Graham, and H. A. Hall, Atty. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur.

(136 Ga. 375)

SAFFOLD et al. v. EVANS et al.

(Supreme Court of Georgia. June 13, 1911.)

*(Syllabus by the Court.)***SETTING ASIDE JUDGMENT.**

Under the facts of this case, the presiding judge did not err in refusing to set aside the judgment which was attacked.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between F. H. Saffold and others and W. J. Evans and others. From an order refusing to set aside the judgment, Saffold and others bring error. Affirmed.

P. W. Meldrim, for plaintiffs in error. Travis & Travis and Geo. W. Owens, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 394)

ENGLISH v. HOGAN.

(Supreme Court of Georgia. June 14, 1911.)

*(Syllabus by the Court.)***NEW TRIAL (§ 70*)—GROUNDS.**

The only grounds contained in the motion for a new trial being that the verdict was contrary to law and evidence, and not supported by the evidence, and there being sufficient evidence to support the verdict, there was no error in overruling the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. 70.*]

Error from Superior Court, Warren County; D. W. Meadow, Judge.

Action between J. M. English and W. H. Hogan. From an order refusing to grant a new trial, English brings error. Affirmed.

M. L. Felts, for plaintiff in error. L. D. McGregor, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 387)

DAVIS MERCANTILE CO. v. WALKER.

(Supreme Court of Georgia. June 14, 1911.)

*(Syllabus by the Court.)***1. MASTER AND SERVANT (§ 44*)—ACTION FOR WAGES—WRONGFUL DISCHARGE.**

Where the plaintiff brought an action against his employer, alleging that the contract of employment was for a year, and that the defendant had wrongfully discharged the plaintiff, the action being brought after the expiration of the year and for the recovery of wages for the balance of the term after the alleged discharge, and where the defense was that the plaintiff had never been discharged, but had left the employment of the defendant of his own accord, it was error requiring the grant of a new trial for the court to instruct the jury as follows: (1) That if the plaintiff quit with the understanding with the defendant that plaintiff "was to quit unless he did a certain thing, unless he stopped drinking, and refused to do it, it would be equivalent to a discharge from his employment; if the de-

mand was for him to stop drinking or comply with his contract, or quit, this would amount to a discharge on the part of the" defendant; and (2) "if he [plaintiff] abandoned his employment because his salary was cut without his consent, it would be a discharge from the employment of the" defendant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 44.*]

2. MASTER AND SERVANT (§ 30*)—WRONGFUL DISCHARGE—INSTRUCTIONS.

There was no error in charging the jury that if the defendant discharged the plaintiff because he would not consent to have his salary cut, and this was the only reason for his discharge, the plaintiff would be entitled to recover.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 30.*]

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by Ike Walker against the Davis Mercantile Company. Judgment for plaintiff, and defendant brings error. Reversed.

Percy Middlebrooks and Samuel H. Sibley, for plaintiff in error. F. C. Foster, Sr., for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(136 Ga. 374)

SOUTHERN RY. CO. v. LEDINGHAM.

(Supreme Court of Georgia. June 13, 1911.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 977*)—REVIEW—GRANT OF NEW TRIAL.**

However great the preponderance of evidence in favor of the party who was successful upon the trial of the case in the lower court, the first grant of a new trial will not be disturbed, unless it appears, upon an examination of all the evidence, that the verdict as rendered was demanded; and as it cannot be adjudged in the case at bar that the evidence required a finding in favor of the defendant, although the evidence is ample to support the finding in its favor, this being the first grant of a new trial, the judgment of the court below granting the new trial upon special grounds will be affirmed, without an examination of such grounds for the purpose of determining their sufficiency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by A. W. Ledingham, Jr., by his next friend, against the Southern Railway Company. Verdict for defendant. From an order granting a new trial, it brings error. Affirmed.

This case was brought here by writ of error sued out to review the judgment of the court below, granting a first new trial. The brief of evidence, as appeared from the record, had been approved and filed in the court below, but was not brought up as a part of the record. It was transmitted by the clerk of the court below upon order issued by this court.

McDaniel, Alston & Black, for plaintiff in error. A. H. Davis, C. D. Hill, and Harvey Hill, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(136 Ga. 370)

WATSON v. CITY OF ATLANTA.

(Supreme Court of Georgia. June 13, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 706*)—LIABILITIES—INJURIES BY PUBLIC AMBULANCE.

A petition is demurrable where it is alleged that the plaintiff was injured in consequence of being struck by an ambulance which was negligently driven against him while he was in the exercise of due care, it appearing from the remainder of the petition that the ambulance belonged to and was being operated for a public hospital of a municipal corporation, which was under the control of the municipality through its board of officers, although it is averred that in the maintenance of the hospital the municipality "charged fees for patients entering therein"; this last averment not being tantamount to an allegation that the municipality maintained and operated the hospital for pecuniary gain and private profit.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. E. Watson against the City of Atlanta. Judgment for defendant, and plaintiff brings error. Affirmed.

R. B. Blackburn, for plaintiff in error. J. L. Mason and W. D. Ellis, Jr., for defendant in error.

BECK, J. This was a suit against the city of Atlanta to recover damages for personal injuries alleged to have been sustained by the plaintiff in consequence of being run upon and knocked down by a Grady Hospital ambulance in charge of and under the control of agents and employees of the city, and it is alleged that plaintiff's injuries were caused by the negligence of the defendant, through its agents and employees in the manner in which the horses pulling the ambulance were driven, to wit, at an unlawful rate of speed. It is also alleged that "said Grady Hospital was under the control of the city of Atlanta, through its board of officers, and that in the maintenance of said Grady Hospital the city of Atlanta charged fees to patients entering therein." The defendant filed a general demurrer to the petition, which was sustained by the court below, and the plaintiff excepted.

Section 33 of the charter of the city of Atlanta provides: "The said mayor and general council shall have power and authority to pass all by-laws and ordinances respecting public buildings and grounds, workhouses, public houses, carriages, wagons, carts, drays, pumps, wells, springs, fire engines,

care of the poor, suppression of disorderly houses, houses of ill fame, for the prevention and punishment of disorderly conduct and conduct liable to disturb the peace and tranquility of any citizen or citizens thereof, and every other by-law, regulation, and ordinance that may seem to them proper for the security of the peace, health, order and good government of said city." We think that under the provisions of this section of the charter the city of Atlanta is authorized to establish and maintain a public hospital. The maintenance of such an institution may well be regarded as in a measure incidental and necessary to the security and preservation of the health and well-being of the citizens, who in the hour of need require the attention of such skilled nurses and physicians as may be selected and employed by the officials who are elected or appointed by the municipal authorities to conduct the hospital and render the services requisite and proper for such an institution. In the case of *Love v. City of Atlanta*, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64, it was said: "In the discharge of such duties as pertain to the health department of the state, the state is acting strictly in the discharge of one of the functions of the government. If the state delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it within its limits the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare, not only of the citizens resident within its corporation, but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the state, and in the exercise of such powers is entitled to the same immunity against suit as the state itself enjoys. Such a duty will stand upon the same footing as its duty to preserve the public peace, and its liability or nonliability would depend upon the same principle which relieves the city from liability for the misfeasance of a police officer in the discharge of his duty. * * * It can make no difference in principle as to the character of the agents employed in the discharge of this duty with respect to the public health. The principle of nonliability rests upon the broad ground that in the discharge of its purely governmental functions a corporate body to which has been delegated a portion of the sovereign power is not liable for torts committed in the discharge of such duties and in the execution of such powers. It can be no more liable because of the failure to select competent drivers of garbage carts than a city could be held liable for failing to

elect a wise, conservative, and discreet mayor."

We are of the opinion that under the decision in the case just referred to, and the reasoning upon which the conclusion reached in that case is based, the operation of the ambulance is an incident to the maintenance and operation of the hospital itself, and is consequently to be classed with those acts in the performance of which the municipal corporation is exercising a governmental function. It is true that it is alleged in this petition that "in the maintenance of said Grady Hospital the city of Atlanta charged fees for patients entering therein"; but we cannot construe this allegation to be an affirmative allegation that the city requires of all its patients payment for expense of board and treatment at the Grady Hospital, as would be the case of a private hospital maintained and operated for profit and the pecuniary advantage of those who own and operate it. Had the distinct allegation been that the hospital was established and operated for private gain and profit by the city, quite another case would have been made from that presented in this petition. If the pleader had wished to charge that the city of Atlanta maintained and operated the Grady Hospital for private gain and profit, and that to this end it charged fees of all of its patients, it would have been very easy to have made that distinct averment. For the Grady Hospital to charge fees from some of its patients is not at all inconsistent with its character as a public institution and one operated by the municipal corporation in the performance of its governmental duties. Under the authority of the case of *Love v. City of Atlanta*, supra, the court below ruled rightly in sustaining the demurrer and dismissing the case. See, in this connection, 2 *Dillon on Municipal Corporations*, § 977, and cases cited, especially that of *Maxmillian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468, and *Elliott on Mun. Corp.* 327.

Judgment affirmed. All the Justices concurred.

(136 Ga. 232)

CROW v. SOUTHERN RY. CO.

(Supreme Court of Georgia. June 18, 1911.)

(Syllabus by the Court.)

RAILROADS (§ 350*)—BLOCKING HIGHWAY—NEGLIGENCE—RIGHT OF ACTION.

Under the evidence it was for the jury to determine whether it was negligence to obstruct the highway, and whether the death of the plaintiff's daughter resulted from becoming wet and chilled while standing in the rain waiting for the crossing to be cleared, and was proximately caused by the blocking of the highway. It was error to direct a verdict for the defendant.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 350.*]

Fish, C. J., and Beck, J., dissenting.

Error from Superior Court, Floyd County; G. W. Maddox, Judge.

Action by Cornelia Crow against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Judgment reversed.

M. B. Eubanks and W. B. Mebane, for plaintiff in error. Geo. A. H. Harris & Sons and Maddox, McCamy & Shumate, for defendant in error.

EVANS, P. J. Mrs. Cornelia Crow brought suit against the Southern Railway Company to recover damages because of the death of her minor daughter, alleged to have resulted from exposure to inclement weather while waiting for the clearing of a freight train which blocked the highway between the daughter's place of work and her home. On the trial evidence was submitted by the plaintiff and defendant, at the conclusion of which the court directed a verdict. The exception is to the direction of a verdict.

The material part of the evidence submitted by the plaintiff was as follows: The plaintiff's daughter, a strong and healthy girl of the age of 18, was employed in a factory located in a town of 5,000 inhabitants, and earned \$1 per day, most of which she contributed to her mother's support. The factory employed about 2,000 operatives, and suspended work at the usual time (about 15 minutes past 6 o'clock) on the evening of November 22, 1907. It was a cold, rainy night. When the plaintiff's daughter came out of the mill, "it was raining as hard as it could." She, with many others of the mill operatives, came through the mill gate and proceeded along the highway on her way home until she reached the spur track of the railway company which entered the mill yard, and which was 30 yards distant from the mill gate. The highway was obstructed at this place by a freight train with 30 cars, half of the train projecting on either side of the highway. Inside of the factory inclosure and near the gate, about 40 yards from the railroad crossing, there is a waiting shed. There is also a hotel near the crossing, about the same distance as the waiting shed. She waited in the rain for about 30 or 40 minutes for the crossing to be cleared, when she proceeded home. One witness testified that it would have been difficult, and not a safe way, for ladies to have gone around the train; and another witness testified that she could not go around the cars. After the employees leave, the gates of the factory yard are shut and locked, and no one except the night watchman is permitted to enter the yard. When the plaintiff's daughter came out of the mill, and discovered that it was raining and that the crossing was blocked, she could have returned to the yard and have taken shelter under the shed before the gate was shut. There was a means of exit from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes.

the rear of the mill; but a person must needs go under a railroad trestle, and it would have been 300 yards further to the plaintiff's home. The effect of becoming wet and chilled from standing in the rain was to suppress the menses of the plaintiff's daughter and to produce vicarious menstruation, which caused her death in June of the next year. A physician testified that one is more likely to catch cold and contract disease standing still in the rain and becoming thoroughly wet than when walking in the rain.

The defendant submitted testimony that the plaintiff's daughter died of tuberculosis; that she lived with her brother and sister-in-law, who died of tuberculosis; that this disease is a germ disease, and is communicable; that the freight train had several heavy laden cars and was switched into the siding to its extreme length; and as the engineer attempted to move the train forward a coupling on the third car from the engine broke. Several unsuccessful attempts were made to connect the coupling, and then the car with the broken coupling was cut loose from the others, and signalmen sent out on the main line to flag approaching passenger trains, which were then due from opposite directions. After arranging for the signals for the passenger trains, the car with the broken coupling was drilled out and left on a spur track, and the engine was brought back and connected with the remaining cars and the crossing was cleared. This work consumed about 30 or 40 minutes, and could not have been accomplished in less time. The conductor testified that it was his duty to carry with his train chains with which to fix couplings. He had a chain with him, but it was left on a disabled car at the last stopping place. If the servants in charge of the train had had a chain, the train could have been pulled off the crossing. The engineer and conductor did not inform any one in the waiting crowd at the crossing while it was obstructed by the train that the train was broken down and could not get away. They knew that the factory usually suspended work about 6:15 o'clock in the afternoon, and that it employed a large number of operatives, many of whom lived in houses located beyond the crossing. The master mechanic of the factory testified that the night watchman has until 10 minutes to 7 to permit employes to leave the mill, at which time he closes the gates. There could not have been much difference in the distance to the home of the plaintiff's daughter by leaving the front or rear exit. There was nothing to prevent the plaintiff's daughter, upon discovering that the crossing was blocked, to have returned to the mill yard and leaving through the back gate.

The plaintiff's case is based upon the propositions that the railway company was negligent in blocking the crossing, and that this negligent act proximately induced her daughter's fatal illness. We think both of these

propositions were supported by proof sufficient to require the submission of the issues to a jury. It was inferable from the evidence that the crossing was blocked for a much longer time than would have been necessary, had the servants of the railway company been provided with chains to use in substitution of a broken drawhead. The conductor testified that it was his duty to carry chains in anticipation of accidents to car couplings, and that, if the train had been supplied with a chain, the train could have been pulled off the crossing by its use. It is true that when the train started on its journey it was furnished with one chain; but this had been left on a disabled car, which was sidetracked at the last stopping place. It was for the jury to say under these circumstances whether the crossing was negligently blocked an unreasonable time.

The other proposition contains two elements: (1) Whether it is possible from the evidence to distinguish between the act of the defendant and the deceased as the cause of the injury; and (2) whether the proximate cause of the injury was the decedent's own negligence in voluntarily standing in the rain, when she could have gone home by a different route, or could have gained shelter in the hotel or shed which were near by. In considering this matter, we must take the evidence in its most favorable aspect to the plaintiff, as a verdict was directed for the defendant, and she was deprived by this action of having the jury pass upon any conflict in the evidence. We may concede that if between the cause of an injury from obstructing a highway the negligence of the injured person intervenes, so that the injury is the direct consequence of his negligence as well as the negligent obstruction of the highway, and it is not possible to determine what portion of the injury is caused by either, or that any substantial injury would have been received except for the negligence of the person injured, no action can be maintained for the injury. 5 Thomp. Neg. § 6237. But one who negligently causes an injury will not be heard to say that part of the mischief would not have arisen if the injured party had not been guilty of some negligence. If one negligently injures a person afflicted with a disease, which injury aggravates or accelerates the course of the malady, he is still responsible for his tortious act. The injured person's affliction is to be considered in the estimate of damages, but does not excuse the tort-feasor's act. The plaintiff's evidence tended to show that the fatal illness of the decedent was caused from her standing in the rain upon a cold night. A physician testified that one is more likely to catch cold and contract disease standing still in the rain and becoming thoroughly wet than when walking in the rain. It was for the jury to say whether the decedent's voluntarily leaving the mill in the rain would have produced her illness, if she had been permitted to walk

home, instead of being detained in the rain for half an hour at the crossing.

Likewise the jury should have been allowed to pass upon the alleged contributory negligence of the decedent. It is inferable from the evidence that a mill shelter and hotel were near by and accessible to the decedent, and that she could have repaired to either of these places while waiting the clearance of the crossing. The evidence also discloses that, while the train was blocking the crossing, the agents in charge of it, though seeing that a number of persons were delayed because of an obstructed highway, did not inform the waiting crowd of the cause of the delay, or when the train was likely to move. It did appear that the broken coupling was on the third car, which was 12 car lengths away from the crossing. The jury might have been of the opinion from the facts (and the inference would not have been unwarranted) that the decedent momentarily expected the crossing to be cleared, and that she was not negligent in remaining on that assumption, rather than going to a shelter, or taking a more circuitous and less convenient route to her home.

Judgment reversed. All the Justices concur, except

FISH, C. J., and BECK, J. (dissenting). In our opinion the evidence was wholly insufficient to show that the defendant's negligence was the proximate cause of the death of the plaintiff's daughter, and therefore the court properly directed a verdict for the defendant.

(136 Ga. 388)

EASTMAN COTTON MILLS v. SUGGS.

(Supreme Court of Georgia. June 14, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 291*)—INJURY TO SERVANT—INSTRUCTIONS.

Where, upon the trial of an action brought by an employé against his employer for damages alleged to have been caused by the defendant's negligence, in that another employé of the defendant, without warning to the plaintiff, started a machine to running at which plaintiff was at work, while plaintiff's hand was in a position to be injured by the running of the machine, the defendant expressly admitted that the employé who started the machine was the vice principal of the defendant, and that his act was the act of the defendant, the court did not err in omitting to instruct the jury as to the doctrine of fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1137; Dec. Dig. § 291.*]

2. MASTER AND SERVANT (§ 291*)—INJURY TO SERVANT—INSTRUCTIONS.

The evidence did not authorize an instruction that "where there were two ways to do a thing, and the injured party selected that way which was the most dangerous, there could be no recovery," and there was no error in omitting to so instruct the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1136-1144; Dec. Dig. § 291.*]

3. PLEADING (§ 376*)—MATTERS TO BE PROVED—ADMISSIONS BY PLEADINGS.

It was not error to charge "that those things which are admitted to be true in the defendant's answer need not be proven."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227; Dec. Dig. § 376.*]

4. NEW TRIAL (§ 128*)—GROUNDS—SUFFICIENCY OF ASSIGNMENT.

The ground of a motion for new trial, "that the charge taken as a whole does not cover the issues of the case, as made by the evidence, and the law applicable thereto," was not a sufficient assignment of error, in that it failed to specify what issue or issues were not covered by the charge.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. § 128.*]

5. SUFFICIENCY OF EVIDENCE.

There was evidence to support the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Action by Daniel Suggs, by his next friend, against the Eastman Cotton Mills. Judgment for plaintiff, and defendant brings error. Affirmed.

D. M. Roberts & Son and W. M. Clements, for plaintiff in error. C. W. Griffin and J. A. Neese, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(136 Ga. 356)

ROUSE v. STATE.

(Supreme Court of Georgia. June 18, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§ 295*)—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER—JUSTIFICATION.

The charges referred to in the first division of the opinion were not subject to the criticisms made thereof.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 295.*]

2. HOMICIDE (§ 302*)—INSTRUCTIONS.

The provisions of the Penal Code relating to the right of one to kill another to prevent the latter from forcibly attacking or invading the property or habitation of the former, or entering such habitation under certain circumstances, were not applicable, under the evidence in this case.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 302.*]

3. CRIMINAL LAW (§ 814*)—ACCOMPLICE—CORROBORATION.

Neither the evidence nor the defendant's statement authorized the court to charge the provisions of Pen. Code 1910, § 1017, relating to the necessity of corroboration in felony cases where the only witness to establish a fact is an accomplice, and the court did not err in failing to give this section in charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1860; Dec. Dig. § 814.*]

4. CRIMINAL LAW (§ 785*)—IMPEACHMENT—INSTRUCTIONS.

There was no error in any of the charges relating to the impeachment of witnesses.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 785.*]

5. CRIMINAL LAW (§ 815*)—INSTRUCTIONS—STATEMENT OF DEFENDANT.

It is not error for the court to shape his general charge with reference to the evidence, where the court charges the section of the Code in regard to the statement made by the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.*]

6. CRIMINAL LAW (§ 731*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY.

"It is the province of the court to construe the law applicable in the trial of a criminal case, and of the jury to apply the law so construed to the facts in evidence. While the impaneled jurors are made absolutely and exclusively judges of the facts in the case, they are, in this sense only, judges of the law."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1694, 1695; Dec. Dig. § 731.*]

7. CRIMINAL LAW (§ 730*)—HOMICIDE (§ 250*)—ARGUMENTS OF COUNSEL—MISTRIAL.

There was no abuse of discretion in refusing to declare a mistrial. The evidence supported the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.* Homicide, Dec. Dig. § 250.*]

Error from Superior Court, Worth County; Frank Park, Judge.

William Rouse was convicted of murder, and brings error. Affirmed.

See, also, 69 S. E. 180.

J. W. Walters & Sons, Perry, Foy & Monk, J. B. Williamson, and Jno. R. Cooper, for plaintiff in error. W. E. Wooten, Sol. Gen., F. A. Hooper, H. A. Hall, Atty. Gen., and J. H. Tipton, for the State.

HOLDEN, J. The defendant, William Rouse, was placed on trial at the October term, 1910, of the superior court of Worth county, on the charge of having murdered one William Bailey. He was convicted by the jury of murder, without recommendation, and sentenced to be hung. To the order of the court denying his motion for a new trial he excepted. The killing occurred on September 4, 1909. On that day the defendant and the deceased rode together in a buggy from Sylvester to Poulan; the deceased having been informed by the defendant that he could obtain some whisky at the latter place. The only eyewitness to the killing was one Dink Smith. This witness swore that at a place known in Poulan as Sandy Bottom he first saw the defendant and the deceased, and all three of them went into a store there and took a drink of whisky, and were then invited by the defendant to go to his house and get another drink. They proceeded to the house occupied by the defendant, and entered the room thereof in which the killing occurred. The immediate circumstances attending the killing were detailed by the witness as follows: "We went in the front door, in the room on the right as you go in. Mr. Rouse then got a bottle of whisky, and we all went to take a drink, and Mr. Bailey said he couldn't take a drink without

water, and he goes out around the house to get a drink of water, and he comes back in the back hall door and set down in a chair in the room. Rouse did not say anything that I know of, when Bailey went out. * * * Bailey came back in the house after he went after water. He came in and set down in the room where he was killed. He came in and set down in the chair, and we all went to take a drink, and Rouse drank, and I drank and handed it to Bailey, and he drank, and he set the bottle down on the right-hand side, and he stooped over to set the bottle down. Mr. Rouse pulled a pistol from his right hip pocket and began shooting. Then he fell forward toward the bed, and Mr. Rouse shot him; and, after he had fell forwards on his face, he shot him in the back. Mr. Rouse after he had finished shooting him he pulls a small pistol out of his bosom, and placed it in his hand. That small pistol he placed in Mr. Bailey's hand. He fired this pistol off in the fireplace before he placed it in his hand." The defendant then told Smith to go get the marshal and tell him that the defendant had killed Bailey, which he did. Witness did not know what took place after he left the house. On his return after going after the marshal, the defendant told him that, when he left Sylvester with Bailey, he carried him off for the purpose of killing him. This witness further testified that there were no cross-words between the defendant and the deceased, and that the deceased did nothing to the defendant that the witness knew of. The state also sought to establish the theory that Bailey was not immediately killed by the bullet wounds inflicted upon him, but that the defendant, who had gone out of the house when Smith went after the marshal, returned, and while alone with Bailey (whom witnesses testified they could hear groaning at the time of Rouse's return to the house), with a knife or other sharp instrument, so cut the throat of the deceased as to render speech on his part impossible. Dr. Lunsford, sworn by the state, testified at length as to the character of the wounds on the body of the deceased, giving it as his opinion that the mortal wound was the one in the throat, which he testified was caused by a knife or other sharp instrument.

In his statement to the jury the defendant's version of the killing was substantially as follows: When he, the deceased, and Dink Smith got into the defendant's house, the deceased proposed to take a drink, and said he would have to have some water. Defendant stepped to the edge of the door and handed deceased a dipper, and returned into the house and commenced writing a note, which he had promised to write for the deceased to take to a woman. Deceased returned with a tin bucket of water. "He took a drink and set the bottle down and took the cup, and

took some water, and he says: 'Now, by God, treat me right about that thing.' I says, 'I don't want to do anything else with you but treat you right.' He says, 'It will be more than you did heretofore.' He says, 'I mean for you to treat me right,' and mentioned some old things between us. I says, 'You are mistaken; I don't want to appear against you in court, nor say anything against you unless I am called without any choice of it.' He says, 'You are a pretty good hand to swear lies against a man,' with an oath to it, and, as he said it, he brought his pistol out of his shirt, and I stepped out and stepped towards him, and he stepped towards, and as he come around I fired with my left hand on his wrist, that way [indicating], and, as I did the pistol went off. That hole they were talking about being in the south side of that house, the ball was shot from Bailey's pistol, and went through my pants, * * * and the bullet went right through these pants and into the floor, and, as Bailey wrung from me to get loose, I shot him through the arm and through the body, and somewhere else in the body I shot him again, and that's what's said to be the knife in the neck. Gentlemen, that was the last shot from my gun. So far as me cutting that man, or putting a knife in him, there was no knife put in that man than there is in one of your jurors."

The witness Smith was arrested along with the defendant. This witness was present at the coroner's inquest, and made a statement regarding the killing which corroborated the defendant's contention as to how it occurred. Afterwards, while in jail, this witness gave in a written statement a different version, and on the stand, at the trial, detailed it as above set forth. On the trial he stated that his testimony given at the inquest was false, and that he so testified because the defendant threatened to kill him, or to have some of his friends do so, if the witness did not tell the story the way the defendant wanted it told. While the motion for a new trial, as amended, contains a number of assignments of error, only one of them relates to alleged error in the admission or rejection of testimony; and we deem it unnecessary to relate the testimony more extensively that has been hereinbefore set forth.

[1] 1. In several grounds of the motion for a new trial complaint is made that the court erred in so charging the jury as erroneously to lead them to believe that if the "words, threats, menaces or contemptuous gestures" of Bailey, the decedent, at the time of the homicide were sufficient to excite the fears of a reasonable man, that he was manifestly intending or endeavoring by violence or surprise to commit a felony on Rouse, the defendant, and the latter, acting under the influence of those fears, killed Bailey, the homicide would not be justified. The defendant contends that the charges excepted to constitute error requiring a new trial under the ruling in the case of *Cumming v.*

State, 99 Ga. 662, 27 S. E. 177, where it was held: "In the present case it was error to charge: 'A fear growing out of and only supported by mere words, threats, menaces, or contemptuous gestures is not the fear which would justify or excuse another for committing a homicide.'" Similar rulings were made in the cases of *Clay v. State*, 124 Ga. 795, 53 S. E. 179, and *Johnson v. State*, 105 Ga. 665, 31 S. E. 399. We do not think the charges excepted to subject to the criticism presented. One of the court's instructions excepted to is as follows: "Provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder." [1] The charge above quoted is a part of the Penal Code 1910, § 65, wherein voluntary manslaughter is defined, and is taken from that portion of the court's instructions wherein he gave this section in charge to the jury. No complaint is made that the law of voluntary manslaughter was not applicable under the testimony, or that the court erred in instructing the jury upon the law of this grade of homicide. If it was proper to charge the jury upon the subject of voluntary manslaughter, it was certainly not error to charge the precise language of the Code defining this offense. The above-quoted language in the section referred to means that, though "words, threats, menaces, or contemptuous gestures" of the decedent may arouse in the slayer a passion by reason of which he kills the decedent, a homicide because of the passion thus engendered will not be reduced from murder to manslaughter. In the charges complained of, the court was dealing with this principle of law, and the language used by him was not such as to deprive the defendant of the benefit of his defense that in committing the homicide he acted under the fears of a reasonable man, nor to exclude the jury from considering, in determining whether or not he so acted, whether words, threats, menaces, or contemptuous gestures on the part of the deceased occurred under such circumstances as would justify the excitement of such fears on the part of a reasonable man. On the contrary, the jury were instructed in one portion of the charge, "You will bear in mind that in every case of homicide where it appears that the circumstances were sufficient to excite the fears of a reasonable man that the deceased was intending or endeavoring by violence or surprise to commit a felony on him, and that the party killing really acted under the influence of those fears and not in a spirit of revenge, that the homicide is justifiable," and substantially repeated this instruction in several other portions of the charge. In view of the entire charge, the instructions above referred to as being complained of were not such as to mislead the jury into the belief that the law was other than that

laid down in the cases above cited, and were not subject to any of the exceptions thereto.

[2] 2. Complaint is made that the court failed to charge the provisions of Pen. Code 1910, § 72, relating to the right of one person to kill another to prevent the latter from forcibly attacking and invading property or habitation of the former, after using persuasion, remonstrance, or other gentle measures; and in so charging the jury as to exclude from their consideration the defense involved in the latter part of Pen. Code 1910, § 70, providing that it shall be justifiable homicide for a person to kill "any persons who manifestly intend and endeavor, in a riotous and tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein." The defenses above referred to were not involved in the case, and there is no merit in either of the complaints to which reference is above made.

[3] 3. Complaint is made that the court committed error in failing to charge Penal Code 1910, § 1017, relating to the necessity of corroboration in felony cases, where the only witness to establish a fact is an accomplice. Neither in the evidence nor in the defendant's statement was there anything to show that the witness Dink Smith on whom the state mainly relied to establish the killing by Rouse was an accomplice in the commission of the homicide, and the court committed no error in failing to charge the action of the Code above mentioned.

[4] 4. One ground of the motion for a new trial is as follows: "Because the court erred in charging the jury as follows: 'When an apparent discrepancy exists between the testimony of different witnesses, it is the duty of the jury to reconcile the whole together if it can be done, so as not to impute perjury to any one. There are several methods prescribed by our law by which a witness may be impeached, and one is by disproving the facts testified to by him. Another is by proof of contradictory statements previously made by him as to matters relevant to his testimony and to the case, and still another is by evidence as to his general bad character. The credibility of a witness is a matter to be determined by the jury under proper instructions by the court. When an attempt to impeach a witness in any of the methods pointed out has been made, it is for the jury to say whether such attempt has been successful, and, when a witness has been successfully contradicted as to material matter, his credit as to other matters is for the jury.' Defendant excepts to this charge, and says the same is error because, when a witness has been successfully impeached by contradictory statements, it is the duty of the jury to disregard his testimony altogether. So that it was error for the court to charge the jury when the witness has been successfully contradicted as to material matter.

His credit as to other matters is for the jury. Defendant contends it was also error for the court to instruct the jury that it was their duty to believe a witness as to other matters who had been impeached by some of these designated methods; there being other legal ways in which a witness may be discredited. For instance, a jury may take into consideration the witness' feelings or prejudices against the defendant, the reasonableness or unreasonableness of his tale, his manner of testifying, and many other things may be considered by the jury in passing upon his credibility." Another ground of the motion for a new trial is as follows: "Because the court erred in charging the jury as follows: 'While it is for the jury to determine the credit to be given the testimony of each and every witness, yet when a witness has been successfully impeached as to absolutely establish in the minds of the jury his unworthiness of credit, as well as where a witness swears willfully and knowingly falsely, his testimony in each and both of these cases ought to be disregarded unless corroborated by circumstances, or other unimpeached evidence.' Defendant contends that the court erred in instructing the jury that, if the witness had been successfully impeached, his testimony would not be taken by the jury, unless corroborated by circumstances or unimpeached evidence. The defendant contends that this charge was error further, because, when a witness has been successfully impeached, it is the duty of the jury to disregard all of his testimony, and pay no attention to it and not to consider it at all." The charges above quoted do not furnish any ground for a new trial. The charge that a witness may be impeached in one of the three ways named in the charge excepted to (first above quoted) is not cause for a new trial, though a witness may be discredited in other legal ways besides those designated in the charge. The court did not instruct the jury that a witness must be believed unless impeached in one of the three ways named in the charge to which reference is made, and immediately preceding the portion of the charge referred to the court instructed the jury as follows: "To enable you, in considering the evidence, to separate the false from the true, you are made by law the exclusive judges not only of the evidence and the weight of the evidence, but also of the credibility of the witnesses. In determining what degree of credit a witness should have, the jury should bring to bear their own intelligent judgment and use such reasonable standards as they would apply in seeking for truth in such matters of importance where their own interests are concerned. Among other things, the jury may look to and consider any interest which a witness may have in the case on trial, whether he manifests any bias or prejudice for or against the accused. You may look to his manner of testifying, to the reasonableness or unreason-

ableness of the facts he relates, and apply such other mental tests in weighing the evidence as your reason and judgment dictate." See, in this connection, *Chapman v. State*, 109 Ga. 157 (3), 34 S. E. 369; *Southwestern R. Co. v. Allen*, 130 Ga. 656 (5), 61 S. E. 541. The portions of the charge excepted to, other than the one just commented on, were in substantial accord with the provisions of the Penal Code relating to the impeachment of witnesses, and the Civil Code 1910, § 5884, which does not appear in the Penal Code, but which is applicable upon the trial of criminal cases as well as civil cases. See, in this connection, *Humphreys v. State*, 133 Ga. 456, 66 S. E. 158; *Grant v. State*, 118 Ga. 804-806, 45 S. E. 603; *Arnold v. State*, 131 Ga. 494-497, 62 S. E. 806; *Smith v. State*, 109 Ga. 479, 35 S. E. 59.

[5] 5. One ground of the motion for a new trial is as follows: "Because the court erred in charging the jury as follows: 'A reasonable doubt of the law is one that grows out of the evidence, or arises from the lack of evidence adduced upon the trial; and leaves a reasonable mind wavering and unsettled—not satisfied from the evidence. A juror cannot create for himself a doubt and act upon it. He cannot raise an artificial or captious doubt in order to acquit. The doubt should be real and honestly and fairly entertained after all reasonable effort to find out the facts. The responsibility of discovering the truth in relation to the charge made against the defendant from the evidence rests upon you, and you alone, under your oaths to render a true verdict according to the evidence. It is only that character of verdict which protects the person on trial on the one hand and preserves society and compels men to respect the law on the other. A verdict rendered on any other consideration is but a mockery of justice.' Defendant excepts to this charge, for the reason that it restricted the jury to find their verdict from the evidence and excluded from their consideration the defendant's statement. The error is that the court omitted to tell the jury in this connection that, if they had reasonable doubt about the defendant's guilt from his statement, it would be their duty to acquit him. The court, defendant contends, nowhere in its charge instructed the jury to this effect." Another ground of the motion for a new trial is as follows: "Because the court erred in charging the jury as follows: 'While I have told you that, in order for your verdict to be a legal and proper one, it must be founded on the evidence in the case, yet, in this connection, I give to you another rule, which may or may not, as you must determine, affect your finding: In all criminal trials the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It is not to be made under oath, and it shall have such force only as the jury may think right to give it. The jury may believe it in pref-

erence to the sworn testimony in the case.' Defendant excepts to this charge, because the court did not instruct the jury that if they had any reasonable doubt as to the defendant's guilt, either from the evidence or the defendant's statement, they ought to give the prisoner the benefit of the doubt and acquit him. Defendant contends that nowhere in the charge did the court instruct the jury that, if they had any reasonable doubt about the defendant's guilt, they ought to acquit him, but restricted the jury to base their verdict upon the evidence, and that, if they had any reasonable doubt, they should acquit. For these reasons, the defendant assigns this charge as error." On similar grounds the following charge is excepted to: "Now understanding as you do your responsibility in this case, the obligation under which you rest to discharge your duty in an impartial, unbiased and unprejudicial manner, to find a verdict according to truth of the case as disclosed by the evidence after applying the evidence to the rules of law as I give them to you, I now call your careful and intelligent consideration to the law of murder, the law of justifiable homicide, and along with them the law of voluntary manslaughter." We do not think there is any error in the charges quoted requiring a new trial. In *Tolbirt v. State*, 124 Ga. 767 (2), 53 S. E. 327, it was ruled: "It is proper for the judge to frame his general charge to the jury upon the evidence alone, appropriately instructing them, however, at some stage thereof, with respect to the prisoner's statement." Also, in this connection, see *Tucker v. State*, 133 Ga. 470 (5), 66 S. E. 250; *Brantley v. State*, 133 Ga. 264 (1), 65 S. E. 426; *Jordan v. State*, 130 Ga. 406 (2), 60 S. E. 1063; *Walker v. State*, 118 Ga. 34, 44 S. E. 850.

[6] 6. Exception is taken to a charge wherein the court stated: "In deciding this question you will remember that you are the sole judges of the evidence submitted to you during the trial of this case. You will accept as correct, for your guidance in making up your verdict, the law as I shall give it to you in charge. So that, having applied the law to the evidence as you shall find it to be, you may render such verdict as the law demands at your hands. You are not at liberty, in determining your verdict, to depart from the evidence nor the law as given in charge." Exception is taken to this charge on the ground that in criminal cases the juries are the judges of the law as well as the facts, and that "they become the final judges of the law and the evidence," and that it was error for the court to tell the jury "that they were the sole judges of the evidence without telling them they would become the judges of the law also." There is no merit in this exception. The jury must accept as the law what the court charges them as being the law. In this connection, see *Berry v. State*, 105 Ga. 683, 31 S. E. 562; *Jackson v. State*, 118 Ga. 780, 782, 45 S. E. 604.

7. One ground of the motion for a new trial is as follows: "Because the court committed error in admitting the following testimony of a state's witness by the name of Dink Smith, over objection of defendant's counsel: 'I do not go out at night at all, and I stay close at home. I left this county and went to my father's to keep from being killed by some of Rouse's friends like he told me.' Defendant's counsel objected to this testimony and asked the court to rule it out, on the ground of its irrelevancy, and on the further grounds that no substantial reason was given by the witness for being in fear of the defendant after he was turned out of jail. Defendant objected to the testimony further for the reason that the defendant could not harm him, as he had been in jail at the time, and, if other people were threatening his life outside, he could not be held responsible for it. And any threats made by any one outside of the prisoner at the bar against this man's life would not be admissible." The testimony discloses the following facts: Rouse killed Bailey on Saturday, and on Sunday Rouse and the witness Dink Smith were arrested and incarcerated in the same cell in jail. On Monday morning Smith was removed from this to another cell, where he remained for a short time, after which he was released from custody. On cross-examination of the witness Smith, counsel for the defendant brought out from him the following testimony: "I have been out of jail about eight months. Nobody ain't bothered me. I went up home and stayed four or five months, and came back down here I think the 12th of August. I moved right back to Poulan and moved in the house that Rouse killed Bailey in, and I have been living in it ever since. I haven't had any cause to go all over the country. I have been in Poulan working around. I have been everywhere I have had any necessity to go. I will be 27 years old the 24th day of January." Immediately after this testimony was delivered counsel for the state, on redirect examination of the witness Smith, brought out the testimony objected to in the ground of the motion for a new trial above quoted. Counsel for the defendant, on recross-examination of the witness immediately thereafter, brought out the following testimony: "I was afraid of Mr. Rouse's friends. He told me, if he didn't kill me himself, he had friends in the county who would. * * * I got out of jail on Sunday, and went home on Monday on the 11 o'clock train, up to Andersonville. I got out of jail after the case was tried. My family went with me and I moved back here on the 12th of August. I wasn't afraid to come back. If I had been afraid at the time, I wouldn't have come back. I came back after I had testified against Rouse. I am afraid to be out at night." It does not distinctly appear from the testimony where was the home of the father of the witness to which in the testimony objected to the witness said he went,

but, in view of all the testimony, we think it proper to consider that it was at Andersonville in another county, and was "the home" referred to in the testimony first above quoted. Counsel for the defendant having brought out from the witness the fact that he went to the home of his father, and stayed four or five months after being released from jail, we do not think the admission of the testimony of the witness as to the reasons why he went to the home of his father, over the objection that it was irrelevant, cause for a new trial. We think this testimony was relevant. Nor do we think the testimony that the witness left the county of Worth and went to the home of his father "to keep from being killed by some of Rouse's friends like he told me" subject to the other objections contained in the above-quoted ground of the motion for a new trial. The witness Smith testified that, after the killing, Rouse several times told him that if he did not relate the occurrence as happening in a certain way, if he (the defendant) did not kill Smith, his friends would. There was no testimony that any of the friends of Rouse had made any threats against Smith. The last sentence in the testimony objected to was admissible, and not subject to any of the grounds of objection made thereto, and, even if the first sentence in the testimony objected to was subject to any of the objections made in the ground above quoted, objection to the testimony as a whole would not be sustainable. The objections made in the ground of the motion for a new trial which we are considering were to all of the testimony therein quoted, and were not to any special portion thereof. However, we think the testimony in the sentence above referred to, that "I do not go out at night at all, and I stay close at home," was admissible in view of the fact that counsel for the defendant had previously brought out on cross-examination of Smith the testimony that "I have been everywhere I have had any necessity to go."

[7] One ground of the motion complains that the court committed error in refusing to grant a mistrial made after the solicitor general used the following language in his closing argument to the jury: "Rouse, came out of the house wiping his hands and immediately jumped into his buggy, and rushed off down to the house of this negro woman, evidently his concubine, and then rushed back." When the motion was made, the solicitor general stated to the court and jury as follows: "There was evidence in this case that he [the defendant] either stayed there or ate there, I forget which it was, but in the heat of my argument I did go too far in referring to that particular woman as being evidently his concubine, and I desire to withdraw that." Whereupon the court instructed the jury as follows: "I charge the jury that they are to be actuated and governed solely by the evidence in this case and the law as given in charge, and

are not to consider any statements made by counsel in their zeal or otherwise that do not appear in the evidence in this case. You will be governed by the evidence as you were sworn to do in being impaneled, and not by any statements counsel may make outside of the evidence. I especially warn you against considering any statements of counsel, not borne out by the evidence." The defendant then renewed his motion to declare a mistrial, and the court made the following statement: "I have instructed the jury, who are presumed to be upright and intelligent men, and who will remember the testimony and be guided by the testimony alone. The motion is overruled." All of what has been above stated transpired in the presence of the jury. Civ. Code 1910, § 4957, is as follows: "Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same; and, on objection made, he shall also rebuke the same, and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial 'if the plaintiff's attorney is the offender.'" Under the circumstances as above set forth, it was a matter in the discretion of the court whether or not to declare a mistrial, and the failure to do so was not an abuse of discretion requiring a reversal. The cases cited by counsel for the defendant to sustain their contention that the failure to declare a mistrial was error show upon examination that none of them involved instances in which the court promptly and fully complied with the requirements of the section of the Code above set forth. The record shows that the judge and the solicitor general did their utmost to wipe from the minds of the jurors any impressions created by the statement of the solicitor general which were liable to harm the defendant, and said that the statement was unwarranted by the evidence.

Counsel for defendant contends that the venue was not shown. The evidence of the witness Smith shows that the homicide was committed in Worth county, and there is no merit in this contention. This is the second time that the defendant has been convicted of the crime charged against him, without recommendation, and sentenced to be hung. This court granted him a new trial when the case was formerly before this court (135 Ga. 227, 69 S. E. 180) because of an error in the charge of the court. The testimony introduced by the state shows an unprovoked murder. It is true that this testimony was that of a witness who before the coroner's jury swore that the homicide occurred in a way tending to justify the defendant in its commission. But this witness says

that the testimony then given was false, and was given because of repeated threats made by Rouse that, if he did not testify in the way he did before the coroner's jury, the defendant or his friends would kill him. The jury trying the case had a right to believe the witness' testimony as delivered on the trial. Moreover, there was testimony that after shots were heard in the house by parties on the outside groans were heard, and that while they continued Rouse returned alone to the house where the homicide occurred, shortly after which the groans ceased. A physician testified that the wound in the neck was made by a knife, or other sharp instrument, which cut the trachea and inflicted a mortal wound, and rendered speech impossible, and that, after this wound was inflicted, it would have been impossible for the deceased to have uttered groans of the character described by the witnesses. The evidence was sufficient to warrant the verdict.

Judgment affirmed. All the Justices concur.

(135 Ga. 801)

CHAMLEE LUMBER CO. v. CRICHTON.
(Supreme Court of Georgia. June 14, 1911.)

(Syllabus by the Court.)

MECHANICS' LIENS (§ 260*)—DISMISSAL OF ACTION—RENEWAL—LIMITATIONS.

An essential element in the creation of a lien of a materialman is his foreclosure of the same within 12 months from the maturity of his claim. If he forecloses within 12 months, and dismisses his action, it cannot be renewed within 6 months thereafter, under Civil Code 1910, § 4381, unless the renewal be also within 12 months of the maturity of the claim. That Code section applies to ordinary suits and remedies, and not to suits to foreclose a materialman's lien on real estate.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 458-468; Dec. Dig. § 260.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Chamlee Lumber Company against E. C. Crichton. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. Gordon, for plaintiff in error. J. L. Hopkins & Sons, for defendant in error.

EVANS, P. J. A materialman, furnishing material for the improvement of real estate, is given a lien upon the real estate so improved; but, in the language of the statute, "to make good [the materialman's lien] it must be created and declared in accordance with the following provisions and on failure of either the lien shall cease." The provisions referred to comprehend three vital and essential things: The completion of the contract to furnish material, the record of the claim of lien within 3 months, and the institution of a suit of foreclosure within 12

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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months from the maturity of his claim. Civil Code 1895, § 2804. In transferring this section to Civil Code 1910, § 3353, certain errors occurred: Subparagraph 3 was entirely omitted, and paragraph 4 was erroneously numbered 3. The materialman in this case began his suit within 12 months of the maturity of his claim of lien, but voluntarily dismissed it. He renewed his action within 6 months of the dismissal of his former action, but after the expiration of 12 months from the maturity of his claim. The primary question is whether the renewed action stands on the same footing as the original action, so as to bring it within the statutory requirement that the foreclosure of the lien be commenced within 12 months of the maturity of the claim.

Civil Code 1910, § 4381, is as follows: "If a plaintiff shall be nonsuited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewed case shall stand upon the same footing, as to limitation, with the original case; but this privilege of dismissal and renewal shall be exercised only once under this clause." This Code section appertains to the remedy, and not to the cause of action. It is applicable to those cases where the defendant may plead the statute of limitations (by demurrer or by special plea) at his pleasure, and where the element of time does not enter into the creation of the cause of action. This court has repeatedly held that statutory liens of this character are in derogation of common law, and the statute must be strictly construed. Indeed, it has been held that the mere fact that a materialman's claim of lien was filed for record before the expiration of three months would not suffice to meet the statutory requirement of record within that time. *Jones v. Kern*, 101 Ga. 309, 28 S. E. 850. In giving to the materialman a lien, the statute expressly states that in order to "make good" his lien he must both record and foreclose within the statutory periods. The record of the lien in time is no more essential to its creation than its foreclosure in time. The lien comes into potential existence only when the statute is satisfied. Its vitality as an enforceable lien depends upon the concurrence in fact of three things, viz.: The furnishing of the materials, the record of the claim of lien within 3 months, and the institution of foreclosure suit in 12 months. If there is a failure in either, the lien is inoperative. *Cherry v. N. & S. R.*, 65 Ga. 633.

In *Parmelee v. S. F. & W. Ry. Co.*, 78 Ga. 239, 2 S. E. 686, the action was against a railway company to recover money paid for freight in excess of the sum allowed by the Railroad Commission, under section 719 (j) of the Code of 1882 (see section 2640 of Civil Code of 1910). That section gave a right of action provided suit was brought thereunder within 12 months after the accrual of the

action. The court, in holding that Civil Code 1910, § 4381, permitting the renewal within 6 months of dismissed or discontinued actions, did not apply to suits under that Code section, said: "The proviso to this act is a condition precedent upon which the suit must be brought. The right of action is given provided the same is brought within 12 months from the time the same accrued. If the same be not brought within 12 months, then there is no right of action under this statute; and where a case has been brought within 12 months, and dismissed, and another case brought, but not within 12 months from the time the right of action accrued, no such right exists; and the statute which provides for the bringing of actions after the dismissal of the same within 6 months does not apply in a case like this." And in *Walker v. Burt*, 57 Ga. 20, it was held that a dismissed foreclosure of a sawmill lien could not be renewed under the statute, where the renewed suit was brought after the expiration of 12 months, and that the renewal statute applied only to ordinary suits and remedies.

Adhering to the rule of strict construction, we interpret the statute to mean that, in creating the lien, the statute demanded as one of its constituent elements that suit to foreclose be begun within 12 months from the maturity of the claim; and this requirement appertains not merely to the remedy, but constitutes one of the essential things which enter into the creation of the lien. Given this construction, Civil Code 1910, § 4381, as to renewal of dismissed actions has no application to suits to foreclose the lien of materialmen.

There are other questions made by the demurrer; but, as the point upon which we have ruled is decisive of the plaintiff's right to a lien, it becomes unnecessary to consider them.

Judgment affirmed. All the Justices concur.

(136 Ga. 375)

MORRISON v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. June 13, 1911.)

(Syllabus by the Court.)

1. DEMURRER TO PETITION.

There was no error in overruling the demurrer to the plaintiff's petition in his action to recover land.

2. NONSUIT.

There was no error in overruling the motion of the defendant to grant a nonsuit, on the close of the plaintiff's evidence.

3. APPEAL AND ERROR (§ 528*)—BILL OF EXCEPTIONS—NECESSITY.

Where an applicant for a new trial, at the time when it was heard, presented to the presiding judge an amendment to the motion, setting up three additional grounds, but the judge declined to approve them, or to allow the amendment, on the ground that a previous order had been taken limiting the time within which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

amendments to the motion might be made, on exception to such refusal the proposed amendment could not be brought to this court as a part of the record, but should have been brought up in the bill of exceptions. *McGarry v. Seiz*, 129 Ga. 296, 58 S. E. 856.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2374, 2384-2388; Dec. Dig. § 528.*]

4. APPEAL AND ERROR (§ 302*)—REVIEW—OBJECTIONS NOT RAISED BELOW.

Some of the grounds of the motion for a new trial, complaining of the rulings in admitting evidence, do not show distinctly that the grounds of objection now urged were urged at the time the objections were made. None of the numerous grounds were such as to require extended discussion. After a careful consideration, none of them are such as to require a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Sarah Morrison against the Central of Georgia Railway Company. From the judgment, Morrison brings error. Affirmed.

D. H. Clark and Jno. R. Fawcett, for plaintiff in error. H. W. Johnson and Lawton & Cunningham, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(126 Ga. 369)

KIMSEY & DOPSON v. MACON LUMBER CO.

(Supreme Court of Georgia. June 13, 1911.)

(Syllabus by the Court.)

1. PROCESS (§ 141*)—CORPORATIONS (§ 507*)—RETURN OF SERVICE—CONCLUSIVENESS—SERVICE OF PROCESS—SUFFICIENCY.

The return of service by the sheriff is conclusive as to the fact of service, unless traversed according to law. *Elder v. Cozart*, 59 Ga. 200. But such return is not evidence as to matters which are not properly the subject of the return. 32 Cyc. 515.

(a) Under Civ. Code 1910, § 2258, there are two modes prescribed for service of process upon corporations: (1) "By serving any officer or agent of such corporation." (2) "By leaving the same at the place of transacting the usual and ordinary public business of such corporation, if any such place of business then shall be within the jurisdiction of the court in which such suit may be commenced." Where service of process in an action for damages was made by serving the president personally, it was not an essential part of the return that the sheriff recited in his return, "Said [president] being the officer in charge of said company's office and business in" the county where the suit was brought; and on the trial of a plea to the jurisdiction such recital was not evidence that the defendant had an office in the county.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 189-192; Dec. Dig. § 141; Corporations, Dec. Dig. § 507.*]

2. SUFFICIENCY OF EVIDENCE.

Though conflicting, the evidence was sufficient to authorize the judge, by consent passing on the law and facts without the intervention of

a jury, to find that the court was without jurisdiction of the defendant corporation.

Error from Superior Court, Dougherty County; Frank Park, Judge.

Action by Kimsey & Dopson against the Macon Lumber Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Pope & Bennet, for plaintiffs in error. W. H. Hammond and Roscoe Luke, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(126 Ga. 394)

LOUISVILLE & N. R. CO. v. REECE

(Supreme Court of Georgia. June 14, 1911.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 256*)—INJURIES TO SERVANT—PETITION—DEMURRER.

The gist of the plaintiff's action in this case was that a railroad steel rail was carelessly and negligently thrown or caused to fall, without fault on the plaintiff's part, upon the foot of the latter, breaking and crushing it, and that the negligence complained of consisted in moving or throwing a steel rail while a gang of laborers, of which the plaintiff was a member were engaged in unloading steel rails from a car, without giving proper notice to the plaintiff that the rail was about to be moved or thrown; but the petition fails entirely to show just how the complainant was engaged in assisting in the removal of the rails from the car, what was his relative position with reference to the rail that was being moved or unloaded, or with reference to the other members of the gang who were engaged in the same work, or how or why any notice was necessary or proper, and the court erred in overruling a demurrer calling for more specific information in regard to these questions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-815; Dec. Dig. § 256.*]

Error from Superior Court, Gordon County; A. W. Flite, Judge.

Action by C. L. Reece against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

C. L. Reece brought suit against the Louisville & Nashville Railroad Company to recover damages for personal injuries alleged to have been sustained in consequence of the negligence of certain employes and agents of the defendant company. Petitioner alleged that his right foot was broken across the instep, in consequence of a heavy steel rail falling across his foot; that it was caused so to fall by the negligence of the agents and employes referred to; that petitioner was without fault; that at the time his foot was broken he was unloading steel rails from cars, with other members of a gang of workmen under Foreman McArthur; and that one of the "supervisors" of the defendant company was present, "hurrying the men

to unload iron from the cars, which interference with the men and the confusion caused by the unwarranted interference of said supervisor, and hurry and confusion caused by the change in foremen, and the excitement caused by the company, and abusive language used by the supervisor to the extra gang, caused them to excitedly throw railroad steel [rails] or iron from the cars without proper notice to the employes who were assisting to unload the cars." The petition was demurred to by the defendant on the grounds that it failed to set forth what constituted the negligence complained of, and did not fully show the character of the negligence and the particular person or persons who were guilty of such negligence, together with their relation to the defendant; that it did not sufficiently set forth acts of negligence on the part of any one, and failed to show how the supervisor's presence and direction was an interference with the company's business, and why the same should have produced confusion, and how the plaintiff's injuries were the result of anything alleged; and that the petition failed to show how petitioner's injuries were received, and failed to set forth any cause of action against the defendant. The court overruled the demurrer, to which ruling the defendant excepted. The trial resulted in a verdict for the plaintiff. The defendant made a motion for a new trial, and, this being overruled, the defendant excepted.

D. W. Blair and O. N. Starr, for plaintiff in error. W. E. Mann, T. W. Skelley, and F. A. Cantrell, for defendant in error.

BECK, J. While the general demurrer was properly overruled, we think the petition is defective in the respects pointed out by the special demurrer. The petition alleges that the plaintiff was injured in consequence of the falling of the rail upon his foot; and in a vague, indefinite way it is averred that the rail fell upon his foot in consequence of some interference upon the part of a certain "supervisor" for the defendant company with a gang of workmen engaged in unloading rails under a certain named foreman; and it is further alleged that the hurry and confusion caused by the interference on the part of the supervisor, and the abusive language used by him to the gang of workmen, "caused them to excitedly throw railroad steel [rails] from the car without proper notice to the employes who were assisting to unload the car." There were no allegations to show the position of petitioner relatively to those who were engaged in unloading the steel rails, nor whether his position was such as to require that notice should be given him when a rail was about to be moved or thrown from the car; nor does it appear from the allegations of the petition that he could not easily and readily see how the rail was being

handled, if it was being handled so as to put in jeopardy his person. In fact, there is not the slightest suggestion in any of the allegations of fact to show that the other employes engaged with the plaintiff were under any duty of giving notice when a rail was about to be moved or thrown from the car. The gist of the plaintiff's action, it seems, is that a rail was moved or thrown without giving proper notice, and yet nothing is alleged to indicate how or why any notice of the moving or the throwing of the rail was necessary or essential to the safety of the complainant, if he observed proper precautions himself for his own safety. The allegations of the petition are so meager, vague, and indefinite that one cannot determine from reading them whether the complainant was on the car assisting in unloading, and was injured while so engaged, or whether he was on the ground, and from that position engaged in assisting at the work of unloading the rails from the car, and while engaged in the latter place a rail was thrown upon him. The demurrant was entitled to more specific information as to the contentions of the plaintiff as to how he was engaged at the time he received the injuries complained of, and what there was in the circumstances which rendered the giving of notice proper or necessary; and the court erred in overruling the special demurrers calling for this information.

The court having improperly overruled the demurrer to the plaintiff's petition, what took place subsequently thereto upon the trial is nugatory, and it is unnecessary to pass upon the questions raised by the assignments of error in the motion for a new trial. *General Supply & Construction Co. v. Lawton*, 131 Ga. 375, 62 S. E. 293.

Judgment reversed. All the Justices concur.

(136 Ga. 425)

EMPIRE BLDG. TRUST et al. v. MEDLOCK.

(Supreme Court of Georgia. June 16, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The charge embraced the legal principles alleged to have been omitted, the instruction alleged to have been inapplicable was authorized by the pleading and evidence, and the verdict is supported by the evidence. There was no abuse of discretion in refusing a new trial.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between the Empire Building Trust and others and Emma Medlock. From the judgment, the Building Trust and others bring error. Affirmed.

Rosser & Brandon and Anderson, Felder, Rountree & Wilson, for plaintiffs in error.

R. R. Arnold and Jas. L. Key, for defendant in error

EVANS, P. J. Judgment affirmed. All the Justices concur.

(136 Ga. 423)

WHITE v. BRYANT.

(Supreme Court of Georgia. June 15, 1911.)

(Syllabus by the Court.)

1. COSTS (§ 277*)—SECOND ACTION—FAILURE TO PAY COSTS OF FIRST ACTION.

Where a suit has been dismissed by the plaintiff, in order to bring a second suit for the same cause of action, the plaintiff must pay the costs or file a pauper's affidavit showing his inability to do so. A failure in this regard furnishes ground for a plea in abatement.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1048-1060; Dec. Dig. § 277.*]

2. COSTS (§ 277*)—FAILURE TO PAY—SECOND ACTION—PLEA IN ABATEMENT—FAILURE TO PAY COSTS OF FORMER SUIT.

Where one had instituted proceedings to foreclose his livery stable keeper's lien, and dismissed the proceedings, and subsequently instituted other proceedings to foreclose the same lien, to which a plea in abatement was filed, setting up that the costs in the first case had not been paid, and that a pauper's affidavit in terms of the statute had not been filed, it was error to overrule the plea in abatement, after the introduction of evidence sustaining the material allegations of the plea.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1048-1060; Dec. Dig. § 277.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by T. J. Bryant against John W. White. Judgment for plaintiff, and defendant brings error. Reversed.

On the 6th day of January, 1909, T. J. Bryant instituted proceedings to foreclose his lien as a livery stable keeper against John White. White filed his counter affidavit, and on the same day Bryant filed his application with the ordinary for an order to sell the property described in his foreclosure proceedings. On the 9th day of the same month the plaintiff, through his attorney at law, dismissed the proceedings, and, subsequently to the dismissal of the case, Bryant instituted proceedings to foreclose the same lien. Whereupon the defendant White filed a plea in abatement, setting up that the costs which had accrued in the first case had not been paid before the institution of the proceedings to foreclose a second time the lien sought to be foreclosed in the first proceeding, nor had the plaintiff filed with his second suit a pauper's affidavit showing his inability from poverty to pay the accrued costs in the first case. After hearing evidence the court overruled the plea in abatement. The evidence submitted, relative to the issue raised by the plea in abatement, was as follows:

Judge Longley, attorney for Bryant, testified: "After I brought the first suit, I went

up with the papers in my hand and called the clerk's attention that I wanted to dismiss and bring another suit, and I asked him if he would accept me for the costs, and he accepted me, and I paid it. Q. (Mr. Mann). You didn't pay it before you filed it? A. No, sir; I did not. Q. Did the sheriff and clerk both accept you? A. Yes, sir. I asked the clerk and sheriff, 'Will you accept me for the costs?' and he said they would, and I filed the suit, and some time afterwards I paid the money. Q. The sheriff consented to it? A. Yes, sir; I talked to the sheriff and clerk both."

The sheriff testified: "Q. (Mr. Mann). You are the sheriff of the county? A. Yes, sir. Q. In the case of Bryant against White was the cost—you made the levy and served the papers? A. Yes, sir. Q. Was the cost in that case paid before you made the second levy? A. It has been paid. Q. How was it paid? A. Why, Judge Longley paid me. Q. When? A. Why, I didn't take no memorandum. Q. It was after the second suit was brought, wasn't it? A. Why, yes; it was after the second suit, but I thought you meant the day of the month. Q. Did he pay you before? A. No, sir. Q. Mr. Bryant didn't pay you before? A. No, sir; not before the levy. The cost has been paid. Q. That was after the suit was brought. Who was to pay you before the suit was brought? A. The first suit? Q. Yes, sir. A. Why, I supposed it would come out of the parties; wasn't anything said about the first suit, I don't think. Q. Before the second suit was brought? A. Judge Longley told me he would see it paid, and I told him I would take him for it. Q. Mr. Bryant didn't say anything about it? A. After the stuff was sold, I went over there with a bill of costs, and he paid it; that was afterwards. Q. (Judge Longley). You mean by that the horses were sold and the costs paid? A. Yes, sir."

W. E. Mann, for plaintiff in error. J. A. Longley, for defendant in error.

BECK, J. [1] Under the decision in the case of Wright v. Jett, 120 Ga. 995, 48 S. E. 345, the court should have sustained the plea in abatement, and erred in refusing to do so and in overruling that plea. The mere fact that the clerk and the sheriff agreed, in the language of the witnesses, to "take him [Mr. Longley] for the costs," did not meet the requirement of the statute. It is disclosed by the evidence that the costs of the first case were not actually paid until after the institution of the second case. The fact that the officers of the court agreed to take Mr. Longley, the attorney, for the costs, did not mean that they had released the party plaintiff from liability for the costs. It is unnecessary for us to rule as to what would have been the effect of an agreement between Mr. Longley, the attorney for the plaintiff, and

the officers of court that they would accept his obligation to pay the costs in lieu of the obligation of the party plaintiff himself, and that the plaintiff should be entirely released from all liability for the costs. We cannot construe the agreement between the attorney and the officers of court, so as to give it this meaning. Such an arrangement between the plaintiff, who dismissed the first case, or his attorney, and the officers of court, relative to the payment of costs, falls entirely to satisfy the statute requiring the payment of costs, where a case is dismissed, before the suit can be brought again. See, in this connection, *Wright v. Jett*, supra, and *Board of Education v. Kelley*, 128 Ga. 479, 55 S. E. 288.

Judgment reversed. All the Justices concur.

(9 Ga. App. 367)

THOMPSON v. WILKINSON. (No. 3,065.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. EVIDENCE (§§ 370, 374*)—APPEAL AND ERROR (§ 1052*)—ACTION ON NOTE—PLEA OF NON EST FACTUM—EVIDENCE.

Where suit is brought upon a promissory note, and a plea of non est factum is filed, it is not proper to admit the note in evidence until prima facie proof of execution has been made. If there be a subscribing witness, he should be called or accounted for. If the inaccessibility of the subscribing witness is shown, or if, when he is called, he fails to remember the signing of the note, or if he testifies that the alleged maker did not execute it, the party offering the note may then proceed to other proof to show that it was in fact executed. In the present instance the magistrate erred in admitting the note without proof of execution; but as the subscribing witness was subsequently called and testified as to the execution of the note, and as there was further proof as to its execution, this error was rendered harmless.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1559-1580, 1583, 1584, 1587-1612; Dec. Dig. §§ 370, 374; * *Appeal and Error*, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

2. SUNDAY (§ 13*)—CONTRACTS—VALIDITY.

A contract relating to a person's ordinary business is void, if executed on Sunday.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 3644; Dec. Dig. § 13.*]

3. HUSBAND AND WIFE (§ 87*)—DEBTS OF HUSBAND—CONTRACT OF WIFE.

A married woman cannot make any contract of guaranty or suretyship, or make a valid promise to pay her husband's debt. The form in which it is attempted to make her liable for the debt is immaterial.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 346-353; Dec. Dig. § 87.*]

4. EVIDENCE (§ 423*)—SIGNATURE—CHARACTER OF SUBSCRIBER—EVIDENCE.

It is competent to show that a person who signed a paper, apparently as a maker, signed only as a witness.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1967-1965; Dec. Dig. § 423.*]

Error from Superior Court, Dade County;
A. W. Fite, Judge.

Action by W. E. Wilkinson against Nancy Thompson. Judgment for plaintiff, and defendant brings error. Reversed.

Foust, Payne & Tatum, for plaintiff in error. W. U. Jacoway, for defendant in error.

POWELL, J. Wilkinson brought suit upon a promissory note signed as follows:

his
"Meredith X Thompson.
mark

her
"Nancy X Thompson.
mark

"Hugh A. Price.

"Witness: Zona Thompson."

[1] Mrs. Thompson filed a plea of non est factum, and afterward by amendment further pleaded that, though her name appeared on the note as a maker, she could neither read nor write, and merely signed as a witness; also that the note was executed on Sunday; also that the note was executed for the pre-existing debt of her husband. The note was tendered in evidence without proof of execution. The defendant objected. The objection was overruled. Primarily speaking, this was error (as the plea of non est factum put the plaintiff to proof of the execution of the note); but it was rendered harmless by reason of the fact that the subscribing witness was called and testified that Mrs. Thompson signed as a witness and not as a maker; and Price was called as a witness and testified that Mrs. Thompson signed as a maker and not as a witness, and that he himself signed as a surety. It was undisputed that the note was signed on Sunday. The plaintiff testified that he had sold Mr. Thompson a horse, and that Mr. Thompson had agreed to give him a note, signed by himself, his wife, and by Price in payment therefor. Thompson and Mrs. Thompson both swore that she had nothing to do with buying the horse and had no interest in it, and this testimony was undisputed. Mrs. Thompson also testified that she signed only as a witness and had no intention of becoming liable on the note. Another person, who was present when the note was signed, testified that he never heard anything said about Mrs. Thompson's signing as a witness, but that he understood that she was signing as one of the makers of the note. The jury found against all the defendants, and Mrs. Thompson brought certiorari to the superior court. It was overruled, and to this judgment she excepts.

1. The exception which relates to the admission of the note without proof of execution has been covered by what has been said above, and the error assigned as to this we hold to be harmless error.

[2-4] 2-4. While the testimony is conflicting in many respects, still it is not conflicting as to the material points. Of course, it was

proper for Mrs. Thompson to prove that she signed the note as a witness, and not as a maker. As to this the evidence was in conflict, and we may eliminate that from the discussion. Her connection with the transaction, so far as the evidence discloses, began and ended on the Sunday on which this note was executed. Even if she had had the capacity to agree to become a maker on the note, so as to assume her husband's debt, the fact that she did so on Sunday would have rendered the note void. But, beyond this, the fact is plain and undisputed that her husband bought the horse and that she did not. Under the law of this state a married woman cannot make any contract of guaranty or suretyship, and cannot lawfully promise to pay her husband's debt. The form in which the transaction takes place is immaterial. If the debt was her husband's, she could not become a party to it, no matter how she signed the note, whether as principal, surety, guarantor, or as witness. If no one else but herself had signed the note, she would not have been bound on it, as the debt was her husband's, and not hers, and the law forbids her from making it hers.

Judgment reversed.

(9 Ga. App. 353)

TRIGG CANDY CO. v. EMMETT SHAW CO. (No. 2,973.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

CORPORATIONS (§ 513*)—SALES (§§ 22, 411, 418*)—PLEADING (§ 8*)—BREACH OF CONTRACT OF SALE—DAMAGES—ALLEGATIONS OF FACT OR CONCLUSIONS.

The allegations of the petition show a cause of action, and the demurrer was properly overruled.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2018-2024; Dec. Dig. § 513; Sales, Cent. Dig. §§ 39-43, 1161-1164, 1174-1201; Dec. Dig. §§ 22, 411, 418; Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

Error from City Court of Ft. Gaines; Ben M. Turnipseed, Judge pro hac.

Action by the Emmett Shaw Company against the Trigg Candy Company. From a judgment for plaintiff, defendant brings error. Affirmed.

This case came to this court on exceptions to the judgment overruling a demurrer, general and special, to the petition. The petition is as follows:

"(1) The petition of Emmett Shaw Company, said company being composed of Emmett Shaw and Carrie Shaw, shows that the Trigg Candy Company, a corporation doing business under the laws of the state of Tennessee, is indebted to said Emmett Shaw Company in the sum of \$234.30.

"(2) That said Trigg Candy Company sold to your petitioner on the 3d day of March,

1909, 250 barrels of candy, each of said barrels to contain 150 pounds, at the price of 5 cents per pound, said candy to be delivered between the date of sale and the 1st day of September, 1909, which is evidenced by the written agreement of the said Trigg Candy Company, which is hereto attached, marked 'Exhibit A.'

"(3) That said Trigg Candy Company failed and refused to ship out and deliver to your petitioner the candy mentioned in paragraph 2 of this petition, or any part of said candy, although ordered and requested by the plaintiff to do so.

"(4) That during said period between the 3d day of March, 1909, and the 1st day of September, 1909, your petitioner was compelled and forced to purchase candy from other manufacturers at a minimum price of 5½ cents per pound, which was the market price for these goods, and they could not be purchased for a less price than 5½ cents per pound from other manufacturers than defendant during the period between March 3, 1909, and September 1, 1909.

"(5) By reason of the fact that said Trigg Candy Company refused and failed to ship out and deliver to your petitioner the candy mentioned in paragraph 2 of this petition, your petitioner was forced to go into the markets and buy the same grade of candy as that brought from defendant at a minimum price of 5½ cents per pound, which was the market price of candy during the period between March 3, 1909, and September 1, 1909.

"(6) That by reason of the facts set forth in the foregoing paragraphs your petitioner was damaged by the defendant, Trigg Candy Company, in the sum of \$234.30, which is the difference in price for said candy between what said Trigg Candy Company sold it to your petitioner and what your petitioner was forced to buy from other manufacturers, being the difference between 5 cents per pound on 37,500."

The next paragraph of the petition alleges that for the purpose of enforcing collection of the damages claimed the Emmett Shaw Company sued out an attachment against the defendant and had the same levied by serving process of garnishment upon two persons therein named.

The contract referred to as "Exhibit A" is as follows: "Ft. Gaines, Ga., 3/12, 1909. Contract. Sold Emmett Shaw Company, Ft. Gaines, Ga., 250 bbl. Stick asst. 5 cents, best #1 Stick Rd (150# bbls). To be shipped as ordered by E. Shaw Co. Contract expires Sept. 1st, 1909. Terms S D to B/L, less 2% cash. Trigg Candy Co., Chattanooga, G. E. Arnold."

The demurrers, so far as they are insisted upon before this court, besides the general ground that the petition set forth no cause of action, may be stated as follows: That

the defendant, being a corporation, could only act through its agent, and it is not alleged what agent sold plaintiffs the candy, and it is not alleged that the agent had authority to make such sale, or such authority as would bind it; that the contract, the breach of which is the basis of the suit for damages, is not a legal and binding contract; that the allegation that the petitioner "was compelled and forced to purchase candy from other manufacturers at the minimum price of 5% cents per pound" is defective, in that it does not allege why plaintiff was forced to buy the candy from other manufacturers, nor how much, and that this allegation is a bare conclusion, unsupported by any alleged fact, and for the same reason the allegation that the petitioner was forced to go into the market and buy the same candy as that bought from defendants, at the minimum price of 5% cents per pound, was insufficient.

Calhoun & Rambo, for plaintiff in error.
King & Castellow, for defendant in error.

HILL, C. J. (after stating the facts as above). 1. The allegation is positive that the contract in question was made by the corporation. It is signed: "Trigg Candy Co., Chattanooga, G. E. Arnold." It does not appear whether Arnold was a general agent, or a special agent authorized to make the contract, or was in fact an officer of the corporation who was fully authorized to make the contract; but the allegation that the contract was the act of the corporation was sufficient to let in proof as to these other facts, and consequently this allegation, in connection with the contract itself, was sufficient as against a demurrer.

2. The contract alleged to have been made by the defendant and subsequently breached by it constitutes an offer or proposal to sell the candy therein specified to the plaintiff within a certain period, and to deliver it as ordered by the plaintiff. The offer or proposal, by its terms, was to expire September 1, 1909. It is alleged that before this date arrived, the plaintiff "ordered and requested" the defendant to ship out and deliver to the plaintiff the candy mentioned in the contract, and that by reason of the refusal of the defendant to comply with this order and request the plaintiff was compelled and forced to purchase candy from other manufacturers at the market price. The plaintiff, by ordering and requesting the defendant to ship the candy, signified in writing an acceptance of the offer or proposal, and therefore the contract became binding upon the plaintiff, and it was already a binding contract upon the defendant as it was duly signed by it when made. *Simpson v. Sanders*, 180 Ga. 265, 60 S. E. 541, and cases there cited.

3. On the breach of the contract by the defendant, the plaintiff was entitled to recover as damages the difference between the contract price and the market price. The allegation that the plaintiff was forced to go into the market and buy the same grade of candy as that which had been bought from the defendant, at the minimum price of 5% cents per pound, is sufficiently definite, and is an allegation of fact, and not a mere conclusion. We think the allegations of the petition, considered as a whole, were sufficiently definite, and set forth a cause of action, and that the court did not err in overruling the demurrer.

Judgment affirmed.

(3 Ga. App. 441)

OWENS v. STATE. (No. 3,379.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. RAPE (§ 53*)—ASSAULT WITH INTENT TO RAPE—EVIDENCE—SUFFICIENCY.

The evidence fully supports the verdict.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 78-82; Dec. Dig. § 53.*]

2. INDICTMENT AND INFORMATION (§ 190*)—ISSUES AND PROOF—OFFENSE INCLUDED WITHIN THAT CHARGED.

On account of the provisions of Penal Code 1910, § 19, a prisoner cannot be convicted of simple assault, where the only assault committed is consummated by a battery. An assault with intent to rape may be committed without a battery, and an indictment for that offense need not charge a battery; and under an indictment for this offense, which does not allege a battery, the defendant cannot be convicted of assault and battery. It follows that if the indictment be for assault with intent to rape, and does not charge a battery, and the proof shows a mere assault and battery, without any intent to rape, the defendant cannot be convicted of any offense, but should be acquitted.

(a) In the present case the indictment charged assault with intent to rape, without charging a battery. That there was an assault and a battery was not denied, only the intent to rape being in issue. The exception to the charge is that the judge did not submit to the jury the question of the defendant's guilt of a simple assault. As the court instructed the jury that, if they did not find that the defendant made the assault with the intent to commit rape, he should be acquitted, the exception is not well taken. Cf. *Carter v. State*, 7 Ga. App. 44, 65 S. E. 1072.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 596-603; Dec. Dig. § 190.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Sam Owens was convicted of assault with intent to rape, and brings error. Affirmed.

D. S. Atkinson, for plaintiff in error. W. C. Hartridge, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 332)

GEORGIA R. R. v. HUNTER. (No. 3,129.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 256*)—INJURIES TO SERVANT—PETITION.

The court did not err in refusing to dismiss the petition, as amended, on general demurrer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 256.*]

Error from City Court of Richmond County; W. F. Ede, Judge.

Action by John Hunter against the Georgia Railroad. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. B. & Bryan Cumming, W. N. Miller, and J. M. Hull, Jr., for plaintiff in error. A. L. Franklin and T. F. Harrison, for defendant in error.

POWELL, J. The petition as amended alleged in substance that the plaintiff was employed as a yard switchman by the defendant company, and it was among his duties to couple cars, throw switches, and to do whatever else he was directed to do by the officers and agents of the company, in order that the business of the company might be expedited; that at about 6 o'clock on the morning of August 17, 1909, the crew with which the plaintiff was working was ordered to carry over a train of 35 cars to the yard of the Charleston & Western Carolina Railway Company, formerly known as the "Old Port Royal Yard," in which there were several tracks. It was alleged that this was a joint yard, used by the defendant and other companies. The train and the crew on which the plaintiff was working pulled in on track No. 1 in this yard, and on track No. 2 there was a train of the Charleston & Western Carolina Railway Company getting ready to go out, going south. The cars which the plaintiff's crew had brought were to be placed on this track No. 2, and these cars were stopped on track No. 1 until the Charleston & Western Carolina train moved out; and as the Charleston & Western Carolina train moved out, the plaintiff took hold of the grab iron on one of the cars on that train in order to go down to the switch which connected track No. 1 and track No. 2 for the purpose of throwing it, so as to let his train in with its cars. The space between track No. 1 and track No. 2 is about 2½ or 3 feet wide. It is the habit and custom of yard brakemen and switchmen in the employ of the defendant company to jump off and on moving trains and ride to the places where switches are to be thrown; and this was permitted by the different companies occupying the joint yard in question. Indeed, it is alleged that the defendant company, in order to facilitate the business of handling its trains, required its switchmen to jump on and off the moving cars, in order to couple

and uncouple cars more expeditiously at these places. As a result of a flood which had occurred about a year before, this switchyard had been considerably washed up, and piles of old scrap iron, clinkers, and rocks were left about in the yard, and between the tracks, and between tracks No. 1 and No. 2, near the place where the plaintiff attempted to catch hold of the grab iron in order to mount the moving car, on the occasion in question, was a pile of clinkers, scrap iron, and rocks about 15 inches high, and as the plaintiff caught the grab iron, he stumbled over this obstruction and was hurt. It is alleged that the morning was dark and foggy, and that the plaintiff did not know of these obstructions in this joint yard; that he had been in the yard only a few times before, and on these previous occasions was there only when it was nighttime, so that he had not seen or become acquainted with the dangerous condition in which this yard had been left; and that he had been given no warning of its condition.

The defendant excepts to the overruling of a general demurrer. We think that the petition, if it is true, sets forth a cause of action; and, of course, on general demurrer we take every allegation of fact as being true. It is not, as counsel for the plaintiff in error insist, a case where the employé of one company has gone to the yards of another company, and has there voluntarily, and for his own convenience, attempted to mount a moving train of another company, and has thus become injured. The plaintiff here alleges that the place where he was hurt was a joint yard of the defendant and of other companies, and that he had been expressly directed by his master to perform his work by jumping on a moving train when necessary to do so, and we cannot say that there was such an element of rashness in his attempt to board a train moving at a rate of five miles an hour (this is the rate of speed at which it was alleged that this train was moving) as to put the case within the rule which makes it negligence for an employé to obey orders requiring him to expose himself rashly to obvious peril. While the plaintiff may have some difficulty in proving his allegation that he did not know the condition of this yard, still he sets forth a fair excuse for his lack of knowledge; that is, that the morning in question was dark and foggy and that he had never been in the yard before, except on a few occasions at nighttime.

One important factor in the case is that the plaintiff waited until the morning of August 17, 1909, to get hurt. There may have been "method in his madness," for on the very day before (August 16, 1909) the act of the General Assembly, now embodied in Civil Code 1910, §§ 2782-2785, was approved and became law. Under that act, contributory negligence of the servant injured in railroad employ-

ment does not bar a recovery, unless his act amounted to a failure to exercise ordinary care. Under the law just mentioned, the doctrine of comparative negligence is made applicable to transactions of this nature, and the jury is allowed to diminish, instead of defeat, the plaintiff's recovery, where he has been guilty of some contributory negligence. Judgment affirmed.

(9 Ga. App. 438)

MOULDER v. STATE. (No. 3,872.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

WITNESSES (§ 274*)—CHARACTER OF ACCUSED—CROSS-EXAMINATION OF WITNESS.

Where character is put in issue, the direct examination must relate to general reputation, good or bad, as the case may be; but on cross-examination particular transactions, or statements of single individuals, may be brought in to the inquiry, in testing the extent and foundation of the witness' knowledge and the correctness of his testimony on direct examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 965, 966; Dec. Dig. § 274.*]

Error from City Court of Lumpkin; E. T. Hickey, Judge.

Luther Moulder was convicted of selling liquor, and brings error. Affirmed.

G. Y. Harrell, for plaintiff in error. T. T. James, Sol., for the State.

POWELL, J. The accused was convicted of the offense of selling liquor. He offered evidence of his general good character. Upon cross-examination of the witness by whom it was attempted to prove the general good character, state's counsel asked: "Do you know the reputation of Luther Moulder [the accused] for selling whisky?" The witness answered: "I cannot say that I do. It seems to me (and I am not positive, but it seems) I have a faint recollection of hearing somebody say—just who made the remark, I cannot now recall the name of such person, or who it was that said that Luther Moulder was illegally selling whisky. I am not positive that I heard anybody make the statement, and I will not swear positively that I did hear anybody made the remark that Luther Moulder was illegally—but it seems I have a faint recollection of hearing somebody say that the defendant had been selling whisky illegally." To this question, and to this most cautious, equivocal, and carefully guarded answer of the witness, counsel for the accused objected; but the court overruled his motion to exclude the testimony, and the exception to this ruling is the point which is presented to this court.

The state cannot put the general character of the defendant in a criminal case in issue; but the accused has the privilege of showing his good character as a relevant fact tending to make his guilt doubtful. Whenever the

defendant puts his good character in issue as a fact, the state has the privilege of disproving this fact, either by cross-examination of the witness by whom the accused attempts to make the proof, or by the introduction of other witnesses who testify that his general character is bad, or by both methods. On the direct examination of such witnesses as are offered to establish character, particular transactions or the opinions or statements of individuals cannot be brought in; but on cross-examination this privilege may be exercised, for the purpose of showing the extent and foundation of the witness' knowledge, or for the purpose of showing the incorrectness of his testimony on direct examination. This is the rule where impeachment of a witness on account of bad character is attempted (see Civil Code 1910, § 5882); and the same rule applies where the character of a party becomes otherwise relevant to the case. Say that the accused puts his character in issue. He, of course, produces the first witness. He will not be allowed on direct examination to ask the witness as to what he has heard particular persons say; but counsel in the examination, and the witness in his answers, will be confined to the general reputation of the accused—that is, his character generally, or, if some particular trait, such as peaceableness or violence, is involved, generally as to that trait. But, when state's counsel comes to the cross-examination, he may inquire of the witness as to whom he has heard speak of the accused, as to what these persons said, and then, for the purpose of showing the incorrectness of the witness' statement that this good character which he has ascribed to the accused is general, may inquire if he has not heard particular persons speak ill of him, or if he has not known him to be accused of particular crimes, or of particular acts which would tend to detract from a man's good character in the community. "The shadings, as well as the brighter hues, are to be considered in making up the estimate of character and reputation." *Ingram v. State*, 67 Ala. 67, quoted approvingly in *Ozburn v. State*, 87 Ga. 173, 181, 13 S. E. 247, 248. "A man's character is made of a number of small circumstances, of which his being suspected of misconduct is one." *Reg. v. Wood*, 5 Jurist, 225, cited approvingly in *Ozburn v. State*, supra. The defendant having rested, the state may introduce character witnesses in rebuttal. In that event the direct examination of state's counsel will be circumscribed, as was the direct examination of accused's counsel in the first instance; that is, he must ask the witness as to the general bad character of the accused, or as to his general bad character as to the particular trait involved. On cross-examination, counsel for the accused will be allowed the same latitude as the state's counsel in

the first instance; that is, he may ask the witness as to the particular persons whom he has heard speak ill of the accused, and may also ask him as to the personal views expressed by particular persons, so far as he knows them.

It is said in this case that, even though this may be the rule, it was not proper to ask the witness who had testified as to the general good character of the accused if he did not know that the accused had a reputation of having sold liquor illegally, because the illegal sale is not an act *malum per se*, and that even a man of good character may violate the law in this respect. It is pointed out that this court held in *Wheeler v. State*, 4 Ga. App. 325, 61 S. E. 409, that "proof that a witness had been convicted of the unlawful sale of intoxicating liquor affords no ground for impeachment of the witness." The proposition involved in the *Wheeler* Case and the proposition involved in the present case are not identical. The fact that a person has been accused or convicted of violating the prohibition law, or any other penal law of the state, does tend in a greater or less degree to detract from his general good character; and, consequently, a witness who has testified to the general good character of a person may be asked on cross-examination if he has not heard that that person has been accused, either generally or by particular persons, of having violated the penal law. But, since general good character, or general bad character, is not primarily to be shown by proof of specific acts, and since proof that a person had been accused or convicted of selling liquor illegally would be proof of a specific act, it is not permissible for the offerer of the testimony thus to introduce proof of the specific acts; and that, of course, is what the *Wheeler* Case holds. There are certain crimes, such as larceny, perjury, etc., as to which specific acts indicate such moral degeneracy as to make a conviction of one of these offenses relevant upon the question of the character of a witness, and, therefore, by a rule different from the one we are now discussing, and additional to it, the record of the conviction of a witness for one of these offenses may be proved to discredit his testimony.

The case of *Ozburn v. State*, supra, clearly establishes the right of state's counsel to go into specifics on the cross-examination of a witness who has testified as to the general good character of the accused. Counsel for the plaintiff in error relies upon the earlier case of *Pulliam v. Cantrell*, 77 Ga. 563, 8 S. E. 280; but an examination of that case will show that the testimony there, as to which the Supreme Court sustained the lower court, related to a question by which the cross-examiner attempted to have the witness to state, not merely that the person in question had been charged with crime,

but that he had been convicted of it, and the court merely held that conviction of crime can be shown only by the record. The *Ozburn* Case states the rule very much more clearly than does the case in 77 Ga. 563, 8 S. E. 280, supra, and there is nothing in the case last mentioned to detract from what is held in the *Ozburn* Case, which states the rule as it exists, not only in this state, but very generally throughout American and English jurisprudence. See, also, *Dotson v. State*, 136 Ga. —, 71 S. E. 164, decided by the Supreme Court on May 9, 1911.

Judgment affirmed.

(9 Ga. App. 344)

ATLANTIC COAST LINE R. CO. v.
LOCKLEAR. (No. 2,943.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1005*) — REVIEW — EVIDENCE.

There is nothing in the evidence in the record to take the case out of the established rule that the verdict of the jury, approved by the trial judge, is conclusive as to all issues of fact.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1005.*]

2. RAILROADS (§ 351*)—ACCIDENT AT CROSSING—LIABILITY OF RAILROAD COMPANY.

The following charge of the court was not erroneous: "So that, if it has been shown in this case that the plaintiff was injured by the running of the locomotives, cars, or other machinery of this company, then a presumption would be raised against the company. This presumption may be rebutted by the defendant by making it appear, either from its own or from the plaintiff's testimony, that the injury was done by plaintiff's consent, or was caused by his own negligence; and the plaintiff cannot recover if both parties were negligent, but the negligence of the plaintiff was equal to, or greater than, the defendant's, or if the injury was the result of accident, unmixed with negligence on the part of either party." It is not subject to exception on the ground that it authorizes the plaintiff to recover if the injury was the result of accident, brought about by the negligence of himself.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 351.*]

3. TRIAL (§ 286*)—INSTRUCTIONS.

The exception that the court charged the jury as to the duty of railway companies to erect blow posts at public road crossings is not well taken, as the only reference the court made to this duty was to tell the jury that it was not applicable to the present case, and this was favorable to the excepting party.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 286.*]

4. RAILROADS (§ 316*)—INJURIES AT STREET CROSSING—DUTIES OF ENGINEER.

The injury having occurred at a street crossing in a city, the following instruction to the jury was not erroneous: "If you should find from the evidence that the engineer, as he approached Anderson street crossing, did not check and keep checking the speed of his locomotive, so as to stop in time, should any person or thing be on the crossing, the defendant would be negligent as a matter of law." East

Tenn. Ry. Co. v. Markens, 88 Ga. 60 (4), 13 S. E. 855, 14 L. R. A. 281.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1006-1008; Dec. Dig. § 316.*]

5. TRIAL (§ 193*)—INSTRUCTIONS.

The following instruction was not erroneous: "When those in charge of a railway train neglect to comply with the statutory precautions in approaching a highway, and a person on the crossing is struck and injured, the only defenses open to the company are that the injury was done by the consent of the person injured, or that by the observance of ordinary care he could have avoided the injury, or, in mitigation of damages, that his negligence contributed to it. When such injury occurs, the onus is upon the company to prove such fault on the part of the injured person." The charge is certainly not subject to the exception that it expresses an opinion on the evidence, or intimates that those in charge of the railway train in question had neglected to comply with the statutory precautions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

6. COSTS (§ 260*)—AFFIRMANCE—DAMAGES FOR DELAY.

The motion of the defendant in error to assess damages for delay is denied. While there is no reason for the grant of a new trial, still the verdict is not so manifestly correct as to exclude a bona fide insistence on the part of the plaintiff in error that a new trial should be granted.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. § 260.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by A. Locklear against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

P. W. Meldrim and Shelby Myrick, for plaintiff in error. Osborne & Lawrence, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 315)

BAGWELL v. MILAM. (No. 2,854.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS OF FACT.

The evidence supports the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. TRIAL (§§ 256, 296*)—MASTER AND SERVANT (§ 44*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE—REQUESTS FOR INSTRUCTIONS—"PRESUMES"—"INCOMPETENT."

The exceptions to excerpts from the charge of the court, considered in connection with the entire charge, are without substantial merit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641, 705-713; Dec. Dig. §§ 256, 296.* Master and Servant, Dec. Dig. § 44.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3507-3510; vol. 6, p. 5534.]

3. NEW TRIAL (§ 130*)—GROUNDS—SCOPE.

An exception that the verdict is contrary to designated instructions is simply equivalent

to the general ground that the verdict is contrary to law; and an assignment that the court erred in overruling a motion to award a nonsuit is covered by the general ground that the verdict is without evidence to support it.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 130.*]

4. FRAUDS, STATUTE OF (§ 129*)—OPERATION AND EFFECT—PART PERFORMANCE.

While a verbal agreement that is not to be performed within one year is not binding upon the promisor under the statute of frauds, yet whenever the promisee performs some act essential to the contract, which results in loss to him and in benefit to the promisor, such part performance takes the contract out of the operation of the statute. There was such part performance in this case. Besides, the jury were authorized to believe, under the evidence of the plaintiff, that the contract was to be performed within the year.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 288; Dec. Dig. § 129.*]

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by J. K. Milam against J. O. Bagwell. From a judgment for plaintiff, defendant brings error. Affirmed.

Milam sued Bagwell to recover damages for breach of a contract of employment. In his petition he alleged that on October 11, 1907, the defendant made a parol contract with him for a period of 12 months to teach telegraphy in the defendant's school, in the city of Atlanta, at a stipulated salary of \$60 a month and 10 per cent. of the gross receipts derived from the teaching of telegraphy, and on that day he began his work at the school, and that Bagwell wrongfully discharged him on the 1st day of February, 1908. The suit was for the remainder of his salary under the contract, from February 1 until October 11, 1908. Bagwell filed several defenses. First, he denied that the contract was for one year, and alleged that it was indeterminate and could be terminated at will; second, he alleged that Milam was wholly incompetent, that he neglected his duties as a teacher, that he took no interest in his work as teacher and was slow and lazy, that under his contract he was to go out and solicit students for the school of telegraphy, but this he never did, and under him the school ran down generally in the number of students and the grade of work, on account of his inefficiency and incompetency, and that for these reasons the defendant had a right to discharge him. By an amendment the defendant pleaded the statute of frauds, it being averred that, if the verbal contract relied on as the basis of the suit was for a period of 12 months (which he denied), it was not to be performed within 12 months from the making thereof, and was not binding, because not in writing. On the trial the jury found a verdict for the plaintiff for the balance of his salary claimed to be due under the contract. The

defendant's motion for a new trial was overruled.

Mark Bolding, for plaintiff in error. Edgar Latham and Colquitt & Conyers, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] 1. The evidence fully supported the allegations made by the plaintiff, although in sharp conflict, and unless some material error of law, prejudicial to the defendant, was committed in the trial of the case, the verdict must stand.

[2] 2. The amended motion for a new trial complains of the following extract from the charge of the court: "If you believe, from the evidence in the case, that Bagwell and Milam entered into a contract on the 11th day of October, 1907, whereby Milam was to teach in the school of Bagwell's Business College in the department of telegraphy, and that the contract was that Bagwell was to give Milam \$60 a month and 10 per cent. of the gross receipts, and entered into that contract for 12 months, dated from the 11th day of October, then the court charges you that Milam was entitled to his wages for 12 months; and if Bagwell turned him off and released him before his 12 months were out, then he had no right to release him, and Milam could sue for and recover the balance per month of what he was entitled to for the 12 months." This excerpt is objected to on the ground that it does not state the true rule of law, and omits the qualification that the discharge and turning off of the plaintiff by the defendant must have been wrongful or unlawful, and in violation of the contract, before he would be entitled to recover in the case, and that this error is not cured in any other portion of the charge.

We think the judge was here stating simply what was necessary to be shown to make out a prima facie case by the plaintiff, so as to put the burden upon the defendant to show that it was not a wrongful discharge. The court did not intend to deprive the defendant of his right to justify the discharge of the plaintiff by establishing his plea that he did so because of the plaintiff's incompetency and unfitness as therein alleged, and the jury could not have so understood, because the whole question of fitness or unfitness was gone into by the evidence fully, and was one of the principal issues to be determined, and the court not only instructed the jury that they would have the pleadings out with them, which would contain the issues in the case, but, as stated, the defense of incompetency was distinctly relied upon as a justification of the discharge of the plaintiff. Besides, the court called the specific attention of the jury to this defense in the following language: "Furthermore, the defendant filed his plea that the plaintiff was incompetent when he hired him for a teacher of telegraphy, and that he was not competent to teach. The law presumes, when a

man hires to do a certain thing, that he is competent to do it, and, if he is not competent to do it, the person who hires him has a right to displace him. Whether there was such incompetency here, you look to the evidence and see, and you pass upon the evidence upon that plea." It is therefore seen that the court did distinctly submit to the jury this issue of competency as made by the defendant's plea and evidence; and, on the assumption that the jurors were men of ordinary intelligence, it is extremely improbable that they could have been misled by the extract from the charge in forming the conclusion that the plaintiff was entitled to recover, although the evidence in support of the plea showed that he was unfit and incompetent as therein alleged.

Error is assigned on the following excerpt from the charge: "The law presumes, when a man hires to do a certain thing, that he is competent to do it; and, if he is not competent to do it, the person who hires him has a right to displace him." This charge is objected to, first, because there is no such presumption of law as that stated; and, second, because the person hired might be lawfully discharged for other reasons than mere incompetency. The use of the phrase "the law presumes" is probably inapt; but it is clear, from the context of the charge, that the judge did not mean to instruct the jury that this was such a legal presumption as could not be rebutted by proof. On the contrary, it is plain, from the context, that the judge used the word "presumption" in its ordinary and general acceptation, and that the jury could not have been misled by it. When a man is employed as being competent to do certain work, until the contrary appears the fair presumption or inference is that he is so; but the inference is entirely rebuttable, and, if rebutted, and it is shown that he is not in fact competent to do the work he held himself out as competent to do and was employed to do, such incompetency would be a sufficient ground for a discharge. In this case the evidence shows that the plaintiff held himself out as a competent telegrapher, that he had been a teacher for many years, and that he was not only a teacher, but a practical telegrapher. Certainly this was sufficient to give rise to a presumption that he was competent as an instructor of telegraphy, and to do the work for which he was employed by the defendant, and was sufficient to cast upon the defendant the burden of showing that he was not competent. In the absence of any request for a more elaborate definition of the meaning of the word "incompetent," the instructions on this subject were sufficient. The word "incompetent," in this connection, should be given a very broad definition, and, in view of the evidence, the jury could only have construed it as applicable to and fully illustrating all the different sorts of incompetency and unfitness alleged by the defendant

against the plaintiff. The defendant claimed that the plaintiff had no knowledge or skill in teaching, had no enthusiasm or energy, took no interest in his work, and was slow and lazy, and did not solicit students for the school, and that the school ran down greatly while he was in charge of it. All of these special complaints are appropriately described by the general word "Incompetent," and it was not necessary for the court to charge more specifically on this subject, unless requested in writing to be more specific. The jury certainly understood that proof of any of these special allegations of unfitness would support the charge made of incompetency.

[3] 3. The seventh ground in the amended motion for a new trial, that the verdict was contrary to the charge of the court on the subject of the statute of frauds, need not be specially considered, as it is fully covered by the general grounds of the motion. And the ninth ground of the amended motion, that the court erred in refusing to grant a nonsuit, will not be considered, because this is also embraced in the general grounds, and is not a proper ground of a motion for new trial.

[4] 4. The principal defense relied upon is that the contract was void under the statute of frauds. It is insisted that the evidence clearly showed that the contract was not to be performed within 12 months from the making thereof, and that, as it was not in writing, it was not binding on the defendant. The evidence is in conflict on this question, for the plaintiff testified that the contract was made on October 11, 1907, and was to run for a year from that date, and the inference is deducible from this evidence that all the preceding negotiations between the parties prior to that date were merely preliminary to the closing of the contract; that the promise to employ had been agreed upon, but the contract itself was not actually made until that date, and, indeed, it was uncertain that the contract would be made even at that date. If this is true, and the jury had the right to accept it as the truth, this would make the statute of frauds not applicable to the contract; and, even if this was not true, the undisputed facts, we think, show such part performance as would take the contract out of the statute of frauds. This court, in *Bentley v. Smith*, 3 Ga. App. 242, 59 S. E. 720, has stated the test laid down by the decisions of the Supreme Court therein cited for determining what part performance of a verbal contract would take it out of the statute of frauds. That rule or test is that the contract will be taken out of the operation of the statute of frauds whenever one party to the contract performs some act essential to the contract that results in loss or injury to him and in benefit to the other party. Let us apply the undisputed facts of this case to this rule.

Milam was employed by the Louisville & Nashville Railroad Company, in the county of Bartow, as a telegraph operator, and had a steady job as such, when he was first approached by the defendant with the proposition to employ him as a teacher of telegraphy in his school at Atlanta. In order that he might accept the proposed contract with the defendant, it was necessary that he resign his position with the railroad company, and it was suggested to him by the defendant that he send in his resignation. This he did. In other words, he gave up a permanent position in order that he might accept the contract proposed by the defendant. Certainly the doing of this act was essential to his accepting the contract proposed by Bagwell, and the giving up of the position resulted in loss to him and in consequent benefit to Bagwell. Therefore, if, as contended by the defendant, the contract was actually made prior to October 11, 1907, when the defendant first went to see the plaintiff on the subject, it also appears that there was such part performance of the contract on the part of the plaintiff as would take it out of the operation of the statute of frauds. It would be a great wrong on the plaintiff, if, after having induced him to surrender a position which he held, to accept the other, the defendant were permitted to claim that such surrender was not essential to his acceptance of the latter position. The facts of this case are not analogous to the facts of the *Bentley Case*, supra. In that case this court held that there was no such part performance of the verbal contract as to take it out of the statute of frauds, because all that Bentley did was to move his family to Washington, Ga., where the contract was to be performed; and Judge Russell states in the opinion that the plaintiff did not testify that it was essential to the contract in any way that his family should be moved to Washington. The expense of moving was the part performance of the contract relied upon in the *Bentley Case* to take it out of the statute of frauds, but it could not be said that the incurring of this expense was an act which was essential to the contract.

On the question of the statute of frauds we conclude, therefore, first, that the jury were authorized to accept the testimony of the plaintiff that his contract began October 11, 1907, and was to be performed within a year thereafter, that he had made no complete contract prior to that time, and that everything that had been done was preliminary to the making of the final contract on that date; and, secondly, that, even if the contract was made prior to that time, the resignation by the plaintiff of his position with the railroad company was essential to the making of the contract with Bagwell, was a loss to him and a benefit to Bagwell, which was within the contemplation of both

Bagwell and himself, and amounted to such part performance of the contract as took it clearly out of the statute of frauds.

Judgment affirmed.

(9 Ga. App. 333)

JONES v. NORTON et al. (No. 2,910.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 175*)—VALIDITY OF CONTRACT—SECURITY TO INDORSER.

The maker of a series of negotiable notes executed a mortgage to his indorser or surety on the notes to protect him against loss on the contract, and stipulated in the mortgage that, on a failure to pay any one of the notes when due, the indorser or surety should have the right to declare the other notes due and proceed to foreclose the mortgage to protect himself as such indorsee or surety. The maker of the notes defaulted in the payment of several of them, whereupon the indorser or surety paid the unpaid notes to the original payee and became the holder thereof, and, under the stipulation of the mortgage, declared them to be due, and proceeded to collect them by suit. *Held*, the mortgage was a valid contract and the stipulation referred to was enforceable by the surety or indorser, either while the notes were still held by the payee, or after the surety or indorser had become the lawful transferee of the notes.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 505-509; Dec. Dig. § 175.*]

2. USURY (§ 55*)—ELEMENTS—COMMISSIONS OR PREMIUMS.

A premium or commission paid by the principal maker of a promissory note to the indorser or surety to protect the latter in the risk assumed and to compensate him for his services in procuring a loan for which the note is given, in which premium or commission the lender has no interest, is in no sense usury.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 119-121, 169-174; Dec. Dig. § 55.*]

3. BILLS AND NOTES (§ 443*)—ACTION—PARTIES—RIGHT OF INDORSER TO SUE.

An indorser has the right to purchase a negotiable note from the payee; and, when the note is due by its terms or becomes due by a contract between the maker and the endorser, the latter can sue the former on the note. In such case the suit is based, not upon the obligation of the maker to reimburse his indorser for money paid out for his benefit, but upon the obligation to pay his negotiable note to whomsoever may be the lawful holder thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1377-1423; Dec. Dig. § 443.*]

4. APPEAL AND ERROR (§ 1078*)—REVIEW—WAIVER OF ERROR IN APPELLATE COURT.

Questions raised by assignments of error not referred to in the argument or brief for the plaintiff in error will not be decided.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

5. STRIKING OUT PLEA—DIRECTION OF VERDICT.

The pleas were properly stricken, and the evidence demanded the verdict as directed.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by J. V. Norton and others against N. N. Jones. Judgment for plaintiffs, and defendant brings error. Affirmed.

This is a suit on promissory notes to recover the principal, interest, and stipulated attorney's fees. The petition contains three counts. The first count alleges, in substance, that on August 6, 1909, the defendant, Jones, made and delivered to the Citizens' & Southern Bank 11 notes for \$200 each, due, respectively, from 7 to 17 months after date, and one note for \$100, due 18 months after date; that all of these notes were indorsed and transferred by the bank to the plaintiffs for value, without notice of any defect; that the notes due 7, 8, and 9 months after date were transferred to them after maturity, and the others before maturity; that the maker had defaulted in the payment of the notes due 7, 8, 9, and 10 months after date, and they were still unpaid; that to secure the payment of these notes to the bank, and the payment of other notes made directly to the plaintiffs by the defendant, he made a mortgage (a copy of which was set out, and which was referred to solely for the purpose of showing the maturity of the notes sued on, and was not sued on as a mortgage), in which he covenanted that, if default should be made in the payment of any one or all of said notes when due, it should be lawful for the parties of the second part (the plaintiffs) to declare the whole remaining indebtedness to be due and payable at once; that on June 9, 1910, the plaintiffs personally served the defendant with notice, in the terms of the mortgage, declaring all of the said notes due because of default in the payment of the past-due notes, and stating their intention to bring suit thereon to the July term, 1910, of the city court of Savannah. The second count alleged that the defendant was indebted to the plaintiffs in the sum of \$550 principal, besides interest and attorney's fees on 11 notes for \$50 each, payable to the plaintiffs, dated August 6, 1909, and due, respectively, from 7 to 17 months after date, and that the defendant had defaulted in the payment of the notes due from March 6 to June 6, 1910. These allegations were followed by allegations similar to those set out in the first count, as to the mortgage, etc. The third count was based on a separate transaction, being for \$100 principal and for interest and attorney's fees on a note, and prayer for the enforcement of the lien given to secure the payment of the note.

The defendant demurred to the first count of the petition, contending that the relation between the plaintiffs and himself was that of principal and surety, and that, upon payment of the notes by the sureties, the notes were discharged, and the action should have been in assumpsit, and not on the notes; and that if the sureties did not pay the notes, but had merely had them transferred, there was no right of action in them, and their suit was premature. The demurrer was overruled, and this is assigned as error.

The answer admitted the execution of the

notes and the mortgage, the default in payment of the past-due notes, and service of notice in regard to attorney's fees, but denied indebtedness for the principal sums, as well as for attorney's fees. It stated that for want of sufficient information the defendant neither admitted nor denied the transfer of the notes as alleged, or the declaration of the maturity of the remaining notes on account of the default. The answer further alleged that the defendant borrowed from the Citizens' & Southern Bank the sum of \$3,500, payable in monthly installments of \$200, for which he gave his notes, and that the plaintiffs became sureties on the notes and not indorsers; that he gave also his notes for the aggregate sum of \$900, payable monthly to the order of the plaintiffs, and executed a mortgage to indemnify them against loss by reason of their suretyship, and that he paid all the notes, both those to the bank and those to the plaintiffs, up to and including February 6, 1910; that on February 18, 1910, the plaintiffs, without just cause or reason, and before any legal default had been made or the liability of the sureties fixed and determined, attempted to foreclose the indemnity mortgage, and that, if he had made default in payment of any of the notes, it was caused without fault on his part, and without his consent, but was due to the illegal and wrongful attempt to foreclose this mortgage whereby the sheriff of Chatham county had taken charge of his business and caused his default in performing his contract. The answer alleges that the only notes past due are "for March, April, May, and June, aggregating \$800," that the rest of the notes have not matured, and that the plaintiffs are sureties on the notes, and cannot charge the defendant for moneys that they have not been called upon to pay, and for which their liability in law has not become fixed and determined by judgment or otherwise. It is further alleged by the defendant that the contract and notes sued on and set out in the first and second counts of the petition are tainted with usury; that he has paid \$300 in excess of the legal rate of interest on these notes for the amount of money loaned him by the bank up to February 6, 1910; that the \$550 sued for in the second count is for money promised and contracted to be paid for the use of money in excess of legal interest, and is usurious; that, as the sums of money sued for in the first and second counts are not due, the plaintiffs were not entitled to attorney's fees, and that the \$100 sued for in the third count is infected with usury.

The answer was demurred to both generally and specially. The court sustained the demurrer to the answer as to the first and second counts of the petition, and overruled it as to the third count, and thereupon the defendant amended by setting up the transactions more in detail, but in substance repeating the answer as originally filed. On

demurrer, both general and special, the amended answer was also stricken; and this is assigned as error. A second amendment to the answer set up that the notes transferred to the plaintiffs before maturity were not due, and that the plaintiffs as sureties, being subrogated to the rights of the creditor, the Citizens' & Southern Bank, which was without power or authority to demand payment of the same before maturity, they could not declare the same due and demand payment thereon before maturity; that the relations between the plaintiffs and the defendant being that of principal and surety, and the sum sued for not yet due, said sum could not now be demanded by either the creditor or the surety, as the transfer of the notes was without the consent of the defendant, and the sureties could not recover thereon before legally called on to pay the sum; that, even if the transfer of the notes was valid, the plaintiffs were under no legal obligation to make payment until after maturity of the notes, and therefore could not recover for any of the notes not matured. This second amendment was demurred to generally, and also on the ground that the mortgage covenanted that the plaintiffs had a right to declare all the notes due in case of default as to any one of them, and that the facts presented by the answer contained an attack on the title of the plaintiffs which was not necessary to let in the defense claimed. The amendment was stricken, and this is assigned as error.

The plaintiffs by amendment struck the third count of their petition. Exception is taken to the allowance of the amendment. The pleadings are voluminous, but it is not necessary to set them forth more in detail; the foregoing statement being sufficient to present the substantial questions raised, and counsel for the plaintiff in error in their argument and brief not insisting before this court on any questions raised by the pleadings except those which involve the substantial merits of the case. On the trial the plaintiffs submitted the following evidence: The notes sued on in the first and second counts; all the notes made to the Citizens' & Southern Bank and indorsed by it, the mortgage executed by the defendant to the plaintiffs to secure them against loss on their indorsement; the notice given by the plaintiffs to the defendant, declaring default as to all the notes on failure to pay those due, stating their intention to bring the suit and claim attorney's fees. The defendant moved for a nonsuit, on the ground that the notes and the mortgage sued on showed the plaintiffs to be sureties, and that they were suing for debts not matured, and that the suit was on notes, and not for money paid. The court overruled the motion, and the defendant accepted to this ruling. The defendant offered no evidence. The court directed a verdict for the full amount of the suit, and the defendant excepted.

R. L. Colding and Jas. F. Evans, for plaintiff in error. Wm. M. Farr and Edward S. Elliott, for defendants in error.

HILL, C. J. (after stating the facts as above). [1] 1. Were all the notes sued on legally due when suit was brought? This question depends upon the right of plaintiffs to declare all the notes to be due on default in the payment of any one of them. The mortgage executed by Jones to the Nortons to secure them in their indorsement of his notes to the bank contained a covenant that if default was made in the payment of any of the notes made to the bank, and which were therein described, the Nortons would, at their option, have the right to declare the whole remaining indebtedness due and payable at once. In other words, only two things were necessary to mature all the notes, viz., a default in the payment of any one, and a declaration by the Nortons that the default matured all the notes. The default being admitted and this declaration duly proved, the question arises as to the validity of this provision of the mortgage. The provision is as follows: "And it is hereby covenanted and agreed, in further consideration of the premises, that if default should be made in the payment of any one or all of said notes, or any renewals thereof, or any interest thereon, in whole or in part, as and when the same may become due and payable, * * * it shall and may be lawful for the parties of the second part [the Nortons], their heirs or assigns, at their option, to declare the whole remaining indebtedness then unpaid to be due and payable at once." It is further provided that "in case of default in the payment of said debt, or any part thereof, * * * the parties of the second part shall have the right either to sell said property [described in the mortgage], or they may take such other legal proceedings hereunder as they may deem necessary and proper in the premises." To provide against any loss which might grow out of their suretyship or indorsement on the notes made by the defendant, Jones, the plaintiffs took the mortgage with the covenant in question. It cannot be doubted that such a provision in a mortgage is valid. The provision is one of general usage, and has been repeatedly held to be valid. In *Shellman v. Scott*, R. M. Charl. 380, a provision similar in its terms was first held in this state to be valid. In that case the covenant in the mortgage was in the following language: "And if default shall be made in the payment of the principal sum aforesaid, or in the payment of interest at any time when the same shall become due, then, in any such case, upon any such default, it shall and may be lawful for the said Benjamin S. Scott [mortgagee], his heirs," etc., "to grant, sell," etc. Similar stipulations providing for the acceleration of the maturity of unpaid notes on the failure to pay any one that is due, were passed upon

by the Supreme Court in *Kilcrease v. Johnson*, 85 Ga. 600 (3), 11 S. E. 870; *Smith v. Champion*, 102 Ga. 92 (3), 29 S. E. 160; *Stocking v. Moury*, 128 Ga. 414, 57 S. E. 704; *Harris v. Powers*, 129 Ga. 76, 58 S. E. 1038. In the case of *Sneed v. Wiggins*, 3 Ga. 94, the contract was one to pay money in which it was expressly stipulated that the money should be paid by installments at specified times, and if one installment was not promptly paid, the whole sum should thereupon become due and payable. It was held that time was of the essence of the contract, and, if the party agreeing to pay failed to do so, he was not entitled to relief in equity. But the validity of such a provision is not an open question either in this state or elsewhere. 20 Amer. & Eng. Enc. of Law (2d Ed.) 932; 27 Cyc. 1101. Certainly the plaintiffs, as the holders of the notes, had the right to sue on them. The defendant borrowed \$3,500 from the bank, and gave his promissory notes therefor, each one of which was indorsed by the plaintiffs. In consideration of their indorsement, the plaintiffs required Jones to give his notes to them for \$50 each, due in from 1 to 18 months; and, in order to protect them from any loss from the indorsements on the notes, they further required the defendant to give them the mortgage in question. This mortgage secured them in two things—against loss on account of their indorsements on the notes to the bank, and also in the payment of the \$900 which they required of him for their risk as sureties. Either their liability on the notes as sureties or their indorsements constituted a good and valid consideration for the execution of the mortgage. The notes were negotiable. They were all indorsed in blank by the bank. The plaintiffs, as the holders of the notes, had the right to sue in their own names certainly on those notes which were past due at the time of the transfer, and it cannot be denied that the action is valid as to the four \$200 notes, or \$800 in all, which were past due when the transfer was made; and we do not understand that any defense was made as to these. It is true the defendant in his plea says that he does not believe that the transfer was for value, or that the plaintiffs had paid for the notes, and he demands strict proof of title. But, in the absence of proof to the contrary, the law presumes that the holder of a promissory negotiable note acquired the same before maturity and for value, and is a bona fide holder thereof, and his title cannot be inquired into, unless it is necessary for the protection of the defendant, or to let in some defense which he could not otherwise make. Civ. Code 1910, § 4290.

The plaintiffs, then, being the bona fide holders of the notes made to the bank, as transferees, and as such entitled to sue thereon, and being the holders of the mortgage based upon a valid consideration, it cannot be seriously questioned that they were entitled to the benefit of the stipula-

tion contained in the mortgage, and which is shown to be a perfectly valid stipulation, that, in case of default as to one note, they had the right at their option to declare all the remaining notes due. But, even without any legal authority in support of this right, the contract itself expressly gave the plaintiffs the right, on default in the payment of one note, to declare all the others due, and, as this stipulation or covenant does not contravene any public policy or general principle of law, it is valid and binding. It is not denied that such a stipulation would be valid when made to the payee of notes, or by the holder of a mortgage made to secure notes. The question is whether such a provision is valid when made to protect a surety. Under section 3568 of the Civil Code of 1910, any surety who has paid the debt of his principal is entitled to be substituted in the place of his creditor as to all securities held by him for the payment of the debt. If, therefore, the bank had held a mortgage providing that, in case of default of one note, all the notes would become due, the transfer of the notes by the bank would carry with it to the transferee the right which the bank had as to this stipulation, for the transfer of a note secured by a mortgage carries with it the mortgage lien. *National Bank v. Exchange Bank*, 110 Ga. 692, 36 S. E. 265. Since, therefore, a valid transfer of promissory notes carries with it any covenant or stipulation which provides that the default in the payment of one note will give an election to declare all the notes due, we do not see why it is not competent and legal to make a direct covenant to this effect, for a valuable consideration with the indorser or surety on the note. "The right of the surety in these respects will be controlled by the terms of agreement between the parties, as where it is stipulated that the surety may enforce his security upon default of the principal or the contract is otherwise of such a nature as to give the surety the right to enforce his security before payment." 32 Cyc. 248. We conclude on this question that the mortgage made to the plaintiffs as indorsers of the promissory notes made by the maker which contained the stipulation that all the notes at the option of the holder of the mortgage could be declared to be due on failure to pay any one of them, and which was to protect them against the risk which they had assumed, was a valid contract and enforceable by them, and especially is this true in view of the fact that they had become the actual holders of the notes by purchase from the bank before the declaration as to the payment of all the notes was made and before the suit was brought.

[2] 2. It is insisted that the court erred in striking the plea of usury. It is not claimed that there was any usury in the notes made to the bank, but it is said that the notes made to the sureties for the bonus of \$900

were usurious; it being insisted that these sureties were practically the lenders of the money to the defendant, as the bank advanced the money to him on their indorsement, and as they had taken an indemnity mortgage, not only for the sum advanced by the bank, but also to secure the payment of their bonus of \$900, and that in this suit they were seeking to recover not only the principal sum borrowed, together with the highest rate of interest allowable, but also the further sum of \$550, with interest thereon, for the use of the principal sum, which was usury; at least, it is said this was a question for the jury, and the court should have submitted to the jury the question as to what was the real truth of the transaction, and, if the jury found from the evidence that it was resorted to to evade the usury laws, the contract would be void, at least to the extent of the usury; but that, if the jury found that it was a bona fide sale of credit to enable the maker of the notes to borrow money from another, it was not usurious. The allegations as to usury did not leave this question issuable. It is admitted that the money was borrowed from the bank, and that the defendant made his notes to the bank for the money, and that these notes provided for only the legal rate of interest. The bank was unwilling to lend the money without an indorser; and, to procure the indorsement of the plaintiffs, the defendant agreed to pay them the \$900, as well as to indemnify them against loss on account of their indorsement. It is clear that the \$900 was paid as a premium, not to the bank, but to the plaintiffs as indorsers of the notes made by the defendant to the bank; not alone for securing a loan from the bank, though this fact would not taint the transaction with usury, but for their indorsement of the notes. The transaction was perfectly valid, and not tainted with usury. "Where the lender neither takes, nor contracts to take, more than legal interest, the loan is not rendered usurious by money paid, or agreed to be paid, by the borrower to others in order to obtain the loan." Civ. Code 1910, § 3437. Therefore, even if the facts showed that the \$900 was contracted to be paid to the plaintiffs by the defendant as the borrower in order to obtain the loan, this would not make it usurious. But the evidence shows that the plaintiffs not only assisted the defendant in obtaining the loan, but made it possible for him to obtain it, in agreeing to become indorsers thereon. It is well settled in this state that, where the lender of money neither takes nor contracts to take anything beyond lawful interest, the loan is not rendered usurious by what the borrower does in procuring the loan and using its proceeds. *Merck v. American Freehold Co.*, 79 Ga. 213, 7 S. E. 265; *Hughes v. Griswold*, 82 Ga. 299, 9 S. E. 1092. In this case it is not claimed that the Citizens' & South-

ern Bank ever took or contracted to take anything for the loan beyond the legal interest, and the fact that the borrower gave his notes for \$900 to the plaintiffs as compensation for the risk undertaken by them in their indorsement and for their services in procuring the loan did not make the loan by the bank usurious, and it was a perfectly legal contract for the defendant to make. *Blount v. Bowne*, 82 Ga. 346, 9 S. E. 164. Indeed, the answer nowhere avers that the bank had any knowledge whatever of this contract which was made by Jones with the Nortons.

[3] 3. The next point urged by counsel for the plaintiff in error is that the suit was prematurely brought for the reason that the notes had not matured; that the transfer of the notes by the creditor to the sureties was entirely voluntary; that the sureties had no right to proceed until a judgment had been obtained against them and their liability as sureties had been fixed and determined in law by judgment or otherwise. In support of this contention, counsel cites section 3555 of the Civil Code of 1910, which is in the following language: "If the principal executes any mortgage or gives other security to the surety or indorser to indemnify him against loss by reason of his suretyship, the surety or indorser may proceed to foreclose such mortgage, or enforce such other lien or security, as soon as judgment shall be rendered against him on his contract." In so far as this section of the Code is applicable at all to the facts of this case, it simply provides a remedy for the indorser or surety in the absence of any stipulations in the contract between the principal and the surety on the subject. This section recognizes the right of the principal to give to his surety or indorser a mortgage or other security to secure and protect him on his indorsement or suretyship, and, if it is legal for such a mortgage to be given, it can be provided in the mortgage that it can be foreclosed or enforced in such way as the parties may stipulate, without reference to the statutory right referred to. In other words, in such a contract, it would be perfectly competent for the parties to stipulate in the mortgage that, on failure to pay one of the installments, all the balance of the debt would become due, and the holder of the mortgage would have a right to proceed to collect the whole debt. But, aside from all this, we do not see why it was not perfectly legitimate for the sureties on these notes made to the bank by Jones, who were apparently to be called on to pay them because of the default of the maker could not have bought the notes from the bank, and, after having bought them and becoming the holders thereof for a valuable consideration, have exercised the right given under the mortgage to declare that all the notes were due because of the default in the

payment of the four which had matured before the transfer, and brought suit at once, for in this event no judgment could be obtained against the sureties as they had ceased to be sureties and were the holders of the notes, and were subrogated to all the original rights of the payee as against the maker. Of course, the notes for \$550 which were given to the plaintiffs as a bonus for their services and as a compensation for their risk in becoming sureties for the defendant by the same stipulations in the mortgage were all due, and the plaintiffs, being the holders of all the notes made by the same maker, could bring suit thereon in the same action against him. In other words, the suit in this case was not one by a surety against his principal, based upon the fact that he as surety had been called upon to pay the debt of his principal, but it was simply a case where the surety had become the holder by purchase of the negotiable instrument on which he was a surety, and, as such holder of the note, was claiming that the maker should pay him, not because he had paid the note or was liable thereon as surety, but because he stood in the place of the original payee, and for that reason was entitled to payment. The whole contention, it seems to us, as to when a surety would have a right to bring a suit against his principal, is not germane to the facts set out by the pleadings, which are not in dispute.

[4] The foregoing constitute the only questions which are insisted upon by plaintiff in error before this court and which are embraced in his brief, many other questions raised by the record having been abandoned.

[5] The evidence for the plaintiffs, which was not controverted by the defendant, demanded the verdict which was directed by the court.

Judgment affirmed.

(9 Ga. App. 371.)

WRIGHTSVILLE & T. R. CO. v.
VAUGHAN. (No. 3,109.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. PLEADING (§§ 46, 193*)—PETITION—DESCRIPTION OF PLAINTIFF—MARRIAGE—"MRS."

Where the plaintiff in a case is a female, and the question whether she is married or single is material to her right to recover, the petition should disclose the fact whether she is married or single. This is a formal defect, but it may be reached by special demurrer.

(a) The prefix "Mrs." before the name of a party, indicates that the party is a female, but leaves it doubtful whether she is married or single (using the word "single" in a sense broad enough to include a divorced person).

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 101, 428; Dec. Dig. §§ 46, 193.*

For other definitions, see Words and Phrases, vol. 5, p. 4615.]

2. PLEADING (§§ 207, 225*)—DEMURRER—SPECIAL DEMURRER—AMENDMENT.

The office of a special demurrer to a plaintiff's petition in this state, is to compel the plaintiff to set forth his charge or ground of complaint plainly, fully, and distinctly, where he has failed to do so. A petitioner cannot be required by special demurrer to set forth the evidence by which he expects to prove the allegations made in his petition; but by this means he can be compelled to give a plain, distinct, and definite statement of issuable and traversable facts, instead of general allegations of liability, or instead of vague, uncertain, or ambiguous recitals. The plaintiff, to meet a special demurrer, may amend as a matter of course, or may by order of court be compelled to amend, upon pain of a dismissal for failure to do so.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 512, 575-582; Dec. Dig. §§ 207, 225.*]

3. HUSBAND AND WIFE (§§ 209, 229*)—ACTION—RIGHT OF ACTION—PLEADING.

Ordinarily the earnings of a married woman are not a part of her separate estate, but belong to her husband. Hence, where she has received a tortious personal injury, permanently impairing or destroying her earning capacity, her husband, and not she, has the right to sue for the loss, so far as relates to the period of their joint lives. This is the ordinary rule, but there are exceptions, as where the husband has, expressly or impliedly, consented for the wife to have her own earnings, or where the wife is living separate from her husband.

(a) Where a married woman sues for personal injuries, and claims the right to recover for earnings or for loss of earning capacity, the defendant may, by special demurrer, compel her to allege in what right she claims the privilege of recovering them, whether by reason of her husband's consent, or by reason of the fact that she was living in a state of separation.

(b) The rule above announced is not in conflict with the recognized rule that the jury, in estimating the damages which a married woman has suffered as a result of a personal injury, may take into consideration, on the question of the degree of her pain and suffering, the fact that her earning capacity has been impaired.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 766-773; Dec. Dig. §§ 209, 229.*]

4. HUSBAND AND WIFE (§ 229*)—ACTION—RIGHT OF ACTION—NECESSARIES.

Primarily the husband, and not the wife, is responsible for necessities, such as medicine and medical treatment furnished to the wife where she has sustained a personal injury; and if the married woman seeks to hold the wrongdoer through whose act the personal injury was inflicted responsible for such expenses, so incurred as a result of the personal injury, she should allege the facts essential to show an exception to this general rule, and by special demurrer may be compelled to do so.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 229.*]

5. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR.

Where a special demurrer is well taken, and the court overrules it, the error is *prima facie* harmful, but not necessarily so. If the reviewing court can with reasonable certainty say that no harm or injury has resulted to the complaining party, a new trial will not be granted, notwithstanding an error of this nature may appear in the record; but in the present case this court cannot say that the

error in overruling the special demurrers was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

6. HUSBAND AND WIFE (§ 210*)—ACTION—RIGHT OF ACTION—LOSS OF EARNING CAPACITY—"CHOSE IN ACTION."

Where a woman suffers a tortious personal injury, impairing or destroying her earning capacity, the cause of action arising therefrom becomes a "chose in action," within the meaning of Civil Code 1910, § 2993, and a part of her separate estate, notwithstanding her subsequent marriage, though the damages which under the law she would have been entitled to recover as a result of the tort may include compensation for loss of earning capacity, which the after-acquired husband would have been entitled to enjoy if it had not been previously destroyed by the tort. Hence in such a case it affords no defense to the action, based upon the loss of earning capacity, to show that she married between the date of the injury and the date of the trial.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 774-783; Dec. Dig. § 210.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1145-1148; vol. 8, p. 7602.]

Error from City Court of Sandersville; K. J. Hawkins, Judge.

Action by W. M. Vaughan against the Wrightsville & Tennille Railroad Company. From a judgment for plaintiff, defendant brings error. Reversed, with direction.

Daley & Daley and Evans & Evans, for plaintiff in error. Minter Wimberly, Jesse Harris, and Hardwick & Wright, for defendant in error.

POWELL, J. Mrs. Vaughan sued the railroad company because of personal injuries received by her when a passenger on one of the company's trains, and recovered a verdict of \$9,000. The defendant has excepted concerning a number of grounds of error; but there are many of them as to which it will not be necessary to rule, on account of the nature of the decision which is about to be rendered in the case. The petition is brought in the name of "Mrs. Willie Mae Vaughan"; but it is nowhere stated in the petition whether the plaintiff was a married woman, a widow, or a divorced person. Among other elements of damages, she prayed to recover for loss of salary and loss of earning capacity; it being alleged in this respect that she was employed as a traveling salesman, and as such she was earning \$100 per month. She also asks for damages on account of hospital expenses, doctor's bill, and medicine, of about \$1,000 in amount. In addition to this she sought damages for certain physical injuries which were inflicted upon her, and for pain and suffering.

At the appearance term the defendant filed demurrers to the petition, on the following grounds:

"Because said petition is filed in the name of Mrs. Willie Mae Vaughan, which implies that she is a married woman, but there is no

distinct allegation in said petition showing whether petitioner is a single or married woman; therefore the petition is too vague and uncertain, for this reason."

"Because in the seventeenth paragraph of plaintiff's petition she alleges that at the time of said accident she was employed as a traveling saleswoman and was earning \$100 per month in such capacity, but she does not allege whether she was thus engaged with the consent of her husband, or in her own right, nor does she allege any reason why she was dependent upon her earnings for her support."

"Because in the fourteenth paragraph of said petition certain expenditures are set forth for doctor's bill, hospital expenses, medicine, and loss of salary, without such allegations as would show petitioner's right to recover for such items and expenses incurred."

"Because, under the allegations contained in said petition, plaintiff is a married woman, and as such has no right to recover for loss of time and services and for medical bill and hospital expenses, as set forth in said petition."

The court overruled the demurrers, and exceptions pendente lite were preserved.

At the trial it appeared, from the plaintiff's testimony, that at the time of her injury the plaintiff was a married woman, and that she was living separate from her husband, whose name was Smith, and that with his consent she was receiving and keeping her earnings to her own use and benefit. A divorce suit was pending between her and Mr. Smith at the time of the injury. Between the date of the injury and the date of the filing of the suit the final verdict in the divorce suit was granted, and she was married to Mr. Vaughan, with whom she was living at the time of the trial. The marital status of the plaintiff is involved in a number of different ways in the course of the decision of the points raised in the case. Some of the points arise on consideration of the demurrers just mentioned, but in the motion for a new trial the point is also made that, inasmuch as she had remarried before the bringing of the suit, her second husband, and not she, would be entitled to recover for the loss of her earning capacity which the injury inflicted on her, unless, indeed, this right was in her first husband.

[1] 1. We have come to the opinion that the court erred in overruling the special demurrer by which the defendant sought to compel the plaintiff to state whether she was a single or a married woman at the time of her injury, especially in the light of the fact that the court also overruled a special demurrer which pointed out that she had not alleged whether she was engaged in business and receiving earnings of \$100 a month with the consent of her husband, or in her own right, and overruled a special demurrer to

the paragraph in which she alleged damages on account of doctor's bills, hospital expenses, and medicine, without further allegations to show by what right she sought to recover for these items of expense. The extent to which a woman may be damaged by personal injury usually depends upon whether she is married or single (using the word "single" in a sense broad enough to include a divorced person). The prefix "Mrs.," appearing in connection with the plaintiff's name, is ambiguous. Cf. *Ballard v. St. Albans Co.*, 52 Vt. 325. This was an ambiguity which the plaintiff should have relieved in response to the special demurrer. However, in the light of the fact that she became Mrs. Vaughan after the cause of action arose, and in the light of what we are going to hold herein as to the materiality, or rather lack of materiality, of her marriage to Mr. Vaughan, we would not reverse the judgment for this delinquency alone.

The most serious objection to the petition was that pointed out by the other special demurrers to which we have referred—that in her petition she sought to recover damages because of the loss of her earnings, without alleging whether she was engaged in the business from which these earnings were received with the consent of her husband, or in her own right, and that she sought to hold the company liable to her for doctor's bills, hospital charges, and medicine, without stating further any reason how or why she, and not her husband, became liable for these items of expense, so as to authorize her to recover for them as a part of her damages.

[2] 2. This brings us to a consideration of the nature and use of a special demurrer in this state. This question was very ably treated in *Kemp v. Central of Georgia Ry. Co.*, 122 Ga. 559, 50 S. E. 465, by Mr. Justice Lamar (whose recent and well-merited elevation to the highest court of the nation enhances even that high regard in which his opinions were formerly held by the bench and bar of this state). It is there pointed out that under our liberal system of pleading many technical rules have been abolished, and that petitions containing such incomplete and partial statements of facts as in many jurisdictions would be held bad in substance are not so regarded in this state, and if the petition contains enough to amend by the incompleteness of statement will be treated as a defect in form rather than a defect in substance; that general demurrer is the means of reaching defects in substance, while special demurrer is the remedy against formal defects or incompleteness of statement. It is pointed out that the Code (Civ. Code 1910, § 5538) requires as to form that the petition shall "plainly, fully, and distinctly" set forth, not only the plaintiff's "charge," but also his "ground of complaint and demand"; that any failure to comply with this requirement

can be voluntarily cured by amendment, almost as a matter of course; and the learned justice pointedly asks: "And why should there be reluctance to cure the defect? The more liberal the right to make amendment, the more ready should the party be to make it, and the court to require it." Then, after adverting to the proposition that it is always easier to allege than to prove, and to the inexpediency of the court's going forward with the trial of a case as to which the plaintiff, in knowledge of his facts, cannot conscientiously allege enough to state a full definite cause of action, he continues: "In view of the liberality in holding defective petitions good as against a motion to dismiss, and the almost unlimited right to amend, but with a recognition at the same time of the defendant's right to a full statement, there has been a marked tendency in our decisions to magnify the office and importance of the special demurrer. And when the defendant calls therefor, he is entitled to a full statement of time, place, circumstance, and facts the plaintiff expects to prove, so that he may prepare his defense accordingly—whether that defense be by demurrer or by plea raising an issue to be passed on by the jury. He is entitled to a statement of issuable and traversable facts; not to general allegations of negligence or liability, which, at last, are more in the nature of conclusions than allegations of fact."

It is true that the marked tendency noticed by the learned justice "to magnify the office and the importance of the special demurrer" probably reached its acme when the case of *Kemp v. Central Ry. Co.*, supra, again appeared in the Supreme Court sub nom. *Central of Georgia Ry. Co. v. Brandenburg*, 129 Ga. 115, 58 S. E. 658, when the decision sustaining the special demurrers in that case was rendered by a divided court. The tendency of the Supreme Court and of this court is now somewhat in the other direction. Cf. *Bittick v. Ga., Fla. & Ala. Ry.*, 136 Ga. —, 70 S. E. 1106 (rendered in April), in which the views expressed by the dissenting justices in the *Brandenburg* case seem to have been recognized as controlling. Despite this tendency to somewhat modify the breadth of the scope which was formerly given to the office of special demurrer, there has been no tendency to diminish the general effect of the rule, so far as it allows the defendant by special demurrer to challenge the petition, if it fails to set out the basal facts definitely and without ambiguity. As Justice Lumpkin says in the recent case of *Riley v. Wrightsville & Tennille R. Co.*, 133 Ga. 413, 421, 65 S. E. 890, 893, 24 L. R. A. (N. S.) 379: "Useless detail and elaboration are not required. But there is no reason to permit vital facts in a case to be pleaded in vague, uncertain, or ambiguous terms, which may have the effect of not putting the adverse side on notice as to how to pre-

pare the defense or to allow the pleader to fail or to refuse to amend as to such matters when called on to do so by appropriate [special] demurrer." It is true, as this court held in *Cedartown Cotton Co. v. Miles*, 2 Ga. App. 79, 81, 58 S. E. 239, 290, "the plaintiff is not required to set forth the evidence, either direct or circumstantial, by which he expects to establish the traversable facts alleged in the declaration, and a demurrer cannot properly be used to compel him to do so"; but, as was further pointed out in that case, there is a vast difference between setting forth the evidence and alleging specific facts upon the which the plaintiff bases his case.

[3] 3. When a woman seeks to recover for lost earnings, or even for lost earning capacity, it becomes basal and important to inquire whether she was married or single, and, if married, whether she was living in a state of separation from her husband, or was entitled to receive her earnings by reason of his consent, express or implied. Notwithstanding the general contractual emancipation of married women in this state by reason of the act of 1866, embodied in Civil Code 1910, § 2993, it is still the law that, in the absence of any contract or agreement, express or implied, on the part of her husband that the earnings of his wife shall be retained by her as her separate estate, they belong to him. *Roberts v. Haines*, 112 Ga. 842, 38 S. E. 109. It is true that by Civil Code 1910, § 2995, the acquisitions of a wife living separate from her husband belong to the wife, and it follows that, "when a married woman is injured by the wrongful conduct of another, two different causes of action may arise: The one in her favor for her own pain and suffering, and the other in favor of the husband for the loss of his wife's services and for expenses incurred as a consequence of the injuries to her. These causes of action are separate and distinct, and in favor of different parties." *Ga. R. Co. v. Tice*, 124 Ga. 459, 461, 52 S. E. 916, 917. It is further held in that case that the damages ensuing to the husband are not confined to the value of her services in the household; "but when at the time of the injury she is actually engaged in a business or calling or avocation which results in earnings for the husband, and there is nothing to indicate that there was any agreement between the husband and wife that this should terminate at any time in the future, we think that as against the wrongdoer the inference is to be indulged that the wife will continue the work for the benefit of her husband during that period of her life in which she is able to perform the services."

Therefore, in this case, when the plaintiff showed by her petition that she was a woman, and left it doubtful as to whether she was married or single, and whether she was living separate from her husband, or whether there was any agreement between her and

her husband that she should have her own earnings, it left "vital facts in the case pleaded in vague, uncertain, or ambiguous terms," and as there was a special demurrer pointing out this very delinquency, and as the plaintiff failed and refused to amend in this respect, we are constrained to hold that the court erred in overruling the special demurrer. In ruling this we have not overlooked the fact that the wife, as well as the husband, has an interest in her earning capacity, and that she may show that she has lost that earning capacity, as proof tending to establish the degree of pain and mental anguish she has suffered, but this is a very different thing from recovering for loss of earnings or loss of earning capacity as such. *Powell v. Augusta R. Co.*, 77 Ga. 192, 200, 3 S. E. 757; *Atlanta Street Ry. v. Jacobs*, 88 Ga. 647, 15 S. E. 825; *Metropolitan R. v. Johnson*, 90 Ga. 500, 508, 16 S. E. 49.

[4] 4. Taking up, now, the special demurrer which pointed out the indefiniteness and incompleteness with which the plaintiff has set up her right to recover for doctor's bills, hospital expenses, and druggist's bills: The only allegation as to these items is as follows: "Petitioner further shows that said defendant company is indebted to her in actual damages in the following bill of particulars: Doctor's bill, \$870; hospital expenses, \$168; medicine, \$125." Primarily the husband is bound for all necessities furnished to the wife, whether she is living with him or separately from him, unless she is living in adultery with another man, or unless she has voluntarily abandoned him without sufficient provocation, and the husband has given notice that he will not be bound. Civil Code 1910, §§ 2996, 2997. While a married woman has such contractual ability that she can make a special contract to pay for necessities furnished to her, still where it does not affirmatively appear that she has so contracted, and it merely appears that the necessities were furnished, it is to be presumed that she contracted for them in the right of her general agency for her husband, and that he, and not she, is liable for them. *Freeman v. Holmes*, 62 Ga. 556; *Rushing v. Clancy*, 92 Ga. 769, 19 S. E. 711. Therefore, even if we should construe the petition as capable of asserting that the plaintiff claimed that, by reason of the infliction of injuries upon her, an expenditure for necessary medical attention and supplies in the sum named arose, still prima facie this would be a damage caused to the husband, and not to her. *Lewis v. City of Atlanta*, 77 Ga. 756, 4 Am. St. Rep. 106; *Georgia R. Co. v. Tice*, 124 Ga. 459, 52 S. E. 916. Before she could recover for these things, it would be necessary for her to show, and therefore to allege, if required to do so by special demurrer, that her husband had failed or refused to furnish her, and that she had contracted for them on her own liability. This she failed to do, even

after special demurrer calling attention to the delinquency. It seems plain that the court erred in overruling this demurrer. As the Supreme Court states it in *Roberts v. Haines*, 112 Ga. 842, 38 S. E. 109: "While it is true that the act of 1866 has wrought many changes in the law with reference to the separate estate of a married woman, there is still imposed upon the husband the obligation to support his wife, with the corresponding right to her services and earnings during coverture." It is to be noticed, also, that under the Code sections mentioned above the prima facie liability of the husband for necessities furnished to the wife does not cease upon his consenting for his wife to receive and to have her earnings to her own benefit.

[5] 5. Having reached the conclusion that the court committed error in overruling these special demurrers, it becomes our duty to look somewhat further into the matter; for it is not every erroneous ruling upon special demurrer that will require the grant of a new trial. The error is prima facie harmful; but there are cases in which the record demonstrates that the error was in fact harmless, and no reversal will be granted for harmless error. After a careful examination of the present record, we cannot say that these errors were harmless. The record shows that the only witness who testified as to these basal facts upon which the plaintiff claimed the right to recover for her loss of earnings and earning capacity, the expenses of her medical treatment, etc., was the plaintiff herself. It is, of course, entirely possible—indeed, we may say very probable—that her statement as to these matters is the truth; but as she declined, in response to special demurrer, to give the information in advance as to what she expected to prove as to these things, she put the defendant to the disadvantage of being unable to prepare its defense, so far as the contradiction of the matters was concerned. It may be that, if the defendant had known in advance that she proposed to claim that her husband had consented for her to receive her earnings, it might have obtained the testimony of this husband and have proved the contrary by him, or might have proved that the husband was able and willing to have paid for her medical treatment. Indeed, it is impossible to say what the defendant could or could not have proved on this subject, if it had only known what the plaintiff was going to claim as to it. We seriously question that even under her own testimony she made out a case of liability so far as the medical treatment and other similar expenses are concerned; and we cannot say whether the jury allowed these items in the computation of the damages or not.

[6] 6. As there will likely be another trial of the case (for we assume that the plaintiff will amend to cure the delinquencies to which

these special demurrers are directed), we feel that it is necessary for us to decide another point, which, if decided in favor of the plaintiff in error, would be controlling in the case. It is insisted that, since the plaintiff remarried after her injury, she cannot recover damages for the permanent loss of her earning capacity, on the ground that her new husband would be entitled to her earnings. We do not think that the point is well taken. When tort is committed upon a married woman, the right to sue for damages which ensue therefrom is one of those choses in action which by the act of 1866 (Civil Code 1910, § 2998) vests in and belongs to the wife as a part of her separate estate. *City of Atlanta v. Dorsey*, 73 Ga. 479 (especially at top of page 481 of the opinion). "If a right of action accrues at all on account of a personal injury, it arises immediately upon the occurrence thereof. The damages may continue for years or be permanent in character; but the right to sue arises at once." *King v. Sou. Ry. Co.*, 126 Ga. 794, 795, 55 S. E. 965, 8 L. R. A. (N. S.) 544. The personal injury which the plaintiff received converted her earning capacity into a chose in action, represented by her right to sue for the impairment or destruction of her earning capacity; so that, when this second husband married the plaintiff, he married her, not as possessing an earning capacity of which he as husband might have taken the benefit, but as possessing a chose in action which, under the Code, remained her separate estate. When a man marries a woman in this state, he is entitled to her earnings, domestic and otherwise, so far as she is able and willing to exert herself to perform them for his benefit, and if a wrongdoer thereafter comes along and impairs the existing earning capacity, a right of action in the husband's favor arises because of the wrong which has thus been done; but if the woman he marries has already converted her earning capacity into cash, or into property, or into a chose in action, he takes only what is left of the earning capacity for his own, and she remains the owner of the cash, or the property, or of the chose in action as the case may be. This particular point is somewhat rare, but the Supreme Court of New Jersey in the case of *Reading v. Pennsylvania R. Co.*, 52 N. J. Law, 264, 19 Atl. 321, had a very similar point, and took the same view as that which we are here expressing.

The judgment will be reversed, because the court erred in overruling the special demurrers, but with direction that the trial court give the plaintiff the privilege of saving the petition from dismissal by making an amendment adequate to cure the deficiencies pointed out. Cf. *Riley v. Wrightsville & Tennille R. Co.*, 133 Ga. 413 (5), 65 S. E. 890, 24 L. R. A. (N. S.) 379.

Judgment reversed, with direction.

(9 Ga. App. 310)

SOUTHERN RY. CO. v. BRANCH.

(No. 2,833.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. WORK AND LABOR (§ 9*)—BREACH OF CONTRACT—NATURE AND FORM OF REMEDY—QUANTUM MERUIT.

One of the different remedies which accrues to a party to an indivisible contract when the other party wholly refuses to perform is the right to sue on a quantum meruit for his services, or for such money as he has expended, if he himself has done anything under the contract, or has paid out money in the execution of its terms.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 23, 24; Dec. Dig. § 9.*]

2. DAMAGES (§ 188*)—EVIDENCE—WEIGHT—MEASURE OF DAMAGES.

Where the value of property, or of a paper evidencing the legal title to property, is involved, the amount which the property or instrument in question has been treated by the parties in their transactions in relation thereto as being worth is of such evidentiary value as to authorize the jury to infer that it represents the true market value, especially in the absence of all evidence to the contrary.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 188.*]

3. TRIAL (§ 232*)—INSTRUCTIONS—REQUISITES AND SUFFICIENCY.

The contention that the court did not treat the plaintiff in error fairly in the presentation of the issues to the jury is not well taken, as appears from an inspection of the charge as a whole.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 232.*]

4. APPEAL AND ERROR (§ 926*)—REVIEW—PRESUMPTION—ADMISSION OF EVIDENCE.

"An objection that a document offered in evidence was not admissible, because the execution of the same was not proved as required by law, being overruled, the presumption is that the execution was duly proved, unless the contrary affirmatively appears, either by an authentic statement that there was no evidence of execution, or by setting out such evidence on that subject as was adduced to the presiding judge. Mere preliminary evidence upon such a question is not for insertion in the brief of the evidence requisite to support a motion for a new trial. Consequently its absence from the brief does not warrant the conclusion that the overruled objection should have been sustained."

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3735-3747; Dec. Dig. § 926.*]

(Additional Syllabus by Editorial Staff.)

5. CONTRACTS (§ 324*)—ACTION FOR BREACH—NATURE AND FORM OF REMEDY.

Where a railroad company broke its contract to transfer to plaintiff a bill of lading on the payment of the value of the goods involved, the fact that the plaintiff acquired rights which he could have enforced in equity, or that the law gave him the right to use the name of the holder of the legal title to bring an action for use in his favor, does not impair his right of action against the railroad company for breach of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.*]

6. NEW TRIAL (§ 40*)—GROUND—ERRONEOUS INSTRUCTION—HARMLESS ERROR.

Failure to charge more specifically as to the basis of damages is not ground for new trial.

where the jury found the right amount, and there was no request for further instruction.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 62-66; Dec. Dig. § 40.*]

Error from City Court of Baxley; J. P. Highsmith, Judge pro hac.

Action by E. Branch against the Southern Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Bennet, Twitty & Reese and J. B. Moore, for plaintiff in error. W. H. Watson and Jas. R. Thomas, for defendant in error.

POWELL, J. Branch sued the Southern Railway Company, alleging: That he had been agent for the company at Baxley, Ga., and that a shipment of shoes came to that place by freight from A. W. Tedcastle & Co., of Boston, Mass., as shippers, consigned to themselves, "order notify" Mr. F. A. Morris; that is, that the goods were shipped with the bill of lading attached to a draft for \$103.50, the price of the goods. That Mr. Morris failed to pay the draft, and, acting on what purported to be instructions from Tedcastle & Co., he, as agent for the railway company, reshipped the goods to Coggins & Brown, a firm of merchandise brokers in Atlanta. That Tedcastle & Co. afterwards filed claim for the value of the goods, insisting that they had not ordered them reshipped. That, when this claim was filed with the railroad company, the plaintiff was unable at the time to produce the written order of reshipment, and made an agreement with the claim agent of the railroad company that he would pay to the company the value of the goods, and that they might settle with Tedcastle & Co., with the understanding that the company would transfer and deliver to him the bill of lading and other papers under which title to the goods was held. That he paid the money to the railroad company, but that they had refused, over his demands, to transfer to him the bill of lading and other papers by which the title to the shipment was held. The answer of the defendant consisted merely of a denial of the salient features of the plaintiff's petition. The plaintiff introduced enough evidence to prove his case as laid, and the jury returned a verdict in his favor for the amount that he had paid to the railroad company, with interest. In its motion for a new trial, the railroad makes a number of assignments of error.

[1] The first point is that the verdict should be set aside on the general grounds, because it does not appear from the evidence how or wherein the transfer and delivery by the railroad company to the plaintiff of the bill of lading, papers, receipts, documents, etc., would have enabled him to secure judgment against Coggins & Brown, to whom the goods were finally delivered;

that a formal transfer of these papers was not necessary to put the title in the plaintiff; that even if the legal title was not transferred by the mere fact of his paying the money, still that he had an equitable title thereby, and could have sued in equity to assert all of his rights; and that even if this was not so, still he could have used the name of the holder of the legal title as plaintiff for his use for the purpose of suing Coggins & Brown, or whoever it was necessary to sue in order to recover for the value of the goods. The plaintiff's suit, it must be remembered, proceeded on the theory that he had made a definite contract with the railroad company that, if he paid them this sum of money, they would transfer to him the writings by which the title to the goods had been held, and that the railroad company had breached that contract by refusing to carry out their portion of it in any respect. The Supreme Court in the case of *Harden v. Lang*, 110 Ga. 392, 394, 36 S. E. 100, 101, in discussing the rights of one of the parties to an indivisible contract, where the opposite party had breached it by failing to perform, shows that the injured party has a number of remedies, one of which is stated as follows: "If he had done anything under the contract, or paid out any money in the execution of its terms, he had a right to sue on a quantum meruit and recover for the same, this being a cause of action distinct from the original contract, but based upon a contract created by law." The plaintiff in this case did not contract for the equitable title to the goods, but for the legal title, and the defendant company wholly failed to perform its contract in this respect; and under the ruling just quoted, the plaintiff because of this breach, became entitled to recover in an action *ex contractu* the very amount which he did recover—that is, the amount he paid over to the railroad company, with interest.

[2] Able counsel for the plaintiff in error are doubtless correct in the proposition that the transaction vested the plaintiff in this case with rights which he could have enforced in equity, just as effectively as he might have enforced those same rights at law, if the formal transfer of the writings had been made to him. But we do not think that this fact, or the fact that the law gave him the right to use the name of the holder of the legal title for the purpose of bringing an action for use in his favor, in any wise impairs his right to insist that the company's refusal to transfer the formal title is a breach of the contract. To say that the party is entitled to the one remedy is not to deny that he has the other also. For instance, if A. makes a contract with B., calling for a warranty deed to a certain piece of land, as to which B. holds the legal title, and as to which C. holds an illegal posses-

sion, and A. pays to B. the stipulated purchase price and demands the warranty deed, and B. retains the price, but refuses to make the deed, it cannot be questioned that A. thereby acquires the right to assert a complete equitable title to the land, as well as the right to use the name of B. as his lessor in ejectment, if the action be brought in the fictitious form, or as plaintiff suing for his use, if the action be brought under the code procedure, and that by a proceeding either at law or in equity he could thus recover the land from C. Still, notwithstanding all this is true, A. has the right to insist upon his warranty deed, and to treat B.'s failure to execute it as a breach of the contract, and may decline to proceed for the land itself, and many maintain a suit against B. for the amount which he has paid him; and the analogy between the case suggested and case at bar is so complete, it seems to us, as to answer fully the argument of counsel as to this point.

[2] 2. It is further insisted that the burden was upon the plaintiff to show that the railroad company's breach of the contract had damaged him, and, further, to furnish to the jury definite proof by which they could measure the extent of this damage, and that there was a failure of proof in this respect; that it is not shown what the shoes were worth, or that, if the title papers had been transferred to the plaintiff, he could have collected anything under any judgment which he might have obtained against Coggins & Brown, because it was not shown that Coggins & Brown were solvent. We think the jury had before them facts and circumstances from which they could well have inferred the value of the shoes, and of the writings by which the legal title to them was held. Conceding that the measure of damage was not fixed at the amount the plaintiff paid the defendant, with interest, and that it was necessary for the plaintiff to show the value of the goods, or of the title papers by which they were held, we still think that there was enough evidence upon which the jury could have based an intelligent and accurate inference. The fact that the original shippers had shipped them out with a draft for this amount attached to the bill of lading, and the fact that the defendant, in settling with the plaintiff, recognized that a claim of this amount was proper, is certainly enough, in the absence of any evidence to the contrary, to lead an intelligent juror to assume that the goods were worth this amount, at which they had been uniformly valued in the transactions of the parties. We further think that the fact that the plaintiff was buying and the defendant was selling what practically amounted to an account against Coggins & Brown, on the basis of 100 cents on the dollar, was sufficient, in the absence of evidence to the contrary, to authorize the jury to assume that Coggins & Brown were sol-

vent, and that a judgment against them would be good.

[3] 3. Another insistence of the plaintiff in error is that the trial judge was not fair in his charge to the jury, because he instructed the jury at undue length as to the contentions of the plaintiff, and made no corresponding presentation of the contentions of the defendant. An examination of the entire charge shows that it is a very concise presentation of the issues in the case and the principles of law applicable thereto. The judge stated the salient allegations of the plaintiff's petition, and then told the jury that the defendant denied these things, and that correctly states the status of the pleadings. He then instructed the jury that the burden would be upon the plaintiff to satisfy them as to these elements of the case (taking them up in detail) before there could be any verdict in his favor, and that, if they found that he had proved them, there might be a verdict in his favor. The fact that the contentions of the plaintiff were detailed at length was not a matter of special favor to the plaintiff, for they were thus detailed in connection with a statement that these were the things which the plaintiff would have to prove before he could recover. It may be noted in this respect that the court not only put upon the plaintiff the burden of proving these things, but of proving them by a higher degree of evidence than that required in civil investigations, for he told the jury that the plaintiff had the burden of showing these things to the satisfaction of the jury to "a moral and reasonable certainty," which, of course, is the rule in criminal, and not in civil, cases.

[6] It may be that the court should have instructed the jury more specifically as to the basis upon which they should calculate the damages, instead of charging them generally that they should return in his favor whatever amount they "might think that he was damaged by reason of the failure of the defendant to comply with the contract," in the event they found in his favor as to the facts upon which his right to recover was based; but as the jury found the right amount, and as the evidence did not admit of two findings on this issue, and as there was no request for further instructions, there is no reason to grant a new trial on this ground.

[4] 4. Some of the grounds of the motion for new trial complain of the admission of writings without sufficient proof of their execution, and of the admission of the secondary evidence of writings without a sufficient accounting for the absence of the original. These grounds themselves are not in proper form to present the question for consideration (*Arnold v. Adams*, 4 Ga. App. 56 [2], 60 S. E. 815); but, aside from this technical delinquency, we may say that there was no abuse of discretion on the part of the trial judge in admitting this evidence,

in the light of what was actually proved as to the execution of the writings and as to the inaccessibility of the originals. Besides, these writings related to a feature of the case which was immaterial, because the plaintiff's right to recover would have been the same, irrespective of what might have been the truth as to the particular matter to which these writings related.

Having carefully gone through the record, we find no reason for granting a new trial. Judgment affirmed.

(9 Ga. App. 424)

MORSE et al. v. STATE. (No. 3,355.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. FALSE PRETENSES (§ 11*)—ELEMENTS OF OFFENSES—OBTAINING REAL PROPERTY.

While the particular statutes creating and defining the offense of cheating and swindling or obtaining property under false pretenses relate specially to personal property, or that character of property which is subject to larcenous asportation, the provisions of section 719 of the Penal Code of 1910, are broad enough to include real estate or any interest therein.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 15; Dec. Dig. § 11.*]

2. FALSE PRETENSES (§ 12*)—ELEMENTS OF OFFENSE—OBTAINING POSSESSION.

To constitute an offense under section 719 of the Penal Code of 1910, it is only necessary to show that the owner of property of value was induced by deceitful means and artful practices to part with the possession thereof, and was thereby cheated and defrauded.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 16; Dec. Dig. § 12.*]

3. FALSE PRETENSES (§ 49*)—EVIDENCE—SUFFICIENCY.

No error of law appears, and the evidence supports the verdict. There was no error in overruling the certiorari.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.*]

(Additional Syllabus by Editorial Staff.)

4. FALSE PRETENSES (§ 13*)—ELEMENTS OF OFFENSE—VALIDITY OF CONTRACT.

That a contract obtained by defendants, accused of swindling and cheating, was defectively executed by the defrauded corporation, is immaterial, where the contract was one of the means adopted for getting possession of the property of the corporation through the fraudulent representations of accused.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 17; Dec. Dig. § 13.*]

Error from Superior Court, Greene County; B. F. Walker, Judge.

A. Morse and others were convicted of cheating and swindling. To a judgment overruling certiorari to review the conviction, they bring error. Affirmed.

Geo. A. Merritt and Geo. Gordon, for plaintiffs in error. Jos. E. Pottle, Sol. Gen., Jas. Davison, Sol., and Brown & Shipp, for the State.

HILL, C. J. Plaintiffs in error were convicted in the county court of Greene county

on an indictment charging them with the offense of cheating and swindling. Their petition for certiorari was sanctioned by the judge of the superior court, and on the hearing of the certiorari the same was overruled. To the latter judgment they excepted.

The indictment (omitting formal parts) charges that the plaintiffs in error "did * * * falsely and fraudulently, and with intent to defraud Greensboro Co-operative Creamery Company, represent to said Greensboro Co-operative Creamery Company, and to T. C. Crawford, president of said company, that they were stockholders of and largely interested financially in Rigbers Ice Cream Company, a corporation, that said Rigbers Ice Cream Company was capitalized at \$20,000, all of which was fully paid in, and said Rigbers Ice Cream Company was worth the sum of \$20,000, and did, on the faith of said representation, induce said Greensboro Co-operative Creamery Company, whereby the plant of said Greensboro Co-operative Creamery Company, including its property, was leased to said Rigbers Ice Cream Company for the term of three years beginning April 1, 1910, and was induced to turn over and deliver said plant and property to said Rigbers Ice Cream Company and to said F. H. Rigbers and A. Morse, representing said Rigbers Ice Cream Company; whereas, in truth and in fact, as the said F. H. Rigbers and the said A. Morse then and there well knew, said Rigbers Ice Cream Company was not then and there capitalized at \$20,000, the capital stock of \$20,000 was not paid in, and said Rigbers Ice Cream Company was not worth \$20,000, or any other like large sum. On account of said false and fraudulent misrepresentation said Greensboro Co-operative Creamery Company sustained loss in the sum of \$1,000."

[1] A demurrer was filed to this indictment, on the ground that the property alleged to have been procured by the false pretenses set out in the indictment was real estate, was an interest in land, and was not within the purview of the penal statutes of this state defining the offense of cheating and swindling. It is urged with learning and ability that these statutes were intended to apply only to personal property and to protect the title of the owner thereof, and that they were never intended to apply to real estate or an interest therein, as this kind of property was not subject to larcenous asportation. In support of this view counsel cite the statute of 30 Geo. II, c. 24, which seems to be the first statute defining the offense of obtaining property by false pretenses, and the decisions in *State v. Eno*, 131 Iowa, 619, 109 N. W. 119, and *People v. Cummings*, 114 Cal. 437, 46 Pac. 284, where in this question is elaborately discussed, and the conclusion reached that statutes of this character do not include real property, how-

ever general in terms, and were undoubtedly aimed and designed solely for the purpose of protecting personal property. It cannot be doubted that these statutes originated in certain defects in the application of the laws against larceny, and from a failure of justice which frequently arose from the subtle distinction between larceny and fraud. Although property might be obtained from the possession of the owner by the grossest character of fraud, it would not constitute larceny if in fact it was obtained by the consent of the owner; and it was to cure this defect that these laws, defining cheating and swindling or obtaining property by false pretenses, were enacted. It is also true that under the English decisions these statutes do not apply to real property, the reason being that this class of property could not be carried away and dissipated like chattels, and that, although the owner might be deprived of his landed estate by means of fraudulent practices and deceitful means, yet the property was bound to remain stationary and accessible to law, and the civil courts furnished ample protection; and it is also true that some of the American courts have followed this view of the law in the application of these particular statutes, and it may be that in this state the offense of cheating and swindling would not apply to one who by deceitful means and artful practices obtained title to the land of another, for the very simple reason that the land could not be taken away, and any contract of sale obtained by such illegal means could be set aside either in a court of law or equity. But we are not prepared to say that this principle would apply to a case of a lease, especially if that lease included, with the interest in the land, personal property. "A lease for a term of years is not a freehold estate, but a chattel." *Fleld v. Howell*, 6 Ga. 423; 8 Enc. Digest of Ga. Reports, 559. One who by deceitful means or fraudulent practices obtains from another a lease of property, and thereby possession of the property, especially where such lease includes personal property, may not only be in a position to deprive the owner of his use of the property for the term of the lease, but may utterly destroy its value to the owner.

Without extending further the discussion on this line (as we deem it unprofitable), we are clear that, under the broad language of the statute of this state under which this indictment was framed, it is not subject to a demurrer on the ground stated. Section 719 of the Penal Code of 1910 provides that "any person using any deceitful means or artful practice, other than those which are mentioned in this Code, by which an individual, or a firm, or a corporation, or the public is defrauded and cheated, shall be punished as for a misdemeanor." Now, this indictment alleges that the defendants, by falsely and fraudulently representing that the Riggers Ice Cream Company was a corporation with

a capital stock of \$20,000 fully paid in did induce the Greensboro Co-operative Creamery Company to lease to the Riggers Ice Cream Company its plant and other property with intent to defraud the Greensboro Co-operative Creamery Company, which in fact did subject the said company to a loss of \$1,000. It is insisted that this general section of the Code does not apply; that the indictment was framed under section 703 of the Penal Code of 1910. We think the general section does apply, and that the indictment is properly framed on this section, and, if the allegations of the indictment are proved as set out, it would show a violation of this general section of the Penal Code.

[2] In the next place, it is said in support of the demurrer that at most it is charged in the indictment that the defendants by the false pretenses therein alleged obtained a three-year lease to the plant and property of the Greensboro Co-operative Creamery Company, and it is insisted that the law is well settled that to constitute an obtaining of property by false pretenses the owner of the property must have been induced by the false representations to part with the title of the property, and not merely with the possession or custody thereof. We do not think the statute under which this indictment is framed is subject to such a limited interpretation. This statute is very broad in its language, and so explicit in its terms as to do away with any necessity for judicial interpretation. "Any person using *any deceitful means or artful practice*, other than those which are mentioned in this Code, by which an individual, or firm, or corporation, or the public is defrauded and cheated shall be punished as for a misdemeanor. Under the language of this statute, if a person is induced by false and fraudulent representations which in character are deceitful or artful to part with the possession of his property, and the property while in possession of the one who thus gains possession of it is damaged or injured, the person so parting with the possession of his property would be defrauded and cheated to the extent of the damage or injury to the property. We do not think it necessary that the title to the property should be obtained to accomplish the fraud, but it would be sufficient if the possession was obtained for some length of time, and thus the opportunity was furnished for accomplishing the cheat or fraud.

If these defendants, by representing that the Riggers Ice Cream Company was a corporation with a paid-up capital of \$20,000, secured from the Greensboro Co-operative Creamery Company its plant and its property, when in fact the Riggers Ice Cream Company was never organized as an ice cream company and none of the stock had been paid in, and if this property, while in the possession of the defendants, was damaged and depreciated in value by their own unlawful use, could it reasonably be said that they

did not violate the terms of this statute? It would be no defense to the criminal act that the lease thus obtained could be set aside in a civil action as having been obtained by fraud. If the allegations in the indictment are true, unquestionably the Rigbers Ice Cream Company, as lessee, was not entitled to the possession of the plant or property of the Greensboro Co-operative Creamery Company, and took nothing by the lease; but this did not destroy the criminal character of the acts of Rigbers and Morse, who, by the fraudulent representations described, obtained possession of the plant and property of the Greensboro Co-operative Creamery Company. We think the indictment was good as against the demurrer.

[3] It is insisted that the allegations of the indictment are not supported by the evidence. First, it is said that no complete contract of lease was made between the two corporations, and that the paper claimed to be the lease was incomplete, in that it was understood at the time of its execution that Rigbers, who signed as president of the ice cream company, and Morse, who signed as secretary of said company, would not be bound by the contract until it had also been signed by Kirkpatrick, the treasurer of the company. But this is denied by the state. It is contended—and we think properly so—that the contract was complete and was binding upon both corporations when it had been signed by the presidents of both corporations and the property therein described had been delivered by the Greensboro Co-operative Creamery Company to Rigbers and Morse as representatives of the Rigbers Ice Cream Company.

[4] It is also insisted by counsel for the plaintiffs in error that the president and secretary of the Greensboro Co-operative Creamery Company, who signed the contract, had no authority to make the contract for the Greensboro Co-operative Creamery Company; that to lease corporate property requires the formal action of either the board of directors or the stockholders. This may be true as a legal proposition; but we think it wholly immaterial whether the contract was legal and binding upon the corporation or not. If the execution of the contract was one of the means adopted by the defendants to carry out their purpose of getting possession of the property of the Greensboro Co-operative Creamery Company, and if in fact they did get possession of the property by reason of this contract, although it may have been incomplete and imperfect in its execution, this defect in the contract would make no difference. The question is: Did the contract induce the Greensboro Co-operative Creamery Company, or the officers thereof, to turn over the property of the company to the accused as representatives of the Rigbers Ice Cream Company? In

making an application of the evidence in the record to the allegations of the indictment, it is clearly shown that the representations charged in the indictment as being false and fraudulent were in fact made by the defendants to the officers of the Greensboro Co-operative Creamery Company; and it is equally clear that these representations were false, and that the Greensboro Co-operative Creamery Company was induced by these representations to deliver to the defendants the possession of its plant and property in Greensboro, and the judge was fully authorized to infer, from the falsity of the representations and the conduct of the defendants, that their purpose was fraudulent.

The only question that remains for consideration is: Was the Greensboro Co-operative Creamery Company defrauded and cheated by these false and fraudulent representations made by the defendants, which induced it to turn over its plant and property to them? Unquestionably the Greensboro Co-operative Creamery Company was deprived of the use of its property for several months, and this was a thing of value. The individual losses of the stockholders of the Greensboro Co-operative Creamery Company in failing to get pay for the milk which they had furnished to Morse at Greensboro cannot be called the losses of the Greensboro Co-operative Creamery Company, although the contract contemplated that the Rigbers Ice Cream Company was to take the milk of these stockholders and pay for it; but the property of the Greensboro Co-operative Creamery Company was delivered into the possession of Morse and Rigbers at Greensboro in pursuance of this contract, which their false and fraudulent representations had induced, and the use of it for some months lost to the creamery company. This property consisted of machinery, which was damaged in its use by Morse who had secured possession of it as the representative of the Rigbers Ice Cream Company. The evidence does not show how much in dollars and cents this loss amounted to, but that there was some loss in deterioration in the value of the machinery of the Greensboro Co-operative Creamery Company is clearly shown. The case was tried by a very able judge on both the law and the facts; jury having been waived. We do not find that he committed any error of law, and there is some evidence in the record to support his finding under the facts.

The testimony which it is insisted the judge illegally admitted in evidence, we think, was admissible, not only as illustrating the purpose of the defendants in making the representations which induced the making of contract, but also as illustrating the financial condition of the Rigbers Ice Cream Company. The evidence objected to was clearly a part of the res gestæ of the transaction.

Judgment affirmed.

(9 Ga. App. 352)

BASHINSKI BROS. v. LAKE.
(No. 2,968.)

(Court of Appeals of Georgia. June 7, 1911.)

*(Syllabus by the Court.)***CONTRACTS (§ 10*)—SALES (§ 22*)—ESSENTIALS OF CONTRACT—MUTUALITY—ACCEPTANCE OF OFFER.**

A. and B. signed an instrument under seal, which recites that, for and in consideration of the sum of \$1 cash in advance, A. agrees to deliver to B., at a designated time and place and for a stipulated price, 50 bales of cotton of a described grade. B. did not agree to purchase the cotton, or to receive and pay for it, or to assume any obligation in respect thereto. *Held:* (1) The instrument was unilateral, lacking in mutuality, and not binding upon either party, and was merely an offer or proposal made by A. to B. (2) The right of B. to demand an enforcement of the obligation, in the absence of any mutual agreement or promise contained in the contract itself, depended upon his doing some act prior to the time fixed for the delivery of the cotton, which would bind him to accept and pay for the cotton in the event of its delivery, and there was no allegation that B. had either actually or constructively done any act indicating an acceptance by him of the proposed sale of the cotton prior to the time fixed for its delivery.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10;* *Sales*, Cent. Dig. §§ 39-43; Dec. Dig. § 22.*]

Error from City Court of Dublin; K. J. Hawkins, Judge.

Action by Bashinski Bros. against E. P. Lake. From a judgment for defendant, plaintiffs bring error. Affirmed.

Bashinski Bros. sued Lake for damages for the alleged breach of the following contract: "Georgia, - Laurens County. This agreement, made and entered into this 19th day of May, 1909, between E. P. Lake, of the county of Laurens, state of Georgia, of the first part, and Bashinski Bros., of the county of Laurens, state of Georgia, of the other part, witnesseth: That for and in consideration of the sum of one (\$1.00) dollar, cash in advance, the said E. P. Lake agrees to deliver to the said Bashinski Bros. fifty (50) bales of cotton averaging not under 500 lbs. per bale, at the price of 10 cents per pound, basis of good middling, standard Savannah classifications. The differences of grades other than good middling to be the official differences as quoted by the Savannah Cotton Exchange during the month of delivery of said cotton to said Bashinski Bros. at Dublin. No cotton to be delivered to the said Bashinski Bros. on this contract under the grade of middling; no damp, sandy, gin-cut cotton to be delivered on this contract. No bales under 320 lbs. weight to be received. The tare of said cotton not to exceed 24 pounds per bale, said cotton to be delivered not later than November 1, 1909. Cotton to be delivered in lots of not less than one bale at a time. Said cotton to be delivered at Lovett, Ga. In case of disagreement as to weight or grade, or the proper interpretation

of this contract, the same to be arbitrated promptly, said E. P. Lake selecting one arbitrator, and Bashinski Bros. selecting the other, and these two arbitrators, in case of disagreement, to select a third arbitrator, whose decision will be binding on both parties, except as to grade. In case of disagreement as to grade, either party to this contract may have the option of referring the matter to the classification committee of the Savannah Cotton Exchange, whose decision will be final and binding on both parties to this contract. Signed in duplicate this 19th day of May, 1909." This contract was signed by each party and was under seal.

The petition alleges that the defendant, Lake, fails and refuses to deliver the 50 bales of cotton as he contracted and agreed to do, by reason of which plaintiffs have been damaged in the sum of \$1,093.74, being the difference in the price contracted for and the price of the cotton on the day when the same was to have been delivered under the contract. The court dismissed the petition on oral motion of the defendant, on the ground that the contract sued upon was unilateral, and was of no binding force or effect in law, and that there was no cause of action set out in the petition; and to this judgment exception is taken.

J. E. Burch, for plaintiff in error. Hines & Jordan and J. S. Adams, for defendant in error.

HILL, C. J. (after stating the facts as above). Under repeated rulings of the Supreme Court construing instruments similar in character to this contract, it was held that they were unilateral and lacking in mutuality, and therefore were not binding upon either party. The contract does not contain any obligation on the part of Bashinski Bros. to take the cotton, if tendered by Lake at the time and place specified in the contract. Lake, in consideration of \$1 cash in advance, agreed to deliver the cotton, but the Bashinskis did not agree to accept it when delivered. The instrument alleged to be a contract is very similar in terms to the instrument sued upon in *Sivell v. Hogan*, 119 Ga. 168, 46 S. E. 67. In that case the contract was under seal, and therefore imported a consideration, yet the Supreme Court held it to be unilateral, because, although Sivell had signed the contract agreeing to deliver to Hogan, at the time and place stated and at a price named, certain cotton therein described, Hogan did not agree, in the contract or otherwise, either at the time the alleged contract was signed or thereafter, to receive and pay for the cotton, and that the right of Hogan to demand an enforcement of the obligation depended upon his doing some act prior to the time fixed for delivery which would bind him to pay in the event of delivery. See, also, *Simpson v.*

Sanders, 130 Ga. 265, 60 S. E. 541; Mallet v. Watkins, 132 Ga. 700, 64 S. E. 999, 131 Am. St. Rep. 226, and many cases cited in both of these opinions. We are clear that under these rulings the instrument sued upon was, for the reasons stated, unilateral, and not enforceable as an executory contract of purchase and sale. It is true that the contract in this case was signed by both parties, but this fact of itself does not make the contract one of mutuality. The instrument, to be a valid contract and mutually binding, must contain mutual agreements, or mutual promises, or a mutual consideration. In the cases of *Harrison v. Wilson Lumber Co.*, 119 Ga. 6, 45 S. E. 730, and *Cooley v. Morse*, 123 Ga. 707, 51 S. E. 625, the instruments alleged to be contracts were signed by both parties. In the latter case the Supreme Court says: "It is true that the instrument sued on begins with the words, 'This agreement, made this day between A. J. Morse and J. L. Cooley,' and is signed by both parties. But Cooley nowhere agrees or promises to do any act, or binds himself in any way. He does not agree to take the lot, or to pay the purchase price"—just as in the present case Lake agrees to deliver, but Bashinski Bros. do not agree to receive or to pay for, the cotton.

The instrument sued on in this case was simply an option. It bound Lake, in consideration of the sum of \$1, to sell the cotton; but it does not contain any counter obligation to buy on the part of Bashinski Bros. In other words, it amounted to no more than an offer or proposal of sale. There is no allegation in the petition that this option was exercised by Bashinski Bros. If Bashinski Bros. had accepted the option, it would have been binding upon Lake, and as an option it was irrevocable until the expiration of the time agreed upon by the parties thereto for the performance of the contract, and if, before the date of performance, it had been accepted by Bashinski Bros., or they had done any act indicating an acceptance by them of the contract, it would have made the contract complete. Of course, suing on the instrument after the expiration of the time for acceptance was not sufficient for this purpose, because the suit shows that the defendant, Lake, had abandoned the contract or violated it, and a suit for damages could not amount to a closing of the contract alleged to have been already rendered impossible of performance by the defendant. *Cooley v. Morse*, supra. The allegations of the petition in the present case are so clearly and fully controlled by the decisions of the Supreme Court above cited, especially the decisions in *Simpson v. Saunders* and *Sivell v. Hogan*, the contract in these cases being almost identical in terms with that under consideration, that it ren-

ders any further discussion of the question unnecessary; and we therefore conclude that the court did not err in dismissing the petition.

Judgment affirmed.

(9 Ga. App. 321)

WARFIELD et al. v. SANBURN.

(No. 2,863.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

NEGLIGENCE (§ 101*)—COMPARATIVE NEGLIGENCE—EFFECT OF FELLOW SERVANT'S NEGLIGENCE—ACTION FOR INJURIES—INSTRUCTION.

The suit was for damages on account of injuries received through a wrongful movement of a locomotive by one of the railroad company's engineers. The plaintiff relied upon two theories: (1) That he himself was a servant of the company, and had been injured in the course of his employment by negligence of the engineer, who was a fellow servant, and that he (the plaintiff) was without fault, and therefore the company was liable to him under the law as it existed in this state prior to the act of 1909 (Acts 1909, p. 160) regulating the liability of railroad companies for injuries to their employes; (2) that if he was not a servant, but was a trespasser, the engineer had injured him through a willful and wanton act, wherefore the company was liable to him. *Held*, that it was error for the court to instruct the jury that if they believed that the plaintiff was negligent, and the defendant company, through its servant, was also negligent, and that the plaintiff, after being negligent and after seeing his danger, could not prevent the injury to himself, the plaintiff would be entitled to recover, but that his recovery should be reduced in proportion to the extent his negligence contributed to the injury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 85, 163-167; Dec. Dig. § 101.*]

Error from City Court of Americus; C. R. Crisp, Judge.

Action by C. O. Sanburn against S. D. Warfield and others, receivers. Judgment for plaintiff, and defendants bring error. Reversed.

E. A. Hawkins, for plaintiffs in error. R. L. Maynard, R. L. Berner, and J. A. Hixon, for defendant in error.

POWELL, J. The petition in this case was not subject to general demurrer on the ground that it set out no cause of action, but it would have been subject to a demurrer pointing out the fact that it was duplicitous, because in a single count it attempted to set up liability resting on two inconsistent theories: (1) That the plaintiff was an employé of the company, and was hurt through the negligence of a coemployé, but hurt under such circumstances of negligence on the part of the coemployé and of freedom from fault on his own part as to make a case of liability under the law as it existed in this state prior to the passage of the act of 1909 (Acts 1909, p. 160) regulat-

ing the liability of railroad companies to their employes; (2) that even if the plaintiff was not an employe, but was a mere volunteer in attempting the work he was doing at the time of his injury, and was therefore to be considered as a trespasser, the engineer had willfully and wantonly injured him, whereby the company was liable. Since there was no timely demurrer complaining of this formal defect, it was permissible for the plaintiff to introduce evidence along both lines, and to take advantage of both theories before the jury; but under neither of these theories was a case for the application of the doctrine of comparative negligence and of diminution of damages presented.

The court instructed the jury very properly that, if they found that the plaintiff was a servant and was injured by the negligence of a coemploye, he could not recover unless he was free from fault; but in this same context, and without in any wise informing them that he was referring to any other theory of the case, charged the rule as to diminution of damages in the event that they found that both were at fault. It has been repeatedly held that the rule in this state by which damages may be pro-

portioned in accordance with the comparative negligence of the parties does not apply to cases arising under the law requiring a servant to be free from fault in order to recover on account of the negligence of a coemploye in railroad service. The present charge would also have been erroneous if, under the context, it could have been considered as able counsel for the defendant in error so ingeniously argues that it should be; that is, as applying to the other theory of the case, because it omits all reference to willfulness and wantonness. Furthermore, the rule is that, if the defendant commits the injury willfully and wantonly, contributory negligence of the plaintiff is no defense at all. *Central of Ga. Ry. Co. v. Moore*, 5 Ga. App. 562, 63 S. E. 642. While in such cases the principle embraced in the maxim, "*volenti non fit injuria*," may be so far applied as to prevent a recovery where the plaintiff has actually or constructively consented to his own injury, still the doctrine of contributory negligence is not applicable. The charge, as given, was not appropriate to any theory of the case, but was a charge which was erroneous, whether considered abstractly or in connection with the particular facts to which the court may have intended to relate it.

Judgment reversed.

(38 W. Va. 486)

CLINE v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of West Virginia.
May 18, 1911. Rehearing Denied
June 17, 1911.)

*(Syllabus by the Court.)***WATERS AND WATER COURSES (§ 54*)—RAILROAD EMBANKMENT—CHANGE OF CHANNEL—LIABILITY.**

If a railroad company make a fill or embankment along a stream, which changes the channel and current, and thus cause land of a riparian owner across the stream to be washed away, it is liable for the damage, and is not exempt from liability by the authority conferred on it by the state to build its road.

[Ed. Note.—For other cases, see *Waters and Water Courses*, 'Dec. Dig. § 54.*']

Error to Circuit Court, McDowell County.

Action by James J. Cline against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wyndham Stokes and J. Graham Sale, for plaintiff in error. Cook & Howard, for defendant in error.

BRANNON, J. The Norfolk & Western Railway Company constructed two fills or embankments on one side of Tug river for a second track, invading the river. One of these fills was just across the river from a tract of land owned by James J. Cline. In 1907 and again in 1908 high water came in Tug river and washed away a considerable quantity of Cline's land and the trees thereon. Cline sued the railway company and obtained a verdict and judgment for \$150, and the company brought this writ of error.

One defense of the action presented for our consideration is that the railway company built these fills on its own right of way, and in doing so did the work in the most approved manner, and was not guilty of any negligence in construction, and therefore, though damage came to Cline, there could be no recovery. Such a legal proposition cannot be sustained. There seems some confusion yet prevailing touching this matter so well established in law that it seems hardly necessary to restate it. When the Constitution provided that "private property shall not be taken for public use without just compensation," the law was that a railroad company or other corporation having authority from the Legislature was not liable when land was not actually taken, or so damaged that it amounted to that, for damages to the land merely consequential from the work. *Spencer v. Railroad*, 23 W. Va. 418, 427, 4 Am. & Eng. Ann. Cas. 1175, 1185; 15 Cyc. 653; 10 Am. & Eng. Ency. L. 1103. But if the work was done negligently, if the power was not prudently and carefully exercised, damages could be recovered. *Taylor v. Railroad*, 33 W. Va. 39, 10 S. E. 29. Some cases held that damages could be

recovered even under such provision using only the word "taken"; that a grant of authority from the Legislature could not exempt for property merely damaged, but not taken. *Trenton Co. v. Raff*, 36 N. J. Law, 335. But this has become an immaterial question, because our Constitution of 1872 (article 3, § 9) inserted the word "damaged," making it read: "Private property shall not be taken or damaged for public use without just compensation." Therefore, no matter whether the property is actually physically taken, or so badly damaged as to amount to a taking, or be merely damaged to a substantial, not speculative, extent, damages may be recovered, and the legislative authority for the work matters not. *Pickens v. Coal R. Co.*, 66 W. Va. 10, 65 S. E. 865; *Guina v. Railroad*, 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806; *Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Watson v. Fairmont*, 49 W. Va. 528, 39 S. E. 193. This provision of our Constitution came from Illinois, and construing that Constitution the United States Supreme Court held in *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638, that: "Under the provision in the state of Illinois adopted in 1870 that 'private property shall not be taken or damaged for public use without just compensation,' a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character; whether the damage be direct, as when caused by trespass or physical invasion of the property, or consequential as in a diminution of its market value." So, if damages came to Cline from those fills, he is entitled to recover.

Another ground of defense is that in fact the fills or embankments did not cause the damage. On this question the evidence is conflicting. There is a large amount of evidence going to show that though there had been in 1901 and 1902 higher rises in Tug river, yet they did not wash the land away, and that these fills changed the current of the stream from the railway side of the river to the other side and threw the current against Cline's land, and that the washing away of the land was directly attributable to these fills. There is some evidence to the contrary. The question was one of fact for the jury. We shall not detail the evidence. The verdict and the action of the circuit court must be in this respect final. Else what efficacy has a verdict upon conflicting oral evidence?

It is complained that the court allowed witnesses to express an opinion that the damage to Cline's land came from those fills. The witnesses giving such opinion were well acquainted with the stream and the fills, had been acquainted with the stream for years before, and spoke from ob-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

servation of river and fills. Opinion evidence is not always to be rejected. When it is based on practical and actual observation of things, which cannot be brought into court to be seen by the jury, it is admissible. This matter had been often discussed. *Walker v. Strosnider*, 67 W. Va. 39, pt. 17, 67 S. E. 1087; *Kunst v. Grafton*, 67 W. Va. 20, 67 S. E. 74, 28 L. R. A. (N. S.) 1201.

Complaint is made of the refusal of instructions. Some of them are based on the proposition of law above stated, and are not sound in that respect. One asserts that it was the duty of Cline to build a defense of his land against the water, and thus prevent damage. Plainly this cannot be so. The work changed the channel and current, and Cline as a riparian owner was entitled to have the river as by nature it was. We need not incorporate those instructions, as the case does not go back for retrial, and as they involve no principle of law not above stated. We need not further discuss the case.

Judgment affirmed.

(69 W. Va. 405)

DENNY v. AMERICAN CAR & FOUNDRY CO.

(Supreme Court of Appeals of West Virginia.
May 16, 1911. Rehearing Denied
June 17, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 124*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES.

The master is liable for an injury to the servant resulting from the master's failure reasonably to inspect and keep safe an appliance with which the servant must work, unless the servant himself failed to exercise due care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

2. MASTER AND SERVANT (§ 235*)—DEFECTIVE APPLIANCES—INSPECTION BY SERVANT.

There is no duty on the servant to inspect closely and make sure of the condition of the appliance with which he must work. He has the right to rely on the duty of the master to keep the appliance reasonably safe, except when the defect is known to him or is such that in reason he should observe it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

Error to Circuit Court, Cabell County.

Action by Richard Denny against the American Car & Foundry Company. Judgment for plaintiff and defendant brings error. Affirmed.

Anderson, Strother & Hughes, for plaintiff in error. Jean F. Smith, for defendant in error.

ROBINSON, J. Plaintiff, while employed by the defendant company in its car manufacturing establishment, was severely injured.

He sued for damages, alleging that the injury was caused by defendant's failure to provide him reasonably safe machinery and appliances with which to work. Through the verdict of a jury, he has judgment for three thousand dollars, as to which defendant has prosecuted a writ of error.

The injury resulted from the tilting of a steel rail on a track in the yard of defendant's establishment. Plaintiff was assisting several other laborers in pushing a heavily loaded truck. The truck was being pushed off a movable section of the track, which movable section was made so as to transfer cars or trucks from one track to another. Each of the two rails on this movable section rested on a timber laid lengthwise with it. There were no cross-ties. When the hind wheels of the loaded truck were at the end of these rails, over one of which plaintiff walked as he pushed, the heavy weight caused the spikes to pull out and the rail to tilt and strike plaintiff between the legs and on the back. The severe character of the injury inflicted is fully established.

Plaintiff's evidence clearly establishes that the track was defective, unsafe and insecure, and that defendant should have known this condition. One of defendant's own foremen testifies that the spikes pulled out and allowed the rail to tilt on its end because of the wear on the track by constant use. It was the duty of defendant to keep the track safe for the employees that were made to walk over it in pushing loaded trucks. Defendant is chargeable with knowledge of its bad condition; for by reasonable care defendant could have observed the defect. The circumstances prove that defendant did not observe care in looking to the condition of the track. Defendant offered no evidence. There is no showing that defendant at any time ever inspected the track or took care to keep it safe. The fulfillment of defendant's duty reasonably to inspect and repair does not appear anywhere in the evidence; but, on the other hand, the fact plainly appears that if there was any inspection at all, the track was left unrepaired. The defect is sufficiently proved to have been there. It was one that reasonable diligence could have guarded against; but no diligence in that particular on the part of defendant appears. This lack of diligence caused plaintiff's injury. The performance of a reasonable duty enjoined on defendant would have prevented it.

[1] This case is controlled by the well known principle that the master is liable for an injury to the servant resulting from the master's failure reasonably to inspect and keep safe an appliance with which the servant must work unless the servant himself failed to exercise due care. The loose and peculiarly laid rail on the movable section of the track was certainly an unsafe appliance.

The master violated its duty when it knowingly used the appliance, or used it without reasonable care to know its condition.

[2] Plaintiff was bound to observe the insecurity of the rail if it was reasonably observable to him. But he was not bound to inspect particularly and make sure of the condition of the rail. If its unsafe condition was not known or visible to him as he pushed the truck, he had the right to rely on the duty of the master to keep it reasonably safe. There is no evidence in this case to charge plaintiff with contributory negligence in this particular.

It was not error to permit a copy of the writ to supply the place of the lost original. The evidence sufficiently establishes that the copy is a true one. Nor was it error to overrule the demurrer to the declaration. That pleading is good.

The plea of the statute of limitations of course was not sustained. There is no evidence showing that the injury occurred more than a year before the institution of this suit. The evidence undoubtedly proves the contrary.

The case was fairly submitted to the jury. An examination of the instructions given and refused convinces us that no error was committed in regard to them.

Let the judgment be affirmed.

(36 W. Va. 396)

AVERILL v. BOYER.

(Supreme Court of Appeals of West Virginia.
May 9, 1911. Rehearing Denied
June 17, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 174*)—APPEAL—PLEADING.

If plaintiff's account, filed with a justice of the peace, is sufficient to inform defendant of the nature and amount of his claim, it is not error for the trial court, on appeal, to refuse a motion by defendant to require plaintiff either to file a written declaration of his claim or to amend his bill of particulars.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 682; Dec. Dig. § 174.*]

2. FRAUDS, STATUTE OF (§ 183*)—ORAL AGREEMENT—EXCHANGE OF LAND—RECOVERY OF CONSIDERATION.

The statute of frauds will not avail to defeat an action on a money demand growing out of, or constituting a part of the consideration for, an oral agreement for the exchange of lands, after deeds have passed.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 296-298; Dec. Dig. § 183.*]

Error to Circuit Court, Kanawha County.
Action by Mary J. Averill against Lula D. Boyer. Judgment for plaintiff, and defendant brings error. Affirmed.

W. S. Laidley, for plaintiff in error.
Everett E. Robertson and Littlepage, Cato & Bledsoe, for defendant in error.

WILLIAMS, P. This suit was originally brought before a justice of the peace to recover money on contract for exchange of lands. Appeal was taken from the judgment of the justice to the intermediate court of Kanawha county. The case was there tried by a jury, and a verdict and judgment obtained by plaintiff for \$282.22. Defendant was denied a writ of error by the circuit court of Kanawha county, and then obtained one from this court. The verdict rests upon conflicting oral testimony, as to the weight of which the jury are the sole judges; and, unless it is contrary to the evidence, or clearly against the great weight of evidence, we cannot disturb it.

The testimony of plaintiff and of her witnesses tends to prove that about the last of August, 1906, plaintiff and defendant made an agreement whereby plaintiff was to convey a small farm, located at lock No. 5 in Kanawha county, and pay \$2,500 cash to boot, in exchange for two houses and lots in the city of Charleston; that shortly after this agreement was made plaintiff ascertained that she could not pay the \$2,500 cash, and the original contract was then modified to the extent that plaintiff was to exchange her farm for one of said houses and lots, the one on Morris street in the city of Charleston, and defendant was to pay plaintiff \$1,000 boot in cash; that shortly after this the contract was again modified to the extent that plaintiff agreed to take from defendant a vacant lot in the city of Charleston in lieu of the \$1,000 in cash; that at the time the contract was first made it was agreed that plaintiff should deliver immediate possession of her farm to defendant, and that defendant should collect the rent for the house on Morris street under a lease made by her to a certain tenant, prior to the first agreement, and should account to plaintiff for such rent from the 1st day of September, 1906, thereby giving plaintiff constructive possession of the house and lot; that plaintiff turned over possession of the farm to defendant the last of August, 1906, and that defendant immediately leased the same to one Harless by written contract for the period of one year, beginning January 1, 1907, and ending January 1, 1908, in consideration of one-half of the crops to be raised on the farm. It is proven that Harless took possession of the farm the 1st of September, 1906, but that he paid defendant no rent for the remainder of that year. Defendant collected the rent from the Morris street property, \$40 per month, from the 1st of September, 1906, until the 1st of June, 1907, and refused to account to plaintiff for it. This suit is to recover that rent money, less certain credits admitted to be due defendant.

There were no formal pleadings before the justice of the peace, but plaintiff's claim

then filed designates it as "nine months rent, beginning Sept. 1st, 1906, property, at \$40.00 per month, \$360.00." The account is credited with taxes, \$54.78, and money paid out for obtaining release deeds, \$25, thus leaving a balance of \$280.22.

[1] The court overruled defendant's motion to require plaintiff to file her declaration, or complaint, setting forth her cause of action, and defendant excepted. This was not error. The pleadings in a justice's court are informal, and may be either oral or in writing. Section 50, c. 50, Code 1906; *O'Connor v. Dils*, 43 W. Va. 54, 26 S. E. 354; *White v. Emblem*, 43 W. Va. 819, 28 S. E. 761; *Poole v. Dilworth*, 26 W. Va. 583. Subsection 8 of said section 50 is as follows: "In an action or defense founded upon an account, note, or other writing for the payment of money, it shall be sufficient for the party to deliver the account, note, or other writing to the justice and to state that there is due to him thereon from the adverse party a specific sum, which he claims to recover or set-off in the action." *Mt'n. City Mill Co. v. Southern*, 46 W. Va. 754, 34 S. E. 782. The trial judge did not abuse his discretion in refusing to require plaintiff to file a declaration of her claim, or an amended bill of particulars; such amendment was not necessary to promote substantial justice. Section 169, c. 50, Code 1906; *Drinkard v. Heptinstall*, 55 W. Va. 320, 47 S. E. 72; *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361. The account filed before the justice was sufficient to advise defendant fully of the nature of plaintiff's demand. The fact that the account states that the money was due for "rent" does not necessarily imply a lease by plaintiff to defendant. It is rent money which, according to plaintiff's proof, defendant had collected as the agent of plaintiff.

Defendant twice moved the court to direct a verdict in her favor, once after plaintiff had given her testimony, and again after plaintiff had closed her case. These motions were overruled, and exceptions taken. These motions were properly overruled, because plaintiff's testimony made out a good cause of action. But, even if there had been merit in these motions, defendant waived them by subsequently introducing her own evidence and suffering the case to go to the jury upon the evidence introduced on both sides. *Williams & Davisson Co. v. Ferguson Contracting Co.*, 60 W. Va. 428, 431, 55 S. E. 1011, and cases cited in opinion.

[2] The statute of frauds is relied on as a defense, but we cannot see that it has any application. It matters not whether the contract to exchange lands was oral or in writing. It was finally consummated, in May, 1907, by an exchange of deeds. Moreover, this is not a suit for specific per-

formance of a contract for sale of land; but it is an action for money which plaintiff claims was received by defendant for plaintiff's use, pursuant to an agreement fully executed by plaintiff, according to her evidence. Plaintiff's right to recover does not depend upon the time when the deeds were exchanged, but upon the agreement as to the time when she should be entitled to the rent for the Morris street property, which she testifies defendant had agreed to collect and turn over to her. It did not require a writing to constitute a valid assignment of the rent reserved; and plaintiff's evidence tends to prove that the rent from the Morris street property was to go to her after September 1, 1906, in lieu of the possession of the farm, which plaintiff says she turned over to defendant the 1st of September, 1906. Actual possession of the Morris street property could not be delivered on the 1st of September, 1906, because of the existence of the lease made by defendant prior to the land trade, and to run for several months. The fact that defendant charged no rent, and collected none, for the occupancy of the farm between September 1, 1906, and January 1, 1907, does not affect the case. The surrendering of possession of the farm by plaintiff was a sufficient consideration to support defendant's promise to account to her for the rent to accrue from the Morris street property.

It is not material that the contract, as originally made, was not fully carried out. The subsequent modifications of it do not relate to the questions of possession of the farm, and rent from the Morris street property. The suit having been brought originally before a justice of the peace, and there being no formal pleadings, it may very properly be regarded as an action in assumpsit, either for money had and received to plaintiff's use, or for money due on contract fully executed by plaintiff.

Shortly after the agreement for the exchange of lands was made defendant employed counsel to investigate plaintiff's title. It was discovered that there was an unreleased lien upon it, and defendant employed counsel, on her own account, to obtain proper releases, which he did. Defendant also paid certain taxes for plaintiff. These items aggregate \$79.78, and are admittedly proper credits, or sets-off. They reduce plaintiff's demand to the jurisdictional amount in a justice's court.

The evidence upon some matters is very conflicting, but as to the credibility of witnesses the jury are the sole judges. They had a right to believe some witnesses, rather than others, wherein their testimony conflicted. We cannot say the jury were wrong in finding for plaintiff; and the judgment of the intermediate court of Kanawha county will be affirmed.

(69 W. Va. 287)

HARMAN v. ALT.

(Supreme Court of Appeals of West Virginia.
May 2, 1911. Rehearing Denied
June 17, 1911.)

(Syllabus by the Court.)

1. BOUNDARIES (§ 46*)—ORAL AGREEMENTS—BINDING EFFECT.

Disputed boundaries between adjoining tracts of land may be settled by express oral agreement, executed immediately, and accompanied by possession.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.*]

2. ADVERSE POSSESSION (§ 106*)—FORCIBLE ENTRY AND DETAINER (§ 8*)—EFFECT—UNLAWFUL ENTRY AND DETAINER.

Actual, open, notorious, exclusive and continuous adverse possession of land for more than ten years, confers good legal title, enabling the owner to maintain an action for unlawful entry and detainer against one who enters unlawfully.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 604-623; Dec. Dig. § 106.* *Forcible Entry and Detainer*, Cent. Dig. §§ 35, 36; Dec. Dig. § 8.*]

3. ADVERSE POSSESSION (§ 108*)—ACQUISITION BY MISTAKE—ESTOPPEL.

The rule that acquiescence or admissions by a landowner, made under a mistake as to his rights, will not estop him from subsequently enlarging his possession to the limits of his deed, does not apply as against one who has acquired good title by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 108.*]

4. FORCIBLE ENTRY AND DETAINER (§ 4*)—PEACEABLE ENTRY—RIGHT OF ACTION.

If an entry on land, though peaceable, be unlawful, the owner may recover the possession from the intruder in an action of unlawful entry and detainer.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 5-22; Dec. Dig. § 4.*]

Error to Circuit Court, Tucker County.

Action by S. C. Harman against W. E. Alt. Judgment for plaintiff, and defendant brings error. **Affirmed.**

C. O. Strleby, for plaintiff in error. J. Wm. Harman, for defendant in error.

MILLER, J. In an action of unlawful entry and detainer the court below directed a verdict for plaintiff, and entered judgment thereon that plaintiff recover the land sued for. To review that judgment this writ of error was awarded the defendant.

There is no substantial merit in the first point, that the summons is defective. *Cunningham v. Sayre*, 21 W. Va. 440, we think decisive of this question.

We are of opinion also, that the judgment below should be affirmed on two grounds: First, that there was an agreement as to the boundary line in dispute, fixing it where plaintiff claims it, and binding defendant; second, that plaintiff by actual, open, notorious, exclusive and continuous adverse possession of said land, for more than ten years, acquired good title thereby, rendering his ouster by defendant, though peaceable, un-

lawful, entitling plaintiff to judgment for possession.

On the question of the agreed line, the uncontradicted evidence is, that plaintiff and defendant own adjoining lots, parts of a larger tract, owned and divided into lots by a former owner. Plaintiff's lot of forty-seven acres lies north east of defendant's tract, described as containing one hundred and ten and one-fourth acres, more or less. The dividing line called for in plaintiff's deed, and in the deed to W. F. Nine, defendant's immediate grantor, and in deeds prior to his, is a line, N. 64° W. The distance called for in plaintiff's deed, and in the deeds to and from his predecessors, is eighty-three poles; in defendant's deed the distance called for is one hundred and fourteen poles. W. F. Nine, from whom defendant purchased his lot by title bond, May 1, 1903, and took his deed, May 11, 1903, bought this lot of Eli Nine in 1890. In 1897, Harper owned the lot immediately east, and F. M. Pearson, the one on the west. There was uncertainty and dispute about the exact location of the division lines. Harper and Pearson were unwilling to build division fences, as desired by Nine, until these lines should be definitely and certainly located. Nine employed R. P. Pearson, a surveyor, to make a survey, calling in as parties, not only Harper and Pearson, but also the plaintiff Harman. Harman carried the chain, at least a part of the time. All agreed on the south east corner of the Nine lot as the beginning corner. The survey definitely located the lines and corners. There was no dissent. Nine insisted on planting stones at each corner, which was done, and pointers were also made to the corners. As then located by Pearson, the division line between plaintiff and defendant is a line, between stone corners, S. 59¼° E. When Alt bought his lot in May, 1903, Nine pointed out to him all these lines and corners, as located by Pearson. In Nine's deed to Alt these stone corners are specifically called for, and the land further described as the same land purchased by Eli Nine from A. C. Harness, and conveyed by said Eli Nine to W. F. Nine, February 19, 1890. Immediately after the survey by Pearson, Harman and Alt joined in building a division fence, on the line S. 59¼° east, building it for thirty or forty rods of posts, wire and boards, to a point where they struck the timber, and from thence out of logs and poles to a stone bluff and a laurel thicket, and to and over it, using logs and poles, making a complete barrier along the entire line, and so maintained this fence until Alt bought from Nine, and afterward the fence was continued and maintained jointly by Alt and Harman, without controversy as to its location, until in November, 1908, when defendant, without plaintiff's knowledge or consent entered and cut some timber, claiming the right to go over

on Harman to a marked line, some three or four rods north of the Pearson line, because of an alleged mistake in the Pearson survey. The land between these two lines is the land now in controversy. After cutting the timber Alt was notified by Harman to cease trespassing. A few days afterwards, however, in the absence of Harman, Alt entered, tore down the division fence, and moved it over on a so called old line. Wherefore the suit.

[1] It is said that because Nine, at the time of the survey by Pearson, in 1897, had not disputed with Harman as to the location of the line, and Harman had not agreed before hand to be bound by that survey, though he participated therein, and afterwards acquiesced, and accepted the same, neither Nine nor Alt are concluded or estopped from enlarging their boundary by going over to the old marked line. This, however, is not the law. *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880, and *Teass v. City of St. Albans*, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802, hold, that disputed boundaries between two adjoining tracts of land may be settled by express oral agreement, executed immediately, and accompanied by possession according thereto. And, as particularly applicable to the contention of defendant's counsel in this case, point six of the syllabus in the first case, declares that, long acquiescence by one adjoining proprietor in a boundary established by the other is evidence of such agreement so fixing the division-line between them. "What is meant by long acquiescence," says Judge Green, in this case, "is not definitely settled by the decisions," but, as particularly applicable to the case here, point eight of the syllabus says: "Such acquiescence, in this State for a period of over ten years will justify a jury in inferring, that such parol agreement establishing such division-line existed; and a verdict based on such inference ought not to be set aside as plainly contrary to the evidence." It was wholly unnecessary, however, for the court below in this case to have submitted to a jury the question of the fact of the agreement by plaintiff, for the evidence proves beyond doubt, and there is nothing to the contrary, that Harman was a party to that agreement. He participated in the survey, and testifies positively, that he did, and he is not contradicted by Nine, that after that said survey, he and Nine agreed on the line established by Pearson, and pursuant thereto built the fence on that line. The fence was intended to, and did, to the satisfaction of the parties, constitute a complete barrier between their respective

lots. It constituted a real and substantial inclosure by Harman of his land, sufficient we think to satisfy all the requirements of the statute of limitations, and the decisions of this court in *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255, and other cases, much relied on by counsel for defendant.

[2] But conceding that there was no agreement binding Harman, there was actual, open, notorious, exclusive, and continuous adverse possession by him, for more than ten years before defendant entered and tore down the division fence. This gave him the absolute, indefeasible title to the land by adverse possession, even though it be conceded *arguendo*, that originally the defendant or his predecessors in title may have had the better title. Plaintiff's title became good title by adverse possession. Such title by adverse possession confers legal title, enabling the owner not only to defend, but to maintain ejectment or other actions thereon. *Parkersburg Industrial Co. v. Schultz*, *supra*, syllabus, point five.

[3] The proposition of defendant's counsel, based on *White v. Ward*, 35 W. Va. 418, 14 S. E. 22, that acquiescence or admission by a landowner, made under a mistake as to his rights, will not estop him from subsequently enlarging his possession to the limits of his deed, does not apply as against one who has acquired good title by adverse possession. This case distinctly so decides.

[4] The point is made, however, that defendant's entry was peaceable, not forcible. This is not a defense if his entry was unlawful. This action goes against one who enters peaceably, if his entry be unlawful; and his entry is unlawful, though peaceable, as against the true owner of the land. In this case we hold that plaintiff had acquired by adverse possession absolute title to the land in controversy, on which he could maintain ejectment or other action. The entry by defendant was therefore unlawful, if not forcible. His entry was that of a stranger to the paramount title of the plaintiff. He must therefore surrender the possession thus unlawfully acquired. *Fisher v. Harman*, 67 W. Va. 619, 625, 68 S. E. 885, citing *Duff v. Good*, 24 W. Va. 682; *Franklin v. Geho*, 30 W. Va. 27, 8 S. E. 168; *Davis v. Mayo*, 82 Va. 97; *Fore v. Campbell*, 82 Va. 808, 1 S. E. 180; *Olinger v. Shepherd*, 12 Grat. (Va.) 462.

These conclusions, we think, constitute a complete answer to all the points presented in argument, calling for no further reply thereto, and resulting in an affirmance of the judgment below. Judgment affirmed.

(69 W. Va. 322)

SPENCER v. RICKARD.

(Supreme Court of Appeals of West Virginia.
May 9, 1911. Rehearing Denied
June 17, 1911.)

(Syllabus by the Court.)

1. PROCESS (§ 164*)—RETURN—AMENDMENT.

It is proper to permit a return of service to be amended according to the fact, in proceedings of the case which attack the validity of the judgment on the ground of an insufficient return, though the amendment defeats the proceedings.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 239-248; Dec. Dig. § 164.*]

2. PROCESS (§ 164*)—AMENDMENT—RETURN OF SERVICE.

An insufficient return of service on the summons to answer an action may be amended, on a motion to quash an execution issued on a default judgment therein, notwithstanding the defendant appeared specially in the action and unsuccessfully sought to quash the return.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 239-248; Dec. Dig. § 164.*]

Poffenbarger, J., dissenting.

Error to Circuit Court, Mason County.

Action by John H. Spencer against O. B. Rickard. Judgment for plaintiff, and defendant brings error. Affirmed.

Somerville & Somerville, for plaintiff in error. Rankin Wiley, for defendant in error.

ROBINSON, J. This writ of error seeks the reversal of an order refusing a motion to quash an execution.

Spencer sued Rickard before a justice of the peace for money due on contract. Defendant appeared specially and moved to quash the return of service on the summons. This motion the justice overruled. Defendant then retired and made no further appearance in the suit. A judgment for plaintiff was pronounced and entered. When an execution was issued on the judgment, defendant by proper notice moved the justice to quash the same. The motion to quash the execution was sustained, and plaintiff appealed from the order of the justice in that particular to the circuit court. When the appeal came on to be heard, the circuit court permitted the return of service on the summons to be amended. The execution was quashed on the ground that it was not properly directed, but the ground that there was no valid judgment because of illegal service was distinctly overruled.

Subsequent to these proceedings, plaintiff filed a transcript of his judgment in the office of the clerk of the circuit court of the county, and execution was issued thereon. It is that execution which defendant attacks in the proceedings now before us.

Defendant says that the execution is not supported by a valid judgment. He insists that the judgment is void because no proper return of service appeared on the summons

when defendant moved to quash the return. In other words, he maintains that there has been no due process of law—no notice to him.

[1] The amended return of service, however, shows that defendant was regularly served. It shows that legal notice of the suit was given him. Now, the main question is: Must the judgment be held to stand on the alleged invalid return of service which defendant unsuccessfully attacked, or on the amendment of the return showing that he really had the character of notice which the law requires when he refused to enter a general appearance in the case?

The judgment against defendant is plainly a judgment by default, though he contested the showing of jurisdiction. The judgment is the same as if he had not specially appeared. The special appearance really availed him nothing, since his motion thereunder was denied by the justice. He can take only the same advantage that he could have taken if he had not appeared for any purpose. When there is no general appearance, as in this case, a judgment rendered is one by default. A default judgment is void and unenforceable if there was no jurisdiction to render it—if the defendant was not notified in the manner prescribed by law. It has been held that, in cases before justices, improper or illegal notice is waived by a general appearance. *Railroad Co. v. Wright*, 50 W. Va. 653, 41 S. E. 147. But the defendant in the case at hand waived nothing by his special appearance. He may still avoid the judgment if he was not legally brought in to answer the action. He may quash the execution issued thereon, if he was not served with process in the action. But may he thus avoid the judgment merely because the original return was bad, though by an amendment properly made it appears that he actually had notice in the manner the law prescribes? He insists that he may.

The judgment is not absolutely void if defendant was duly notified, though the return of service did not show due notice to him. If process had been legally executed on him at the time of trial, he knew it. He knew the actual manner of the service of notice to answer the suit. If he was served in an illegal way, he could rely on that fatal defect, make no general appearance, and defeat the enforcement of the judgment whenever undertaken. But if he knew that legal service was made on him, he could not allow judgment to go against him by default and thereafter be sure to defeat it simply because the original return did not show the legal service that actually was made; for, by well established law the fact of a sufficient service may thereafter be shown by an amendment of the return. When defendant declined to make a general appearance, knowing, as he must have known, that legal service had been executed on him and only badly returned, he

suffered a judgment by default and took the risk of an amendment according to the actual fact which would fully support that judgment. He could only safely take the course which he pursued when he knew that no amendment according to the fact could ever show a valid service of the summons. He has not been unjustly denied an opportunity to defend on the merits, as he submits. He had that opportunity but refused to take advantage of it.

We need not pass on the sufficiency of the original return of service. It is conceded that the amended return, made pending the proceedings to quash the first execution, is good. The amended return shows that defendant had notice of the suit in which the judgment was rendered, as required by law. It proves that the justice had jurisdiction of defendant to render the judgment against him. It supports the judgment and denies the ground on which defendant would quash the last execution issued thereon.

[2] To allow a return of service to be amended according to the fact, in proceedings of the original case which attack the validity of the judgment on the ground of the insufficient return, though the amendment defeats the proceedings, is usual practice. *Capehart v. Cunningham*, 12 W. Va. 750; *Laidley v. Bright*, 17 W. Va. 779; *Anderson v. Doolittle*, 38 W. Va. 633, 18 S. E. 726; *Hopkins v. Railroad Co.*, 42 W. Va. 535, 26 S. E. 187; *McClure-Mable Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. 921; *Gauley Coal Land Ass'n v. Spies*, 61 W. Va. 19, 55 S. E. 903; 1 Enc. Digest Va. & W. Va. 356-359. It was merely this practice that was followed in the case under consideration. The course pursued was fully warranted. On the motion to quash the execution, now before us by this writ of error, the amendment of the return of service that had been made in the proceedings to quash the former execution was shown. That amendment stood as a former adjudication, from which no appeal had been taken. As we have said, the amendment proved that there was due notice to defendant before the rendition of the judgment in question. It validated the judgment attacked by the motion to quash the execution. Though it took away the foundation of the motion to quash the execution, the amendment of the service was properly relied on.

A motion to quash an execution is a proceeding in the case in which the judgment was rendered. In this instance it was a proceeding in the nature of a motion to reverse the default judgment because the summons to answer the action had not been legally served. Clearly was it analogous to a motion for that purpose. No direct method of reversal on that ground is provided by statute as to cases before justices. Defendant could not appeal and contest the point of insufficient service, for his appeal would have operated as a general appearance and the point would thereby have been waived. Rail-

road Co. v. Wright, supra. But when final process was issued in the case, he could then seek a substantial reversal of the judgment by motion to defeat that process. The motion to quash the execution was indeed a motion to reverse the judgment on the ground of the insufficient return. Then, the holding of this court in *Anderson v. Doolittle*, 38 W. Va. 633, 18 S. E. 726, is applicable and justifies the amendment of the return of service: "It is proper, on the hearing of a motion to reverse a judgment by default for defective return of the summons in the action, to allow the sheriff to amend his return, and then overrule the motion to reverse, if the amended return be good. The amended return relates back, and takes the place of the original defective one."

An order will be entered affirming the judgment.

POFFENBARGER, J. (dissenting). I do not regard the result attained in this case as consistent with legal principles and orderly procedure. The true principle is declared in *Crowley v. Fisher*, 57 W. Va. 312, 50 S. E. 422, *Chapman v. Maitland*, 22 W. Va. 345, and *Price v. Pinnell*, 4 W. Va. 296. The general policy of the law is to save a litigant the benefit of all proper exceptions taken in due time. There can be no such thing as compulsory waiver. Voluntariness is the essential, dominant element of a waiver. The exception here presented, starting with the unfortunate suggestion in *Railway Co. v. Wright*, 50 W. Va. 653, 41 S. E. 147, is the only instance of violation of the principle found in the jurisprudence of this state, so far as I know.

Nor do I think the error in a judgment, entered over the protest of a defendant on insufficient process or a defective return, can be cured by an amendment, for this works a compulsory waiver. Such was the reasoning of Judge Stannard in *Wynn v. Wyatt's Adm'r*, 11 Leigh (Va.) 585, in the following concise and forceful terms: "The argument presents the singular dilemma, that a party cannot free himself from the present or past effect of erroneous process, without forfeiting his right to exemption from judgment until proper process shall be sued and duly served upon him. It would subject him to judgment without any future regular process, as the consequence of his objecting the nullity and irregularity of past process." President Tucker approved this reasoning. To the same effect see *Fisher v. Crowley*, cited; *Chapman v. Maitland*, 22 W. Va. 329; *Price v. Pinnell*, 4 W. Va. 296; *Hickman v. Lerkey*, 6 Grat. (Va.) 210. The apparent departure from the rule in *Gauley Land Ass'n v. Spies* may be justified by disclosure of lack of any defense. An insufficient answer having been rejected, nothing further was offered. The decisions of this court, cited as authority for cure of such defect by amendment, were all in cases of default judgments and decrees.

They do not justify the application of the rule under the circumstances of this case. Acting upon the suggestion in *Railway Co. v. Wright*, the defendant rested his case upon the motion to quash the return, seeing submission of his defense thereafter would be treated as a waiver of the defect. He has not been allowed to make his defense without giving up his legal right to a sufficient return. The statute gives that right. Denial thereof by a compulsory waiver—mere coercion—is judicial legislation pure and simple.

For these reasons, I dissent.

(112 Va. 525)

WELLS v. LAGORIO et al.†

(Supreme Court of Appeals of Virginia.
June 8, 1911.)

BOUNDARIES (§ 9*)—LOCATION AND QUANTITY OF LAND.

A vendor thought that he was selling all the land he owned, but his possessions were greater than he supposed. The purchasers were placed in possession of what each believed he purchased, and each knew the exact boundaries of the premises conveyed, and each received the identical parcel purchased. *Held*, that the purchasers acquired only the identical parcel purchased, as bounded by the lines pointed out, though they did not obtain the quantity of land they supposed they purchased.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 77-80; Dec. Dig. § 9.*]

Appeal from Circuit Court of City of Norfolk.

Suit by one Lagorio and others against A. B. Wells and others. From a decree granting relief, defendant Wells appeals. Reversed and rendered, dismissing the bill.

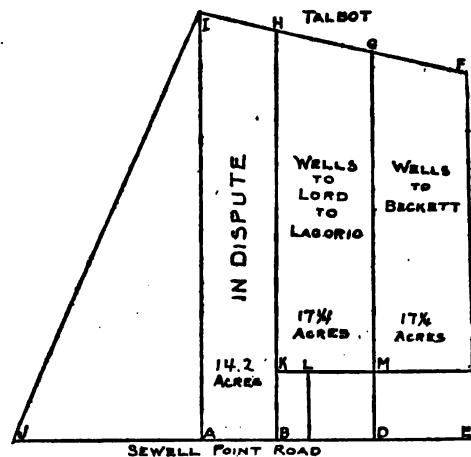
A. T. Stroud and W. L. Williams, for appellant. Wm. W. Old & Son and M. W. Talbot, for appellees.

KEITH, P. The children and heirs at law of Augustine Lagorio filed their bill, in which they pray that a certain tract of land be partitioned among them and certain persons whom they name as defendants interested in the land as tenants in common. They also name A. B. Wells, from whom the land sought to be partitioned was derived, and T. B. Edwards, a coterminous landowner, as parties defendant. All of the defendants answered the bill; the cotenants confessing its equity and expressing their willingness to have the land partitioned. Wells demurred to and answered the bill, and claimed title in himself in fee to the land in the bill mentioned. Proofs were taken, and the circuit court entered a decree in accordance with the prayer of the bill, and, it appearing that partition could not be made in kind, appointed commissioners, who were directed to sell the land, so that its proceeds might be divided among those entitled. From this decree an appeal was taken by A. B. Wells.

The facts are as follows: Wells was the

owner of a certain tract of land in the county of Norfolk, and by deed dated November 1, 1883, he sold to Claude Lord a portion of it—"the same being the westerly half of a tract of woodland, said to contain 60 acres, lying on the north side of Sewell's Point road, and bounded on the west by the lands occupied by Jackson Denby, on the north by Talbot's land, and on the east by Phillips' land, the said lands being a part of lands deeded by Mrs. Martha Upshur and others, dated October 18, 1882, to A. B. Wells and John C. Lord; the said land to be divided by a line starting at the center of the tract on the Sewell's Point road, thence running in a northerly direction to the center of the north line dividing the tract in halves, said westerly half, sold to said Claude Lord, said to contain 30 acres more or less." By deed dated September 25, 1886, Wells sold to Abram Beckett "all that tract of land lying and being in Tanner's Creek district and county of Norfolk, state of Virginia, and bounded and described as follows, to wit: On the west by lands owned by Claud Lord, and on the north by one Talbot, and on the east by lands of Phillips, and on the south by Sewell Point road, containing 30 acres more or less, being a part of the same that was conveyed to A. B. Wells and John C. Lord by deed bearing date on October 18, 1882, and duly of record in the clerk's office of Norfolk county court; the said John C. Lord having subsequently conveyed his interest to the said A. B. Wells."

The controversy in this case arises with respect to the location of the western line of the original tract owned by Wells; his deed to Claude Lord calling on the west for "lands occupied by Jackson Denby." That line is shown on the plat which accompanies this opinion as B, H.



The lands sold by Wells to Lagorio appear on this plat as B, H, G, D; the lands sold to Beckett as D, G, F, E. At the date of these deeds the wife of Jackson Denby held title to the triangle A, I, J; but her husband

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied September 14, 1911.

seems to have extended his occupancy beyond the limits of her title, so as to embrace A, I, H, B, which is the land in controversy.

Lagorio was put in possession of the western half of the tract owned by Wells, which was supposed to contain 30 acres, but which upon survey was ascertained to contain only 17¼ acres. Some years thereafter the Denbys conveyed to a man by the name of Edwards, who, upon investigating his title and having a survey of the premises made, found that his line upon the east was I, A, and not H, B, as had been theretofore supposed. He disclaimed all interest in that quadrilateral containing 14.2 acres, and so informed Wells, who thereupon made claim to it. The land is in a wild state, grown up in scrubby woods and bushes—practically in a state of nature.

The controversy in this case is as to the ownership of that quadrilateral of 14.2 acres; Lagorio and those interested with him claiming that the land purchased by him was bounded on the west by the land occupied by Jackson Denby, and that he was entitled by the terms of his deed to the line I, A; as his western boundary, and that, as he only bought one-half of the entire tract, that, of course, would throw his eastern line further to the west, and so with the tract sold to Beckett, so that, each having purchased half of the original tract, the purchase of each would be increased by one-half of the 14.2 acres—at least that would be the logical result of their claims. Certainly, if all the facts had been known at the date of the deed from Wells to Lagorio, and he had sold one-half of the quadrilateral A, I, F, E, the dividing line G, D, on the plat, would have fallen further to the west, and would have left in the half which Beckett afterwards bought 7.1 acres now embraced in the quadrilateral B, H, G, D. They agreed among themselves, however, that, instead of readjusting their rights in that way, they would consider themselves coparceners of the land in dispute, and that it be sold and the proceeds divided among them.

It appears from the evidence that the line B, H, was shown to Lagorio and accepted by him as his western boundary at the date of his deed, and so the line G, D, was the western boundary of Beckett. Lagorio and Beckett were both placed in possession of what they bought, or what they believed at the time of the transaction they were buying, and they and their assigns are still in the enjoyment of it. As the facts have since developed, it appears that the western line of Wells' original tract is further west than either he or his vendees at the time supposed. They were under the impression that his western line was H, B. It turns out now, in the light of subsequent developments, that his western line was I, A, and at the time of making the deeds to Lagorio and Beckett he

was the actual owner, though ignorant of the fact.

As was said by the commissioner to whom the cause was referred: "It is true that Wells thought he was selling all of the land that he owned; but his possessions were greater than he knew, and it cannot be reasoned that he intended to sell that which he did not know that he owned. It is true that Wells thought he was selling 30 acres to each of the parties, Lord and Beckett, and they thought they were getting approximately that amount, and it is further true that they did not get approximately 30 acres apiece; but they did get a tract of land, the exact boundaries of which they knew and had been pointed out to them. They got the identical piece of land that they purchased, bounded by the very lines which they had contemplated and which had been pointed out to them—the exact lands they had proposed to purchase, although their lands contained less acreage than was supposed."

For the foregoing reasons, we are of opinion that the decree of the circuit court should be reversed, and an order entered dismissing the bill of complaint.

Reversed.

(112 Va. 443)

SAUNDERS et al. v. BANK OF MECKLENBURG et al.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. BILLS AND NOTES (§ 106*)—VALIDITY.

The taking of a note by a bank, pending proceedings for its dissolution, to secure a pre-existing indebtedness, was not engaging in new business, as affecting the right to enforce the note.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 106.*]

2. CORPORATIONS (§ 608*)—DISSOLUTION—ENFORCEMENT OF CONTRACTS.

Generally no defense can be made to a suit by a corporation on a contract made with it, that it has forfeited its charter for acts of non-user or misuser, or that it has been dissolved, until such forfeiture or dissolution has been determined in a proceeding brought for that purpose.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2416-2419; Dec. Dig. § 608.*]

3. FRAUDS, STATUTE OF (§ 106*)—OBLIGATION FOR ANOTHER.

A note in ordinary form, payable to a bank and given pending proceedings for dissolution, to secure a pre-existing overdraft by a third party, is sufficient, within statute of frauds (Code 1904, § 2840), requiring a promise to answer for another's debt to be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 216, 218; Dec. Dig. § 106.*]

4. TRIAL (§ 296*)—INSTRUCTIONS.

Under a defense to a note that it was given to avoid "indictment and prosecution" of a cashier, an instruction predicating the defense on a

"prosecution or trial" was not reviewable error, where other instructions show that the terms "indictment" and "prosecution" were used synonymously.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

5. CONTRACTS (§ 71*)—ASSUMPTION OF ANOTHER'S OBLIGATION—CONSIDERATION.

Mere forbearance to sue, without agreement to that effect, is not sufficient consideration for a third person's promise to pay the debt, though forbearance be induced by the promise; but an agreement to forbear may be implied from conduct of the parties and the nature of the transaction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 295, 298, 298, 316-324; Dec. Dig. § 71.*]

6. BILLS AND NOTES (§ 538*)—INSTRUCTIONS—CONSIDERATION.

Under a defense of want of consideration for a note given to secure a debt of another, an instruction which authorized recovery without finding of an agreement, express or implied, that plaintiff should forbear to sue the original debtor, but merely on finding that plaintiff did so forbear, was erroneous.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 538.*]

7. APPEAL AND ERROR (§ 263*)—REVIEW—INSTRUCTIONS—EXCEPTIONS—NECESSITY.

An instruction to which no exceptions were taken will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1518-1532; Dec. Dig. § 263.*]

8. JUDGMENT (§ 184*)—ON MOTION—NOTICE.

Since pleadings on a motion for a judgment for money after notice, under Code 1904, § 3211, are intended to be very informal, except where statutes require otherwise, as under section 3269, authorizing special pleas of failure of consideration, etc., instructions offered by defendant on the ground that the terms of the notice of the motion for judgment are not such as to warrant recovery on a note made and delivered as collateral to secure payment of a debt to plaintiff from a third party were properly refused.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 346; Dec. Dig. § 184.*]

Error to Circuit Court, Mecklenburg County.

Proceeding by notice and motion, under Code 1904, § 3211, brought by the Bank of Mecklenburg and others against Mrs. A. A. Saunders and others to recover judgment on a note. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

John A. Lamb and Samuel A. Anderson, for plaintiffs in error. E. P. Buford and W. E. Homes, for defendants in error.

BUCHANAN, J. This is a proceeding by notice and motion, under section 3211 of the Code of 1904, to recover a judgment on a promissory note for \$10,000, made by the plaintiffs in error, Mrs. A. A. Saunders, Mrs. Clara C. Saunders, and Mrs. Neva S. Prince, payable to the defendant in error the Bank

of Mecklenburg, dated April 28, 1908, and due 12 months after date.

The Bank of Mecklenburg suspended business on the 13th of April, 1908, on account of its insolvency. It had been in business from the year 1872 or 1873, with a principal office at Boydton and a branch office at Chase City. The insolvency of the bank seems to have resulted from the action of the cashier at Boydton in permitting one of its customers, who became insolvent, to overdraw his account by more than \$100,000, and the action of the cashier at Chase City in allowing the Kershaw Manufacturing Company, another of its customers, which was also insolvent, to overdraw its account to the extent of some \$29,000. When the stockholders ascertained the condition of the bank, one-fourth or more of them in interest, who were also creditors, filed their bill in the circuit court of Mecklenburg county, pursuant to the provisions of section 1105a, subsec. 15, Code Va. 1904, for the purpose of winding up and dissolving the corporation, and enjoining the bank, its officers, and directors from disposing of its assets, and praying for the appointment of a receiver or receivers to take charge of its affairs, to collect the debts due and payable to it, for such disposition of its assets as might be just and equitable, and for general relief.

The bank filed its answer, in which it admitted the allegations of the bill. As prayed for, the court granted an injunction and appointed receivers. Afterwards, on the 28th day of April, 1908, the note sued on was made.

Upon the trial of the cause, there was a verdict and judgment for the plaintiff bank for the benefit of its receivers. To that judgment this writ or error was awarded.

The principal errors assigned, in substance, are: (1) That the bank, at the time the note was made, was a dissolved corporation, and could not be legally made the payee thereof; (2) that if the note was a promise to pay the debt of another, it is not a sufficient promise in writing under the statute of frauds; (3) that it was given for an illegal consideration; (4) that the note was without consideration.

The questions involved in these assignments of error were raised in the circuit court by pleas, objections made to evidence, instructions given and refused, and by a motion to set aside the verdict as contrary to the law and the evidence. The assignments of error will be considered, for the most part, without reference to the manner in which the questions involved were raised.

[1] As to the first assignment of error: It is true that at the time the note sued on was made the makers thereof were not indebted to the plaintiff bank; but it was ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ecuted in part payment, or as collateral for the payment, of the debt due from the Kershaw Manufacturing Company by overdraft, before the bill for winding up the affairs and dissolving the bank was filed. The taking of the note, however, was not in any sense engaging in new business, as is argued on the part of the bank, but was merely a means of securing the payment of an existing indebtedness. While the object of the proceeding under section 1105a, subsec. 15, Code Va. 1904, was to wind up the business and dissolve the bank corporation because of its insolvency, no decree, when the note sued on was made, had been, or so far as the record shows has ever been, made dissolving the corporation.

[2] The general rule (and there is nothing in the statutes under which the bill was filed to wind up and dissolve the corporation to change that rule) is that no defense can be made, to an action by a corporation on a contract made with it, that it has forfeited its charter for acts of nonuser or misuser, or that it has been dissolved, until after such forfeiture or dissolution has been judicially determined in a proceeding instituted for that purpose. See *Banks v. Poltiaux*, 3 Rand. 136, 15 Am. Dec. 706; *Crump v. Mining Co.*, 7 Grat. 352, 56 Am. Dec. 116; *Pixley, etc., v. Roanoke Nav. Co.*, 75 Va. 320; 1 Min. Inst. 637; 2 Cook on Stockholders, § 637; 2 Clark & Marshall, § 324; 10 Cyc. 1345.

[3] The next question to be considered is whether or not the note for the payment of the debt of another is sufficient, under section 2840 of the Code, which provides, among other things, that no action shall be brought "to charge any person upon a promise to answer for the debt, default or misdoings of another * * * unless the promise, contract, agreement, representation, assurance, ratification, or some memorandum or note thereof be in writing and signed by the party to be charged thereby or his agent; but the consideration need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary) by other evidence."

Our statute does not require, as did the fourth section of the English statute of frauds, that a writing evidencing a promise to pay the debt of another shall show on its face the agreement between the parties in order to be valid. The difference between the two statutes is commented upon by the judges delivering opinions in the case of *Colgin v. Henley*, 6 Leigh, 85. At that time there was no provision in our statute that the consideration for the promise need not be stated in the writing, but could be shown by parol evidence. In that case the court seemed to think that the statute was satisfied if the promise to pay the debt of another was in writing.

In the case of *Packard v. Richardson*, 17 Mass. 122, 9 Am. Dec. 123, in which the

Massachusetts statute (substantially the same as the English, it seems) was construed, it was said by Chief Justice Parker that the object of the statute was to secure certain and definite evidence of the existence and terms of the promise sought to be enforced against the defendant, and it ought not to be carried further by arguments founded upon the technical meaning of the word "agreement." It was therefore decided in that case that, if the nature and extent of an undertaking for the debt or default of another appear in writing, the demands of the statute are satisfied, and the consideration by which the agreement is upheld may be shown, as in other cases, by parol evidence.

And as the learned editors of Smith's *Leading Cases* say, in their note to the case of *Wain v. Walters*, vol. 2 (5th Am. Ed.) p. 291, the same course of decision has been generally followed in the New England states, as well as in most other parts of the Union, citing a number of cases, "and there can be little doubt of its soundness where, as in some of the states, the word 'promise' (as in Virginia) has been substituted for or introduced with the word 'agreement' in the fourth section of the statute."

The writing sought to be enforced against the defendants in this case shows clearly the nature and extent of their undertaking, and, as it seems to us, satisfies the requirements of that section of our statute of frauds, the construction of which is involved in this case.

[4] Although the writing was a sufficient compliance with the requirement of the statute of frauds, it was not binding unless supported by a valuable consideration. *Colgin v. Henley*, supra. The defendants insist that the consideration for the note was that Haskins, the cashier of the Chase City branch of the plaintiff bank, should not be indicted or prosecuted, and, as this was an illegal consideration, there can be no recovery upon the note. There was evidence tending to show that the defendants made the note upon that understanding.

That question was submitted to the jury upon the following instructions:

(1) "The court instructs the jury that, to render the note for \$10,000 sued on in this cause illegal on the ground that it was given on the consideration of an agreement that C. Haskins, the late cashier of the Chase City branch of the Bank of Mecklenburg, should not be prosecuted for a felony committed by him as such cashier, it is necessary that there should have been an agreement to that effect, either express or implied, between the parties to this cause, and it is essential that such agreement must have been that the said C. Haskins should not be prosecuted for such felony."

(4) "The court instructs the jury that, even though they may believe from the evidence that the defendants and each of

them signed the note dated April 28, 1908, for \$10,000, and introduced in evidence in this case, yet if the jury further believes from the evidence that the said note was executed under an agreement, expressed or implied, between the parties to this cause, that one C. Haskins, who had been an employé of the Bank of Mecklenburg, and had been charged with a criminal offense, to wit, a felony, would not be indicted or prosecuted for said criminal offense, then the court instructs the jury that there was no legal consideration for said note, and that the same is void, and the jury should find for the defendants."

Exception was taken to the giving of instruction No. 1. The objection made to that instruction is that it told the jury, in effect, that in order for an agreement between the parties to the note to render it invalid there must be an agreement that Haskins should not be *prosecuted or tried*, and that an agreement that he should not be *indicted* would not invalidate it.

When instructions Nos. 1, 4, and 5 are read together, and in connection with the plea setting up that defense that the note was made for unlawful consideration, it seems to us that the terms "indicted" and "prosecuted" were treated as synonymous by the court and counsel, and that the question whether or not the consideration for the note was unlawful was fairly submitted to the jury.

[5] The consideration for the writing sued on, as claimed by the plaintiff, was (1) that "the note was given for a present indebtedness of the Kershaw Manufacturing Company, was made payable at a future date, and was accepted and acted upon by the receivers" of the plaintiff bank; and (2) that it was given "as a part of the subscriptions made by various persons who contributed to make the restitution" (that is, to pay the overdraft debt of that company), and having been accepted by the receivers, who on the faith thereof forbore to sue on the bond of the cashier or on the notes of the Kershaw Manufacturing Company, indorsed by C. H. and W. H. Saunders.

There was evidence tending to sustain the plaintiff's contention as to the consideration, and two instructions, numbered 2 and 7, on that question, were given.

No. 2 is as follows: "The court instructs the jury that the forbearance to sue for a debt which is due is a legal and valuable consideration for a promise made by a third person to pay such debt, and that a note payable at a future date, given for a present debt, is evidence of an agreement to suspend the remedy for the debt until the note is due, and, if the jury believe from the evidence that at the time the note sued on in this case was executed the Kershaw Manufacturing Company was indebted to the Bank of Mecklenburg in the sum of about

\$35,000, evidenced by notes indorsed by C. H. Saunders and W. H. Saunders, and that the note sued on was given as part payment of the said indebtedness, and that in consideration thereof the plaintiffs in this case have, from the time the said note was delivered to them hitherto, *forborne* to sue on the said indebtedness of the Kershaw Manufacturing Company to the said Bank of Mecklenburg, said note for \$10,000 is supported by a consideration deemed legal and valuable in law, and the jury should find for the plaintiffs."

The objections urged to instruction No. 2 are that there is no evidence of an agreement between the parties to forbear suing in consideration of the undertaking to pay the debt of the Kershaw Manufacturing Company, and that it does not correctly state the law, even if there were such evidence.

It is true that there is no evidence of an express agreement to forbear suing; but the evidence shows that the receivers of the plaintiff bank did forbear bringing suit, and there is also evidence tending to show that they did not sue because of the undertaking of the defendants and others to pay the overdraft debt of the Kershaw Manufacturing Company.

While it seems to be settled that the mere forbearance to sue, without an agreement to that effect, is not a sufficient consideration for a promise to pay the debt of the person liable, even though the act of forbearance was induced by the promise, yet an agreement to forbear may be implied from the conduct of the parties and the nature of the transaction. 9 Cyc. 343; 6 Am. & Eng. Enc. Law, 744, and cases cited.

In *Boyd v. Freize*, 5 Gray (Mass.) 553, it was held that forbearance to sue on a debt due and payable, upon receiving a personal promise of payment from the assignee in pais of the debtor, was evidence from which a jury might infer an agreement to forbear.

[6] While forbearance to sue is evidence from which a jury may infer an agreement to forbear, it is not conclusive. The facts that the defendants did execute the note sued on, and that the plaintiff did forbear to sue because of its execution, do not show a consideration for the undertaking to pay the debt of another, unless there was an agreement, express or implied, that the plaintiff would forbear to sue. Such an agreement is absolutely essential; yet under instruction No. 2 the jury might have rendered a verdict for the plaintiff, without finding that there was any such agreement. The instruction was therefore erroneous.

Instruction No. 7 was in the following language: "The court instructs the jury that if they believe from the evidence that the note dated April 28, 1908, was given in consideration of the fact, and with the understanding that the sum of \$28,000 would be

raised by the friends of C. Haskins for the purpose of making up a deficit alleged to be due by C. Haskins to the Bank of Mecklenburg, and that the sum of \$28,000 was not raised, but only a part thereof was raised, then the consideration of said note failed, and the jury should find for the defendants."

[7] That instruction in effect declares that the note sued on was given for a sufficient consideration, if the full amount undertaken to be raised by the friends of Haskins, cashier, was in fact raised. Some questions were discussed here which involve the correctness of that instruction; but, as no exceptions were taken to it in the trial court, they will not be considered.

[8] Error is also assigned to the action of the court in refusing to give instructions numbered 7 and 9, offered by the defendants, upon the ground that the terms of the notice of the motion for judgment are not such as to permit the plaintiff to recover upon a note made and delivered as collateral to secure the payment of a debt due the plaintiff bank from the Kershaw Manufacturing Company.

The court properly refused to give those instructions, because the pleadings on a motion for a judgment for money after notice are intended to be of a very informal nature, except where statutes require otherwise, as under section 3299 of the Code. See *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875; *Board of Sup. of Washington Co. v. Dunn*, 27 Grat. 608; *Blanton v. Commonwealth*, 91 Va. 1, 20 S. E. 884; *Union, etc., Co. v. Pollard*, 94 Va. 153, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715.

As the case must be reversed because instruction No. 2 given by the court was erroneous, and the cause remanded for a new trial, it is unnecessary to consider the assignment of error that the verdict of the jury is contrary to the law and the evidence, as the evidence may not be the same on the next trial.

The judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

Reversed.

(112 Va. 376)

LAMBERT v. JENKINS.

(Supreme Court of Appeals of Virginia. June 8, 1911.)

1. COURTS (§ 91*)—FORMER DECISION—STARE DECISIS.

Where, in a prior action between plaintiff, an owner, and a subcontractor, it was material that the court should construe the written contract for the construction of a building between plaintiff and the present defendant, and it was there held, on appeal by the Supreme Court,

that defendant was an independent original contractor, and not plaintiff's agent in the employment of the subcontractor, and that plaintiff could not, therefore, recover against such subcontractor, the court, in the subsequent action by plaintiff against defendant in construing the same contract, properly held that defendant was an independent contractor, and that the subcontractor was defendant's agent, though defendant was no party to the prior suit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 326; Dec. Dig. § 91.*]

2. CONTRACTS (§ 198*)—ORIGINAL CONTRACTOR—MATERIALS—GUARANTY—INSTRUCTIONS.

Where a contractor for a building guaranteed that the workmanship should be first-class and satisfactory in every respect, and plaintiff sued for damages caused by the failure of a subcontractor to provide proper materials for the construction of a granolithic floor, a request to charge that defendant contractor was not a guarantor that the floor would be perfect, but only agreed to use his best knowledge, skill, judgment, and energy in the business, and if he did that, and kept all the other parts of the contract with reference to workmanship, the jury should find for him, was properly refused, as contrary to the terms of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 861-883; Dec. Dig. § 198.*]

3. CONTRACTS (§ 198*)—BUILDING CONTRACTS—GUARANTY OF WORKMANSHIP—MATERIALS—"WORKMANSHIP."

Where a contractor for the construction of a building guaranteed that the workmanship should be first-class and satisfactory in every respect, the term "workmanship," as used in such guaranty, was sufficient to protect the owner against the use of bad or unsuitable materials by a subcontractor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 861-883; Dec. Dig. § 198.*]

4. DAMAGES (§ 123*)—BREACH OF CONTRACT—MEASURE.

Where a contractor for the construction of a building guaranteed that the workmanship should be first-class, and a granolithic floor put in by a subcontractor was soft and defective, the court properly charged that the owner's measure of damages was such a sum as it would reasonably take to make the floor conform to the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 320-325; Dec. Dig. § 123.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE.

In an action against a contractor for damages because of a defective granolithic floor in a building constructed by a subcontractor, defendant was not entitled to an instruction as to his right to set off the value of other work done by such contractor, where there was no offer of evidence at the trial as to the cost or value of such work; and this, notwithstanding the jury saw the same, and by taking measurements could have placed a valuation thereon.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.*]

6. PRINCIPAL AND AGENT (§ 182*)—NOTICE TO AGENT—EVIDENCE—STATEMENTS MADE TO AGENT.

In an action against a contractor for damages resulting from a defective floor in a building constructed by a subcontractor, the latter being the agent of the contractor, the owner was entitled to testify that he complained to such subcontractor, and told him that the floor could not be used, that it was soft, and did not seem right.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 182.*]

7. APPEAL AND ERROR (§ 1051*)—EVIDENCE—PREJUDICE.

Where, in an action for damages caused by the defective construction of the floor in a building, the jury were permitted to view the premises, defendant was not prejudiced by the introduction of photographs thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Error to Law and Equity Court of City of Richmond.

Action by L. H. Jenkins against George W. Lambert. Judgment for plaintiff, and defendant brings error. Affirmed.

W. L. Royall, for plaintiff in error. Garrett & Pollard, for defendant in error.

CARDWELL, J. This case and that of Veitch v. Jenkins, 107 Va. 68, 57 S. E. 574, arose out of a contract entered into between plaintiff in error, G. W. Lambert, and defendant in error, L. H. Jenkins, which was construed in the first-named case.

The essential features of the contract are set out in Veitch v. Jenkins, supra, as follows:

" * * * L. H. Jenkins entered into a written agreement with * * * George W. Lambert, by which the latter engaged to purchase material, employ labor, and superintend and erect for the former a building in the city of Richmond for a book factory, in accordance with certain plans in hand, to use his best efforts to secure materials and labor at the lowest cost, and to render his employer a true account thereof. The estimated cost of the building was \$12,110, which amount was not to be exceeded without the consent of the owner, and Lambert guaranteed that the workmanship should be first-class and satisfactory in every respect, while Jenkins agreed to pay the net cost of material and labor, together with a commission of \$1,300 to Lambert.

"The plans called for a granolithic floor in one of the rooms of the building, and the contractor (Lambert) employed Veitch to supply the material and lay the floor."

The controlling question in Veitch v. Jenkins, supra, was whether or not Lambert was an independent contractor, or merely an agent of Jenkins, and it was held that he was an independent contractor—the result of the decision being that Jenkins could not recover of Veitch the cost and expense incurred by Jenkins in consequence of Veitch's failure to supply suitable material and lay the granolithic floor as called for in Lambert's contract with Jenkins; that Veitch was the employé of Lambert, and not of Jenkins, and, therefore, was not answerable to the latter in damages for defective work. After that decision, Jenkins brought this suit against Lambert, and recovered the judgment herein complained of, for \$1,032.38, as the amount expended by Jenkins, made nec-

essary by reason of the granolithic floor in question being so defective that it could not be used, and therefore did not conform to the requirements of the contract between the parties.

[1] The giving of instructions Nos. 1 and 2, offered by defendant in error, plaintiff below, is assigned as error, and the only reasons given for objection thereto are: (1) "Telling the jury that Lambert was an independent contractor"; and (2) "telling the jury that Veitch was Lambert's agent."

It is very true that plaintiff in error was not a party to the record in Veitch v. Jenkins, supra; but the contract construed in that case is the same contract to be construed in this, and as the contract was in writing and unambiguous in its terms, the opinion in the first case said that it was the province of the court to construe the instrument, and as a matter of law to determine the relation between the parties thereto, and then followed the language construing the contract quoted above. Not only was it there decided that plaintiff in error here stood in the relation to defendant in error of an independent contractor, but that there was no privity between the latter and the former's "employé, Veitch," and therefore it was held that Veitch was plaintiff in error's agent in the matter of supplying the necessary material and putting down the granolithic floor called for in the contract. The contract being the same, and the evidence in the two cases practically the same, the rule that, "where the contract is in writing and unambiguous in its terms, it is the province of the court to construe the instrument and as a matter of law to determine the relation between the parties," applies as well here, and parol evidence intended to alter or vary the terms of the contract cannot be considered.

The case of Lambert v. Phillips, 109 Va. 632, 64 S. E. 945, relied on by the plaintiff in error, has no controlling influence in this case, for the all-sufficient reason that in that case the contract was oral, not written, and the sole question involved was to whom credit was given, a question for determination by the jury under proper instructions from the court.

The assignments of error with respect to the giving of defendant in error's instructions Nos. 1 and 2 are without merit.

[2] The refusal of the trial court to give an instruction (No. 3) asked by plaintiff in error is assigned as error.

It was sought by the instructions to have the jury told that plaintiff in error "was not a guarantor that the granolithic floor in the building he undertook to erect would be perfect, but only agreed that he would use his best knowledge, skill, judgment, and energies to the business, and that if he did that, and kept all the other parts of his contract (that

as to workmanship being meant), the jury should find for him."

It is very clear that this instruction would have been contrary to the plain terms of the contract, which, so far as is material, we have adverted to, and there was no error in refusing it.

[3] The modification by the court of instruction No. 4, asked for by plaintiff in error, is assigned as error.

The instruction as asked is as follows: "The jury are instructed that the defendant, Lambert, agreed by his contract with the plaintiff, that has been produced in the evidence, that the workmanship upon the granolithic floor to be laid should be first-class in every respect and such as would be satisfactory to a reasonable man. But they are further instructed that the burden of proving that the workmanship upon said floor was not first-class in every respect and such as would be satisfactory to a reasonable man rests upon the plaintiff. If, therefore, the jury believes from the evidence that the plaintiff has failed to prove that the workmanship upon said floor was not first-class in every respect and such as would be satisfactory to a reasonable man, and if they believe, further, from the evidence that the defendant kept all of his other agreements with the plaintiff, then their verdict should be for the defendant."

The modification of the instruction complained of is in these words: "But the court instructs the jury that if they believe from the evidence the defendant or his agents, or any of them, was negligent in furnishing bad material for the construction of the granolithic floor, or negligent in mixing said material, or negligent in the construction of the said floor, then he violated the duty laid upon him by the contract that the workmanship should be first-class."

The insistence of the learned counsel for plaintiff in error is "that, in guaranteeing that Veitch's workmanship would be first-class, he (Lambert) did not guarantee Veitch would use the best material, and if bad material crept in without his (Lambert's) knowledge, his guaranty that the workmanship would be first-class, should not make him responsible for that bad material."

It is difficult to perceive what plaintiff in error undertook to do pursuant to his guaranty that the "workmanship should be first-class and satisfactory in all respects," if it was not to protect defendant in error against the use of bad or unsuitable material in doing the work undertaken. The modification of instruction No. 4, in effect, merely told the jury that if they believed that plaintiff in error or his agents were negligent in furnishing bad material, or negligent in the construction of the granolithic floor, then he violated the duty imposed upon him by the contract that the workmanship should be first-class. As the instruction was offered, it was calculated to mislead the jury, and the

court's modification of it was necessary and proper.

[4] As to the measure of damages, the jury were instructed as follows: "The court instructs the jury that, if you find for the plaintiff, then, in assessing your damages, you will find such as it would reasonably take to make the granolithic floor conform to the contract aforesaid."

The giving of this instruction is assigned as error, although plaintiff in error, as is to be inferred from the state of the record, did not ask for a counter instruction, or a modification of the instruction complained of. It is perhaps well to note in this connection, also, that it is not denied that plaintiff in error had been paid in full, before the cause of action against him arose, for the work he had undertaken to do for defendant in error.

With respect to the instruction as to the measure of damages, we deem it only necessary to say that it conforms to the general rule stated in the case of *Burruss v. Hines*, 94 Va. 416, 26 S. E. 875, as follows: "The general rule in awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the contract had been properly performed."

"The object of the law," says the opinion by Judge Joynes in *Peshine v. Shepperson*, 17 Grat. 485, 94 Am. St. Rep. 468, "is to give amends or reparation."

This general rule, as stated, is fully sanctioned in *Stillwell, etc., Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035; and in the case of *Wright v. Sanderson & Sims*, 20 Mo. App. 534, quite similar to the case at bar, the following instruction to the jury was approved: "If the jury find for the plaintiff, the measure of damages is the amount it would cost to make the foundation and cellar wall of the size and as good as the contract required."

The rule is also sanctioned in the case of *Leathers v. Sweeney*, 41 La. Ann. 287, 5 South. 662, *Plunkett v. Meredith*, 72 Ark. 3, 77 S. W. 600, and *Hebb v. Welch*, 185 Mass. 335, 70 N. E. 440. The action in *Leathers v. Sweeney*, supra, was to recover damages of a steamboat builder for defects of construction which occasioned loss to the owner, and it was held that the measure of damages was the amount of reasonable costs incurred and paid by the owner to remedy the defects and to place the boat in a proper condition, as contemplated by the contract.

[5] It is claimed, however, for plaintiff in error here, that the instruction should have told the jury that he was entitled to set off the value of the office floor, porch, and coping laid or constructed by Veitch; but a complete answer to this contention is that he did not at the trial offer any evidence as to the costs of the office floor, porch, and coping. Under these circumstances, the contention, for the first time made in this court,

that the jury "saw the office floor, and by measuring and taking it from the dimension of the rest of the floor they could have put a valuation on it," cannot avail plaintiff in error. It comes too late. *Warren v. Warren*, 93 Va. 73, 24 S. E. 913, and note to the case at page 195, 2 Va. Law Reg; *Sul. Mines Co. v. Insurance Co.*, 94 Va. 355, 26 S. E. 856. Moreover, when the jury were sent to view the premises, it was not asked that they be told to take the measurements which it is here contended they should have taken; and, besides, the jury did not assess damages to defendant in error to the full amount he had paid to Veitch for putting down the floor in question, to say nothing of what he had paid to plaintiff in error for seeing to it that the work was properly done and "satisfactory in all respects."

[6] Since Veitch was the agent of plaintiff in error, and not of defendant in error, the trial court did not err in permitting the latter, when testifying in his own behalf, to testify: "I complained to Mr. Veitch, and told him we could not work in that place; that the floor was soft or something—didn't seem to be right."

[7] Nor did the court err in permitting the introduction of photographs of the floor in question, especially in view of the fact that the jury viewed the premises, and, therefore, could not possibly have been influenced to the prejudice of plaintiff in error by the photographs.

We are now brought to the remaining assignment of error with respect to the refusal of the court to set aside the verdict of the jury and grant plaintiff in error a new trial, which assignment is not argued in the petition for this writ of error.

The case was fairly submitted to the jury by the instructions given them, and stands here as on a demurrer to evidence, and we can see no reason for our interference with the verdict of the jury, approved by the learned judge below. Therefore the judgment complained of must be affirmed.

Affirmed.

(155 N. C. 307)

BROWN CARRIAGE CO. v. DOWD et al.

(Supreme Court of North Carolina. May 26, 1911.)

1. BILLS AND NOTES (§ 49*)—"ACCOMMODATION BILL."

An "accommodation bill" or note is one to which the accommodating party has put his name, without consideration, to accommodate some other party who is to issue it and is expected to pay it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 86; Dec. Dig. § 49.*]

For other definitions, see Words and Phrases, vol. 1, pp. 73, 74.]

2. SALES (§ 451*)—CONDITIONAL SALES—REGISTRATION.

Where a contract of conditional sale was not made or to be performed in North Carolina, it was valid without registration under the common law, in the absence of proof that the law of the state where it was executed or to be performed required registration; the North Carolina registration law being inapplicable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1323; Dec. Dig. § 451.*]

3. EVIDENCE (§ 35*)—JUDICIAL NOTICE—STATUTES OF OTHER STATES.

Statutes of other states will not be judicially noticed, but must be proved as facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. § 35; Appeal and Error, Cent. Dig. § 2859.]

4. SALES (§ 468*)—CONDITIONAL SALES—INSTRUCTION—LIEN—RETENTION.

An agency contract for the sale of vehicles required the agent to execute a series of notes for the invoice price for the accommodation of the principal and to pay the proceeds of sales thereon, and, if the notes were not paid before maturity, to give new notes in place thereof. The contract referring to the first series of notes provided that they should be considered as accommodation notes only, and that no title to the vehicles should pass to the agent by reason of giving them, nor should the fiduciary relation established by the contract change on that account. The stipulation for payment of the final renewals was followed by a declaration that the vehicles, until sold by the agent, remained the property of the seller with full control thereof, and that the proceeds of any sale to the amount of the invoice price should be paid to it. *Held*, that the provision for payment of the last renewals did not change the seller's right to retain control of the vehicles in possession of the agent until their claim was paid in full, nor release their lien on the vehicles remaining in the hands of the agent unsold as security for the debt.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 468.*]

5. PRINCIPAL AND SURETY (§ 115*)—DISCHARGE OF SURETY—ABANDONMENT OF SECURITY.

Plaintiff, having contracted with the bankrupt to sell plaintiff's vehicles at B., entered into an agency contract with him requiring the execution of accommodation notes to plaintiff for the invoice price of vehicles shipped to be paid by the proceeds of sales as made, and, if not paid when due, to be renewed in accordance with the terms specified. The contract also provided that the title to all the vehicles in the bankrupt's possession should belong to plaintiff until paid for, and that the making of the renewal notes should not change the fiduciary relation existing between the parties. Renewal notes having been executed by the bankrupt and signed by defendants as sureties, after bankruptcy plaintiff voluntarily surrendered to the bankrupt's trustee the vehicles on hand, the value of which exceeded the notes on which defendants were sureties, and filed its claim as a general creditor for the balance due on such notes, without making any attempt to claim the vehicles remaining unsold. *Held*, that defendants were discharged as sureties under the rule that a surety, when he pays the debt, is entitled to an assignment of the securities held by the creditor, and, if the latter has voluntarily rendered himself unable to make such assignment or has caused the security to become unavailable to the indorser, the latter is discharged pro tanto.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 244-268; Dec. Dig. § 115.*]

6. PRINCIPAL AND SURETY (§ 115*)—INDORSERS—SECURITY—IMPAIRMENT—PROMISE TO PAY.

Sureties on certain notes given by a bankrupt in payment of vehicles under a sales agency contract, reserving ownership of the vehicles unsold in the payee of the notes until paid for, by promising to pay the notes, did not impair their right to have the vehicles, remaining unsold at the time bankruptcy intervened, preserved and their value applied to their exoneration; nor did such promise authorize the payee to voluntarily surrender the vehicles so remaining to the bankrupt's trustee for sale and distribution of the proceeds among creditors.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 244-268; Dec. Dig. § 115.*]

Appeal from Superior Court, Mecklenburg County; E. B. Jones, Judge.

Action by the Brown Carriage Company against W. C. Dowd and others. From a judgment for defendants, plaintiff appeals. Affirmed.

The plaintiff appointed James G. Dowd as their agent at Birmingham, Ala., for the sale of their vehicles, under a contract dated January 14, 1907 (Exhibit A), by which it was provided that the agent should pay all freight and storage charges and taxes, insure the property in the name and for the benefit of the plaintiff, and sell the vehicles, in the usual course of business, to bona fide customers for cash, at not less than the consigned invoice value of the same. It further provides, as follows:

"(5) Said agent shall sign and send to the Brown Carriage Company accommodation notes for the amount of each invoice as soon as it is sent to him, said notes being dated the same day as the invoice and to be payable one-third in four months, one-third in five months, one-third in six months, said notes being considered as accommodation notes only and no title in said vehicles pass to said agent by reason of giving same, nor does the fiduciary relation established by this contract change on that account.

"(6) On the first of each month, following the date of shipment, said agent is to make a full and complete report of all sales made, at the same time remitting to the Brown Carriage Company proceeds of said sale, retaining as his commission only such amount as shall have been received in excess of the invoice value of said goods.

"(7) Ten days before the first accommodation note referred to in paragraph No. 5 comes due, should the monthly payment for goods sold not have equaled an amount sufficient to pay same, said agent is to mail a new note at four months to said Brown Carriage Company for the difference between the total of said payments and the amount of this note. The Brown Carriage Company is to return to them the accommodation note referred to. Should said monthly payments exceed the amount of the first

note falling due, the note is to be returned to said agent by the Brown Carriage Company, and the amount in excess is to be credited as a part payment on the second note falling due, and other payments made from that time to be credited on this second note in the same manner as provided for with the first note. Should these payments not be sufficient to pay the second note, ten days before its falling due, said agent is to send a new note at four months for the amount remaining after deducting these remittances, and the Brown Carriage Company is to return the second accommodation note, as provided for the first accommodation note. Should the amount so paid exceed the amount of the second note, the surplus is to be credited on the third note in the same manner as on the previous notes. Should it not be sufficient to pay the third note, however, a new note is to be given at four months, as provided for with the two preceding notes. When the three renewal notes given as provided for above fall due, they are to be renewed in like manner, the renewal notes falling due twelve months from the time of shipment. These notes are to be paid at maturity, without reference to the amount of work still on hand unsold at that time.

"(8) Said agent shall make a report of goods on hand at any time the Brown Carriage Company shall request same, giving stock number and catalogue number of the vehicles. The attorney or agent of the Brown Carriage Company shall have access to the premises wherein said goods are kept, for the purpose of ascertaining their condition or whatever information they may desire with respect thereto, also the privilege of examining books and records pertaining to the sale of said vehicles.

"(9) If at any time, through the carelessness or neglect of said agent, any of the vehicles on hand be damaged or their condition be such as to impair their value, said agent agrees to pay to said Brown Carriage Company such an amount as will put the vehicles in good condition.

"(10) All the vehicles supplied to said agent by said principal, until in good faith sold by the latter as provided herein, shall remain the absolute property of said principal, who may at will require same to be delivered or reshipped to it or delivered to any agent of said company. All the proceeds of sales received by said agent accruing from sale of goods supplied hereunder shall belong to said principal, excepting only such amount as shall be in excess of invoice value of the same, which excess said agent shall accept as full recompense of his services, charges and expenses of every kind and description."

"(12) It is expressly understood and agreed by and between the parties hereto

that this is a special agency contract for the sale of vehicles of the Brown Carriage Company, and that no act or omission on the part of said agent shall in any wise bind the Brown Carriage Company, no further authority being conferred upon said agent.

"(13) If said agent shall fail to comply with any of the conditions of this contract, he shall upon noncompliance forfeit all commissions, or remuneration due or which may become due the said agent hereunder."

The agent gave the notes described in clauses 5 and 7 of the contract and this action was brought to recover the amount of the three renewal notes mentioned in the last part of the seventh clause. The first of these notes, dated February 1, 1908, is for \$500 and due May 30, 1908; second, dated February 25, 1908, for \$416.36, due July 1, 1908; third, dated March 25, 1908, for \$416.36, due August 1, 1908—the total amount of the notes being \$1,332.72. All the notes, both original and renewals, were indorsed by the defendants W. C. Dowd and W. F. Dowd. Plaintiff also alleges that on July 4, 1908, after the maturity of the note for \$500 and the note for \$416.36 due July 1, 1908, the defendants, for a valuable consideration, promised to pay the same. The agent sold vehicles from time to time and accounted to the plaintiffs for the proceeds of sale. On January 6, 1908, he was adjudicated a bankrupt, and, at that time, he had in his possession vehicles exceeding in value the total amount of the notes in suit. The defendants answered and averred that the notes upon which this suit was brought were accommodation notes by the terms of the contract of agency and given by James G. Dowd and indorsed by the defendants only for the accommodation and benefit of the plaintiff, who wished to use them in bank to supply a deficiency in their capital, caused by a withdrawal of the money which they had invested in the vehicles shipped to their agent at Birmingham, and therefore they were not liable thereon to the plaintiff. They further alleged that the plaintiff had surrendered the vehicles to the trustee in bankruptcy of James G. Dowd, had proved the claim against him as a general creditor without asserting any lien on or right to the vehicles, and had actually accepted a dividend from the bankrupt's general assets as an unsecured creditor, and that by this conduct the defendants as indorsers, or even as sureties, were released. The plaintiff admits that it proved its claim in bankruptcy without asserting any right to or lien upon the vehicles, which they permitted to be taken by the trustee and applied to the payment of the bankrupt's debts generally, and also that it received its dividend from the trustee, knowing that he had the property, but it relied on the fact that the defendants, by promising, after the bankruptcy, to pay the notes, induced the plaintiff to desist from

taking possession of the goods, and tendered an issue to that effect, which was refused. The court submitted issues to the jury which, with the answers thereto, are as follows:

"(1) Were the originals of the notes sued on executed by James G. Dowd pursuant to the terms of the contract marked 'Exhibit A'? Answer: Yes. (2) Were the originals of the notes sued on and all renewals thereof executed by James G. Dowd and indorsed by the defendants for the accommodation of the plaintiff? Answer: Yes. (3) Were the defendants induced to indorse said notes by reason of the representations of the plaintiff that said notes were only to be paid from the proceeds of the sales of the vehicles shipped said J. G. Dowd by the plaintiff under the terms of the contract marked 'Exhibit A'? Answer: Yes. (4) What amount of the proceeds of the sale of the original shipment of vehicles by the plaintiff to James G. Dowd were paid to the plaintiff by the said James G. Dowd? Answer: \$690. (5) What was the invoice price or value of the balance of said original shipment left on hand when James G. Dowd filed his petition in bankruptcy? Answer: \$950. (6) What disposition was made of the balance of said first shipment so left on hand when said petition in bankruptcy was filed? Answer: Trustee in bankruptcy. (7) What disposition was made of the other vehicles shipped to James G. Dowd by the plaintiff which were on hand when said petition in bankruptcy was filed? Answer: Trustee in bankruptcy. (8) What was the invoice value of all vehicles shipped by the plaintiff to James G. Dowd which were on hand when said James G. Dowd filed his said petition in bankruptcy? Answer: \$1,700. (9) Did the plaintiff file its claim as a general creditor of James G. Dowd with the referee in bankruptcy for the alleged balance claimed to be due it by said James G. Dowd, for vehicles shipped to the said James G. Dowd by the said plaintiff? Answer: Yes. Stating partially secured by indorsement of notes sued on. (10) Did the defendants, after the maturity of the notes, described in the plaintiff's second cause of action, and after the said notes had been protested for nonpayment, agree to settle same? Answer: No. (11) Did the defendants waive the right to have the funds, received from the goods sold by J. G. Dowd, applied as payment on the notes? Answer: No."

Judgment was entered upon the verdict for the defendant, and plaintiff appealed.

Pharr & Bell, for appellant. Burwell & Cansler and Thaddeus A. Adams, for appellees.

WALKER, J. (after stating the facts as above). The vital question in this case arises out of the somewhat vague wording of a clause of the contract between the plaintiff and James G. Dowd, who was appointed

agent at Birmingham, Ala., to sell its vehicles. The material parts of the contract are generally expressed with sufficient clearness to be easily understood; but the last clause in the seventh section is given different constructions by the respective parties. The original notes and the successive renewals thereof, except the last, were undoubtedly for the accommodation of the plaintiff, and if the last renewals, being the notes sued on, are of a like character, the plaintiff is not entitled to recover, and the verdict and judgment were right. But what does the language of that one sentence mean? "These notes (the last renewals) are to be paid at maturity without reference to the amount of work still on hand unsold at that time"; that is, at their maturity, which was 12 months from the time the vehicles were shipped. The plaintiff says that this provision changed the character of the notes and they became ordinary promissory notes indorsed by W. O. Dowd and W. F. Dowd, not for its accommodation, but for the benefit solely of their brother, James G. Dowd, and that they were due and payable at their maturity, to the plaintiff, by both maker and indorsers, who were really sureties for their payment. The defendants, on the contrary, contend that, as shown by the proof, the object in giving the notes was that plaintiff might use them as a basis of credit in bank and supply the deficiency in funds for carrying on its business, which had been caused by the withdrawal of money invested in the vehicles held by their agent, James G. Dowd; that they were executed solely for the benefit of the plaintiff, and not to create any liability of the defendants for their ultimate payment; and, further, if it had been intended that the defendants should, in the end, become absolutely bound for their payment, it was no advantage to them that they were originally accommodation paper. The defendants, therefore, insist that they continued to be accommodation notes, and that the stipulation for their payment at maturity meant a payment by the payee, who is the party legally bound to pay them, and this position is sound, provided the premise is correct that they did not cease to be accommodation notes because of that provision.

[1] "An accommodation bill or note is one to which the accommodating party has put his name, without consideration, for the purpose of accommodating some other party who is to use it, and is expected to pay it." 1 Daniel, Neg. Inst. 191.

They also contend that, if this language is obscure, any doubt as to its meaning should be resolved in their favor, and in this connection rely on *Hill v. Manufacturing Co.*, 79 Ga. 105, 3 S. E. 445, in which Chief Justice Bleckley said: "We recognize that the party who wrote the contract, made it ambiguous, and executed it in that condition, must explain

the ambiguity in order to obtain a construction of it in his favor. The author of the ambiguity has the burden of explaining it when he seeks to take the benefit of a construction favorable to himself, and, if he does not clear up the meaning beyond doubt, the doubt must be given against him." They further contend that, if not accommodation paper, and the stipulation is to be considered as having changed the character of the notes so that the defendants became liable upon them as indorsers or sureties to the plaintiff, it follows that the terms upon which James G. Dowd held the vehicles were also changed, and the shipment, instead of being a consignment as originally contemplated, was converted into a sale, not absolute, but conditional, the title to vest when the notes are paid, or that the vehicles in the possession of James G. Dowd were thereafter to be held by him as a security for the payment of the notes. If this be so, it is then argued that, by relinquishing the property thus held for it as security, whether by way of conditional sale or otherwise, to the trustee in bankruptcy, to become a part of the general assets of the bankrupt and by proving its claim as unsecured and receiving a dividend from the general assets, plaintiff waived its lien upon the property, and discharged the defendants W. O. Dowd and W. F. Dowd. It was admitted that all the notes were executed pursuant to the terms of the contract. We are inclined to the opinion, upon a view of the entire transaction, that the notes retained their original quality of accommodation paper, notwithstanding the clause of the contract which gave rise to this litigation; but we need not decide that question, as our opinion is with the defendants upon their second proposition.

[2] We may as well state now that the contract between the plaintiff and James G. Dowd was not made in this state, nor was it to be performed here, and if the stipulation in the contract, as to the payment of the last renewals at maturity, turned the consignment into a conditional sale, or impressed a lien upon the property, by way of mortgage or otherwise, as a security for the payment of the notes, either of which it may be conceded would require for its validity probate and registration, if the contract had been subject to our registration law, the contract is nevertheless valid without registration, as there is no evidence in the record that registration of such a contract is required to be in writing and registered in order to be valid against creditors, either by the law of Ohio or Alabama. The case, therefore, is not affected by what is said in *Godwin v. Bank*, 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 985; *Lance v. Taintor*, 137 N. C. 249, 49 S. E. 211. At common law such contracts were not required to be registered, and not in this state until required by statute, and we presume that the common

law exists in other jurisdictions until the contrary is shown.

[3] We do not take judicial notice of the statutes of other states; but they must be brought to our attention by proof. It was said by Judge Pearson, in *Hooper v. Moore*, 50 N. C. 130: "What is the law of another state or of a foreign country is as much a question of law as what is the law of our own state. There is this difference, however: The court is presumed to know judicially the public laws of our state, while in respect to private laws and the law of other states and foreign countries, this knowledge is not presumed. It follows that the existence of the latter must be alleged and proved as facts, for otherwise the court cannot know or take notice of them. This is familiar learning. 3 Wooddeson, Lec. 175." To the same effect are the following cases: *Knight v. Wall*, 19 N. C. 125; *Moore v. Gwynn*, 27 N. C. 187; *State v. Jackson*, 13 N. C. 564; *Hilliard v. Outlaw*, 92 N. C. 266; *Minor on Conflict of Laws*, page 531, where it is said that: "If the foreign law in issue is the unwritten law of a state not originally subject to the common law, or, in any event, if it is a statute or written law, the presumption (as in the case of the common law) does not apply." In *Hall v. Railroad*, 146 N. C. 345, 59 S. E. 879, we said: "It was stated by counsel for the plaintiff that the law of Virginia was similar in its provisions to our statute; but there is nothing in the record to show what the law of that state is. We do not take judicial notice of the statutes of another state. They must be pleaded and proven." *Griffin v. Carter*, 40 N. C. 413; *Brown v. Pratt*, 56 N. C. 202. However, therefore, the fact may be, we must hold, in the absence of proof showing the contrary, that the new contract, if we may so call it, did not require registration and, consequently, the vehicles in the hands of James G. Dowd, at the time he was adjudged a bankrupt, did not pass to the trustee. When the verdict upon the sixth and seventh issues is read and interpreted in the light of the evidence and the charge of the court, it means that the plaintiff intentionally abandoned the property to the trustee; and, when taken in connection with the admission that it proved its claim as an unsecured creditor and received a dividend paid by him from the general assets, it further means that the plaintiff, quietly and without a protest, and certainly without any assertion of its right to the property, assented to, if it did not ratify, the act of the trustee in taking and appropriating the property for the benefit of the bankrupt's general creditors.

There is but one question remaining for our consideration, and that requires us to determine the legal effect of the conduct of the plaintiff with reference to the property upon both its and the defendant's rights. In

the first place, if the provision of the contract as to the payment of the last renewals at maturity changed the relation of the defendants to the note as accommodation indorsers, did the plaintiff still retain a lien on the property for the security of the debt?

[4] It is impossible to read the contract throughout, without concluding that it was the clear intention of the plaintiff to retain control of the vehicles in the possession of James G. Dowd, until their claim was satisfied in full. Referring to the first series of notes, the contract provided as follows: "Said notes being considered as accommodation notes only and no title in said vehicles to pass to said agent by reason of giving same, nor does the fiduciary relation established by this contract change on that account." The stipulation as to the payment of the final renewals is in the seventh section of the contract, and it is followed by the tenth section, which positively and emphatically declares that the vehicles, until sold by James G. Dowd, shall remain the property of the plaintiff, with full control thereof, and the proceeds of any sale to the amount of the invoice price shall be paid to it. If the plaintiff intended to wipe out this provision and part entirely with all its interest in the property and all control thereof and to surrender it altogether, as a security, to James G. Dowd, when the last renewals were executed, why did it not say so in plain and unmistakable language? If the provision that the notes should be considered as accommodation paper, and the giving of them should not have the effect of passing the title of the property to their agent, extends to the renewals, and is not confined to the original notes, and a majority of the court is disposed so to think, though we do not decide the point, the contract would retain its legal designation and character as a simple consignment for sale, or upon a *del credere* commission, and the plaintiff must fail in this suit, or if the indorsers of the notes are to be regarded as simple guarantors of the good conduct and fidelity of plaintiff's agent, James G. Dowd, the same result would follow, unless some delinquency of the agent had been shown, i. e., that he had sold vehicles and had not accounted for the proceeds.

As tending to support this view of the case, it may well be suggested, as it was by the defendant's counsel, that the stipulation for the payment of the last renewals at maturity could not have been intended to change the liability of the indorsers, as it requires payment "without reference to the amount of work on hand and unsold at that time," and the parties could not have contemplated that James G. Dowd and his indorsers should pay the notes in full if nearly all the property had been sold and the plaintiff had received the proceeds of the sale, and only an inconsiderable part of the property

remained in the hands of the agent. But, however this may be, it is evident that the plaintiff did not intend to release the property, to let it go, until the notes had been paid, even if the liability of the indorser was changed by giving the last renewals. This idea pervades the whole contract. If the indorsers had become insolvent, their nominal principal having become a bankrupt, we apprehend the plaintiff would be in court and claiming that it had never parted with its right to the property and seeking to recover it, or at least to charge it with a lien or as security for the payment of the notes, upon the ground that title to the property did not pass from it by the giving of the last renewals and not until the payment of the same. They would have been surprised by the suggestion, and justly so, that they had relinquished *all* of their rights therein, as they did not intend a sale to their agent. If this be the correct view to take of the case, we think the indorsers were discharged by the conduct of the plaintiff with regard to the property. In *Brandt on Suretyship & Guaranty* (3d Ed.) § 480, the doctrine is thus stated: "If the creditor has a surety for the debt, and also has a lien on property of the principal for the security of the same debt, and he relinquishes such lien, or by his act such lien is rendered unavailable for the payment of the debt, the surety is, to the extent of the value of the lien thus lost, discharged from liability. This rule does not depend upon contract between the surety and creditor, but results from equitable principles inherent in the relation of principal and surety. It is equitable that the property of the principal, pledged for the payment of the debt, should be applied to that purpose, and it is grossly inequitable that in such case the property should be diverted from that purpose, and the debt thrown upon a mere surety. Upon obtaining such a lien, the creditor becomes a trustee for all parties concerned, and is bound to apply the property to the purposes of the trust." The creditor, it is true, must have the means of satisfaction in his hands or under his control, either a lien on the property or something equivalent to it and just as effective, conferred by law or by agreement, or a right with respect to the property, which the law requires him to assert and preserve or enforce for the benefit of the indorser. "The creditor must part with no security for the payment of the debt; but the security must be a mortgage, pledge, or lien—some right or interest in the property which the creditor can hold in trust for the surety, and to which the surety, if he pay the debt, can be subrogated; and the right to apply or hold must exist and be absolute." *Brandt*, § 484.

[6] The indorser, when he pays the debt, is entitled to an assignment of the securities held by the creditor, and if the latter

has voluntarily rendered himself unable to make it, or has caused the securities to become unavailing to the indorser, the latter is discharged, at least pro tanto. In this case, it appears that there was enough property on hand to pay the notes. A familiar illustration is a release by a creditor of a lien acquired by the levy of an execution upon the property of the principal debtor. "If the creditor recovers a judgment against principal and surety, or against the principal alone, and execution is issued thereon and levied upon real or personal property of the principal subject thereto, and such property is, by act of the creditor, released from the levy and lost as a security, the surety is discharged to the extent that he is injured thereby." *Brandt*, § 489; *Cooper v. Wilcox*, 22 N. C. 90, 32 Am. Dec. 695, in which it is said: "Between the creditor and a surety, the former is not bound to active diligence to protect the latter; but, if by his act he deprives him of a security, the latter is pro tanto discharged, and where, upon an appeal from the county to the superior court, the judgment was affirmed, and execution issued against the defendant and the sureties to the appeal bond, and was levied upon property of the principal debtor sufficient to satisfy it, and the plaintiff discharged the levy, he discharges the sureties. The rights of a surety to protection are recognized in all courts, if his character as a surety can be averred; as at law, in cases between the holder and drawer of a bill, if the former release the acceptor, he thereby discharges the latter." And again: "So in *Law v. East India Company*, 4 Ves. 829, it was considered as incontestable that where a creditor has a fund of a principal debtor sufficient for the payment of a debt, and gives it back to the debtor, the surety can never afterwards be called upon. The creditor, by virtue of the seizure in execution, or of the deposit, becomes a trustee of the security so acquired, or of the fund for the benefit of all concerned, and is responsible to any party injured by unfaithfulness in execution of that trust. For it is a rule that if he be not only creditor but trustee, *then* even his neglect, if it occasion the loss of that to the benefit of which the surety is entitled, will pro tanto discharge the surety. *Capel v. Butler*, 2 Sim. & Stew. 457 (1 Cond. Eng. Chan. Rep. 543)." Page 91, of 22 N. C. (32 Am. Dec. 695). The principle is clearly defined by Chief Justice Brickell in *Knighton v. Curry*, 62 Ala. 404: "The principle upon which the whole doctrine of subrogation, not only as it is applied for the protection of sureties, but as it is applied to compel him who is primarily liable, or the thing which may be primarily liable to bear a burden, to continue to bear it for the relief of him, or another thing, secondarily liable, does not depend upon contract, but has its foundation in natural justice, and

is said by Ch. Kent to be 'recognized in every cultivated system of jurisprudence.' No doctrine can be more firmly established than that a surety who has paid the debt of the principal is entitled to stand in the place of the creditor, as to all securities for the debt, held or acquired by the creditor, and to have the same benefit from them as the creditor might have had, if the surety had not paid, and the creditor had resorted to them. 1 Story's Eq. § 499 et seq.; 1 Lead. Eq. Cases (4th Ed.) 136; 2 Lead. Eq. Cases (4th Ed.) 277; Brandt on Suretyship, §§ 260-282. As a necessary consequence of this right of the surety, it is well settled on authority that if the creditor, without the consent of the surety, parts with or renders unavailable any security or fund, which he has the right to apply in satisfaction of the debt, the surety is exonerated to the extent of the value of such securities. The reason is that such securities or fund are impressed with a trust for the payment of the debt, and the creditor is bound to apply them, or hold them as a trustee, ready to be applied for the benefit of the surety. *Cheeseborough v. Millard*, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; *Hays v. Ward*, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; Brandt on Suretyship, §§ 370-372. The principle is sometimes expressed in another form: 'That when a creditor has the means of satisfaction in his own hands, and chooses not to retain it, but suffers it to pass into the hands of the principal, the surety to that extent will be discharged.'" *Cullum v. Emanuel*, 1 Ala. 29, 34 Am. Dec. 757. It would be useless to multiply authorities to support so familiar a doctrine.

[8] The plaintiff contends, though, that it was lulled into security and induced to part with the property by a promise of the indorsers to pay the notes, and the court refused an issue intended to present this phase of the matter. We do not see how a promise to pay the notes could impair the right of the indorsers to have the property preserved and applied to their exoneration. If they had actually assumed their principal's obligation or paid the notes, the right of subrogation would arise at once, and it would be, if anything, more the duty of the creditor to protect them when it is known that they must suffer, or when they have actually been subjected to loss. It can make no difference what kind of indorsers the Dows were, or whether they were guarantors or sureties, for, in either of those relations to the notes, they were entitled to the protection of the creditor, and plaintiff should not have slept upon their rights, nor should it have relaxed its energies in their behalf, simply because they promised to pay the debt. As we have said, its obligation to them was increased thereby, for they were in greater jeopardy of loss, and the plaintiff's solicitude for their protection should have been correspondingly increased and quickened. At any rate, plaintiff failed in its duty, and it would be most

inequitable for the consequent loss to fall upon the indorsers. This contract was not intended as a sale, either in its inception or development, but as something far different. The plaintiff surely did not propose to let go the property before it had actually received, not merely notes or a promise to pay, but all of its money. This is apparent, if we give its words—for the contract was prepared by plaintiff—their natural meaning; but settling all doubts against it and fairly and reasonably construing it, as a harmonious whole, so as to effectuate the real intention and to do justice and right, and square our decision with the principles of equity, we cannot but conclude that the defendants have been released, as indorsers or promisors, by the fault of the plaintiff.

We have not considered the correspondence between the parties, which was introduced to show that defendants were actually regarded as accommodation indorsers, though we think the court erred in admitting secondary evidence as to the contents of the lost letter; the proof as to search and loss not being sufficient to dispense with the primary proof—the letter itself. But this is not material, in the view we have taken of the case, as we think the rights of the parties can be sufficiently determined by the contract itself and the undisputed facts, without the aid of extraneous proof.

Perhaps we should further inquire whether the relinquishment of the property to the trustee is such a dealing with the security by the plaintiff as to discharge the indorsers of the notes; but this would seem to be too plain to need any demonstration. The very question was presented in *Fleming v. Odum*, 59 Ga. 362, and the creditor held to have forfeited his right of recourse to the surety for payment. The court said: "In respect to this property so levied on, the assignee stood in the shoes of the defendant, and the sheriff had no more right to deliver up the property to the assignee than he would have had to deliver it to the defendant himself; therefore *Lumsden v. Leonard* [55 Ga. 374] controls this case. Indeed, this case is stronger for the surety than that. In that case the defendant still had the property, and another levy might have been made, and the only hurt the surety sustained was the danger that defendant, his principal, might have run it off. This risk was increased, because the creditor, through the sheriff, had in hand enough to pay the debt from the principal's property, and let it go; but in this case much more has the surety been hurt, for the property has gone to another. The assignee has it, and probably has disposed of it to pay other debts. At least, it has not been heard of since. This creditor has not pursued it, either against the sheriff or the assignee, or claimed the proceeds in the bankrupt court. It is gone—a dead loss to this judgment—and the surety is hurt to the extent of its value, and that is enough to pay the whole judgment. So that the

result is that the surety's property is levied on to pay a judgment which the creditor had enough of the principal's property to pay; but, by his fault and the sheriff's—one or both—let it unlawfully get away from under the levy. We think it clear that the surety is discharged." It is not suggested, and cannot successfully be contended, that, if the property was held on consignment at the time of the bankruptcy, it passed to the trustee.

We have reached our conclusion in this matter with less hesitation, because we believe it accords, not only with well-settled rules of law, but with the very justice of the case. Had the plaintiff intended to change the character of the notes and convert what was a consignment into an absolute sale, and not a conditional one, nor into a lien or security, it should have expressed that intention clearly, and not left it to uncertain, if not unwarranted, inference. If the plaintiff expects the courts to enforce this kind of contract according to its present contention, it should use language which more plainly carries that idea with it, or, at least, should free it of its present ambiguity; otherwise it cannot complain if it is construed favorably to indorsers. Our rendering of its provisions makes it consistent, while that of the plaintiff, we think, produces discord and repugnancy and frustrates its leading purpose. We would not be understood as even intimating that the plaintiff inserted the disputed clause in the contract for a double purpose, and so that, in certain eventualities, it might claim either way that might subserve its interests, though such a suggestion is made in this case and was made in *Bank v. Scott*, 123 N. C. 539, 31 S. E. 819, cited by the defendant's counsel, in regard to a contract somewhat similar. It is not necessary that we should search for a bad motive, when the rights of the parties must depend upon the contract as it is written; there being no allegation of fraud. The plaintiff has merely failed to state in the written instrument what it now says was its intention, and that is all. It is not a question of motive, but of construction.

We find no reversible error.

No error.

(186 Ga. 511)

HUGHES v. ATLANTA STEEL CO.

ATLANTA STEEL CO. v. HUGHES.

(Supreme Court of Georgia. June 18, 1911.)

(*Syllabus by the Court.*)

1. SUNDAY (§ 26*)—VIOLATION OF LAW—PERSONAL INJURIES—DEFENSES—ILLEGAL ACTS—FELLOW SERVANTS—NEGLIGENCE.

The collateral fact that the plaintiff and the defendant are engaged in violating the law does not prevent the former from recovering damages of the defendant for an injury negli-

gently inflicted, unless the unlawful act contributed to produce the injury.

(a) A servant who is injured by the negligent conduct of an incompetent fellow servant, the incompetency being unknown to him, may recover from the common master damages arising from his breach of duty in knowingly employing and retaining the incompetent servant, where the proof shows that at the time of the injury the plaintiff, the negligent and incompetent fellow servant, and the master were all three engaged together in the violation of a penal statute of this state, viz., the statute making penal the pursuit of one's business or work of ordinary calling on the Lord's Day.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. §§ 59-63; Dec. Dig. § 28.*]

2. NEGLIGENCE (§ 76*)—VIOLATION OF LAW—PERSONAL INJURIES.

The ruling in *Wallace v. Cannon*, 38 Ga. 119, 95 Am. Dec. 385, *Martin v. Wallace*, 40 Ga. 52, and *Redd v. Muscogee R. Co.*, 48 Ga. 102, to the effect that when two or more parties engage in an act violative of a penal law, and one of them is injured by the carelessness or negligence of the other, the injured party is not entitled to damages, should be so qualified as to provide that, to defeat a recovery in such case, the violation of the statute must be a contributing cause of the injury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 104-107; Dec. Dig. § 76.*]

Certified Question from Court of Appeals.

Action by Robert Hughes against the Atlanta Steel Company. From the judgment, both parties appeal to the Court of Appeals, who certified a certain question of law to the Supreme Court. Question answered.

F. M. Hughes and Westmoreland Bros., for plaintiff. Smith, Hammond & Smith, for defendant.

EVANS, P. J. The Court of Appeals has certified to us the following question of law: "Can a servant who was injured by the negligent conduct of an incompetent fellow servant, the incompetency being unknown to him, recover damages from a common master, arising from his breach of duty in knowingly employing and retaining the incompetent servant, where the proof shows that at the time of the injury the plaintiff, the negligent and incompetent fellow servant, and the master were all three engaged together in the violation of a penal statute of this state, viz., in pursuit of their business and work of ordinary calling on the Sabbath day? Penal Code 1910, § 422."

[1] One injured through the negligence of another ordinarily has a right of action against a tort-feasor. The query submitted by the Court of Appeals raises the question whether this right of action is lost because, at the time of the happening of the tort, the injured person was violating a penal law. In Massachusetts it was held that a plaintiff who gratuitously assisted the defendants in clearing out a wheel pit on the Sabbath, for the purpose of preventing the stoppage, on a week day, of the defendants' mills, could not recover for the defendants' negligence, by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

reason of the statute making penal such work on the Sabbath day. The court based its decision on the premise that the plaintiff's act, working on the Lord's Day, was so inseparably connected with the cause of action as to prevent his maintaining the suit. *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119. In most jurisdictions, including the Supreme Court of the United States and the courts of England, it is held that a collateral unlawful act, not contributing to the injury, will not bar a recovery. The mere fact that the plaintiff on the one hand, or the defendant on the other, was engaged in violating the law in a given particular, at the time of the happening of the accident, will not bar the right of action of the former, nor make the latter liable to pay damages, unless such violation of law was the efficient cause of the injury. 1 *Thomp. Neg.* §§ 82, 249; 37 *Cyc.* 573; *P. W. & B. R. Co. v. P. & H. Steam Towboat Co.*, 23 *How.* 209, 16 L. Ed. 433; *Black v. City of Lewiston*, 2 *Idaho (Habb.)* 276, 13 *Pac.* 80; *Knowlton v. Railway Co.*, 59 *Wis.* 278, 18 *N. W.* 17; *Osaphe v. Judd*, 30 *Minn.* 126, 14 *N. W.* 575; *Sharpe v. Evergreen*, 67 *Mich.* 443, 35 *N. W.* 67; *Bigelow v. Reed*, 51 *Me.* 325; *Mohoney v. Cook*, 26 *Pa.* 342, 67 *Am. Dec.* 419; *Ill. Central R. Co. v. Dick*, 91 *Ky.* 434, 15 *S. W.* 665; *Baldwin v. Barney*, 12 *R. I.* 392, 84 *Am. Rep.* 670; *W. U. Tel. Co. v. McLaurin*, 70 *Miss.* 26, 13 *South.* 36. As said by Judge Cooley: "The principle is that, to deprive a party of redress because of his own illegal conduct, the illegality must have contributed to the injury." 1 *Cooley on Torts* (3d Ed.) 269. The statute denouncing as penal the following of one's ordinary calling on the Lord's Day defines and declares a duty to the state. A breach of duty to the state does not necessarily involve a breach of duty to the defendant in such cases; and when it does not, it is simply an irrelevant fact, unless the law gives it relevancy in some express form. Hence the conclusion is irresistible that the plaintiff's violation of a penal statute cannot be pleaded in defense of a tort, unless such violation is a contributing cause of the injury for which compensation is asked.

But it is contended that, where both plaintiff and defendant are engaged in violating a penal statute when the former is negligently injured by the latter, the rule should be different from that applied to cases where the plaintiff alone was committing an illegal act at the time of his injury. In support of this contention the cases of *Wallace v. Cannon*, 38 Ga. 199, 95 *Am. Dec.* 385, *Martin v. Wallace*, 40 Ga. 52, and *Redd v. Muscogee Railroad Co.*, 48 Ga. 102, are cited. These decisions rule that when two or more parties are engaged in the same illegal transaction, in violation of the supreme law of the land, and one of them is injured by the carelessness or negligence of the other, the court will not lend its assistance in favor of

either party to recover damages. Is this ruling decisive of the question of law submitted; and, if so, are those cases so wrong in principle that they should be reviewed and modified, a request to review these cases having been made? Each of these cases arose during the late war between the states, and the alleged illegality consisted in the transportation of troops in aid of the Confederate government and in opposition to the government of the United States. In the *Cannon Case*, Cannon was the engineer of a train which carried Confederate soldiers and munitions of war in addition to passengers, and was killed in collision with another train of the defendant on its return trip after having transported Confederate soldiers to their destination. In none of the cases did the court discuss or recognize the principle that the plaintiff would be cut off from recovery because of his own illegal conduct, unless its illegality contributed to the injury. Should the ruling be modified to this extent? At the outset we venture to say that no rational differentiation can be made between cases in which it is held that the plaintiff may recover for a tort inflicted while he alone was violating the Sunday law, and cases where both he and the tort-feasor were simultaneously violating the Sunday statute, where in neither instance the violation of the statute did not contribute to the injury. If a carpenter undertakes to repair his house on Sunday, and negligently lets fall a piece of timber, which injures his neighbor, a gardener, while working in his garden, can it be said that the gardener shall go without redress because he was following his ordinary vocation on the Lord's Day? In the case hypothesized there can be no causal connection between the carpenter's negligence and the gardener's work on Sunday. The occurrence would have happened on any other day under similar circumstances. It would be offering a premium upon negligence to hold that if two persons are engaged in violating the Sunday law, and one should negligently injure the other, he could escape liability when the violation of the law was not a contributing cause of the injury. In effect it would be to allow an independent public offense to be set off against a private wrong. It was held in *Gross v. Miller*, 93 *Iowa*, 72, 61 *N. W.* 385, 26 *L. R. A.* 605, that the mere fact that both parties were violating the Sunday law by hunting on that day will not prevent one of them from recovering from the other for injuries caused by the negligent discharge of a revolver by the other. In the course of demonstrating the proposition the court said: "If one violates the Sunday law, he is amenable to the state—is subject to the punishment inflicted by the statute. We cannot see, upon principle, why the mere act of violating such a law should in any case be held a contributing cause to the injury, if one follows. If the boys had

not gone into the woods, the accident would not have happened; and the same is true if they had not been in existence. So far as the pleadings show, there is nothing surrounding the accident that was in any way peculiar to the day upon which it happened. It was not more likely to happen upon Sunday than on any other day. It was not a necessary, or even, we think, a probable, result of the violation of the law." The fact that a party injured was at that time violating the law does not put him out of the protection of the law. The law should not absolve from responsibility the perpetrator of a private wrong, solely because the injured party may have violated a penal law, which violation in no wise contributed to his injury.

Again, the argument is advanced that the rule that a person violating the Sunday law is not precluded from recovering damages for injuries received from the negligence of another is not applicable where the parties sustain the relation of master and servant, for the reason that it is a necessary part of the injured servant's case to prove the contract, and a contract to labor on the Sabbath is void; that without the contract no legal duty of the master to employ competent fellow servants is shown. It may be admitted that the test whether a demand connected with an illegal transaction is capable of being enforced by law is whether the plaintiff requires the aid of the illegal transaction to establish his case. This comes from the universally accepted principle of public policy that no court will lend its aid to a party who grounds his action upon an immoral or an illegal act. In the case hypothesized by the Court of Appeals the action is founded on a breach of duty, which the law imposes as an incident to the relation of master and servant. The master's duty under the law is to exercise due care in the selection of servants, and not to retain them after knowledge of incompetency. The terms of the contract of the master with his incompetent servant are of no relevancy to the plaintiff's case. The relevant fact is that the master had put the incompetent servant to work with the injured servant as a fellow servant. Nor is the injured servant, in making out a prima facie case, required to prove more than that he was at work for

the master, subject to the latter's orders and control, and liable to be discharged by him for disobedience of orders or misconduct. *Brown v. Smith*, 86 Ga. 274, 12 S. E. 411, 22 Am. St. Rep. 456. A servant who is required to report for work on Sunday, and while working on that day is injured, may not be able to recover for services rendered on the faith of the contract; but he is not for that reason to be physically disabled by a negligent master, and denied a recovery for his injury solely because the injury happened while he and the master were working on Sunday. *Solarz v. Manhattan Ry. Co.*, 8 Misc. Rep. 1123, 29 N. Y. Supp. 1123; *L. N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Taylor v. Star Coal Co.*, 110 Iowa, 40, 81 N. W. 249; *Johnson v. Missouri Pac. Ry. Co.*, 18 Neb. 690, 28 N. W. 347. Persons who are fellow servants of a master do not cease to be such because the work on which they were employed at the time of the injury was being done on the Sabbath and the work was in violation of the Sunday law. *H. & T. C. Ry. Co. v. Rider*, 62 Tex. 267. An employé of an industrial corporation is engaged in the primary work of earning his wage, and ought not to be placed at the master's mercy because the master conducts his work on Sunday as well as weekdays. A compositor in a printing office, who sets the type from which a criminal libel is printed by his master, ought not to be denied a recovery for an injury sustained by him from the master's negligence while engaged in setting the type. The true rule is that a master who negligently injures his servant while working on the Lord's Day is liable to the injured servant, notwithstanding that at the time of the injury both may have been violating the Sunday law.

[2] We therefore think that the ruling in the cases of *Wallace v. Cannon*, 33 Ga. 199, 95 Am. Dec. 885, *Martin v. Wallace*, 40 Ga. 52, and *Redd v. Muscogee R. Co.*, 48 Ga. 102, that where two or more persons are engaged in the same transaction, which is in violation of a penal statute, and one of them is injured by the carelessness or negligence of the other, the injured person is without remedy, should be modified, with the qualification that, to prevent a recovery, the violation of the penal statute must be a contributing cause of the injury. All the Justices concur.

(126 Ga. 397)

TOWALIGA FALLS POWER CO. v. WASHINGTON.

(Supreme Court of Georgia. June 14, 1911.)

*(Syllabus by the Court.)***1. GIFTS (§ 25*)—PAROL GIFT OF LAND—RIGHTS OF DONEE—DAMAGES TO LAND.**

A child, in possession of land under a parol gift from the father, who was the true owner, the child having made valuable improvements on the land on the faith of such gift, is the owner of the freehold relatively to all persons except the father and those claiming under him, though such possession of the child may not have continued for seven years. Where the premises are damaged by another, the child is entitled to full compensation, especially when showing affirmatively the acquiescence of the father in the claim of the child, which may be done by introducing in evidence upon the trial of the case a conveyance from the father to the child made pending the action, and passing the absolute title in fee simple in the latter. *Fulton County v. Amorous*, 89 Ga. 614 (3), 16 S. E. 201.

(a) This is true, though the child in the suit for damages alleged that at the time of the acts complained of, producing the damage, he was "seised and possessed in fee simple" of the premises.

(b) If the father had not made the deed above referred to, he might have been able to recover nominal damages; but the execution of the deed barred him of this right.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 43-48; Dec. Dig. § 25.*]

2. REVIEW ON APPEAL.

The evidence was sufficient to support the verdict, and the court committed no error in refusing a new trial.

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

Action by Mattie Washington against the Towaliga Falls Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Cleveland & Goodrich and Persons & Persons, for plaintiff in error. H. M. Fletcher, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(126 Ga. 405)

LANCASTER v. HILL, Sol. Gen.

(Supreme Court of Georgia. June 15, 1911.)

*(Syllabus by the Court.)***1. OFFICERS (§ 66*)—REMOVAL—"SUFFICIENT CAUSE."**

A statute authorizing the removing of an officer for "sufficient cause," including incapacity and official misbehavior, contemplates a cause relating to and affecting the administration of the office, restricted to something of a substantial nature, directly affecting the rights and interests of the public.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 66.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6760, 6761.]

2. SHERIFFS AND CONSTABLES (§ 13*)—MISFEASANCE—REMOVAL FROM OFFICE.

The plaintiff in execution or his lawful attorney has control of the execution, and may direct the executing officer as to the time and manner of enforcing it. If the plaintiff directs the levying officer to temporarily withhold the execution, the officer has no right to levy it, contrary to the plaintiff's direction, notwithstanding his fees may be included in the costs taxed in the judgment. But the mere insistence of the officer upon a levy of the execution unless his fees are paid (without an actual levy), inspired by a bona fide belief of his right to demand his fees as a condition of suspending action, is not such misfeasance as would authorize his removal from office.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 28; Dec. Dig. § 13.*]

3. SHERIFFS AND CONSTABLES (§ 13*)—REMOVAL FROM OFFICE.

Rudeness of an officer, not amounting to illegality of conduct or to oppression under color of office, is not such misconduct as will give cause for the removal of a constable from office.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 28; Dec. Dig. § 13.*]

4. SHERIFFS AND CONSTABLES (§ 13*)—REMOVAL FROM OFFICE—INDIVIDUAL MISCONDUCT.

It is misbehavior in office which the statute specifies as a ground for removal of a constable, and not individual misconduct, disconnected with the discharge of any official duty.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 28; Dec. Dig. § 13.*]

5. EXTORTION (§ 4*)—SPECIFICATION OF WHAT CONSTITUTES—SUFFICIENCY.

The specification of conduct constituting the crime of extortion is sufficient allegation of misbehavior.

[Ed. Note.—For other cases, see *Extortion*, Cent. Dig. §§ 3, 4; Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2622-2624.]

6. SHERIFFS AND CONSTABLES (§ 111*)—OFFICIAL MISBEHAVIOR—ILLEGAL LEVY.

It is official misbehavior for a constable to knowingly make an illegal levy, with the purpose of oppressing one against whom he is illegally executing the process.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 111.*]

7. SHERIFFS AND CONSTABLES (§ 13*)—PETITION FOR REMOVAL.

The original petition was amendable under the principles announced in *Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 818.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 13.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Application of C. D. Hill, Solicitor General, on the relation of J. D. Cromer, to remove from office C. M. Lancaster. From a judgment of removal, defendant brings error. Affirmed.

Moore & Branch, Anderson, Felder, Rountree & Wilson, E. D. Thomas, Mayson & Johnson, J. E. & L. F. McClelland, J. A. Boykin, and Daley, Chambers & Smith, for plaintiff in error. C. D. Hill, Sol. Gen., Wm. A. Fuller, and Geo. Gordon, for defendant in error.

EVANS, P. J. This is a proceeding by the solicitor general of the Atlanta circuit, on the relation of J. D. Cromer, to remove from office C. M. Lancaster, a constable of Fulton county. The original petition assigned as grounds for his removal: (1) That he insisted on levying a *fi. fa.* after the defendant and the plaintiff in execution had agreed that the *fi. fa.* should be temporarily stayed, unless his costs were paid, which insistence was in the business office of the relator and in the presence of some of his patrons, and that the constable only desisted when the defendant had taken further legal steps by procuring a supersedeas of the judgment on which the execution issued; (2) that the officer is unreasonable, rough, and domineering in his methods, delighting to oppress the poor and the weak and to humiliate the innocent, and that he has an exaggerated conception of the importance of his office; (3) that on three occasions he had been convicted of being drunk and disorderly in the recorder's court of the city of Atlanta, and in the last two offenses his disorderly conduct consisted in the use of vile, vulgar, and profane language; (4) that the constable had been guilty of divers and sundry other acts of cruelty and misconduct, and the plaintiff asks permission of the court to produce evidence thereof. The constable demurred to the sufficiency of the complaint. Whereupon the relator amended by alleging the following additional grounds for the officer's removal: (5) The officer went to the house of Mrs. J. A. Burton to execute a *fi. fa.* against her and her husband, by levying on the household goods of the defendants. Mrs. Burton exhibited her exemption certificate, legal in form and substance, and duly allowed by the ordinary, embracing the household goods upon which the officer indicated his intention to levy. Mrs. Burton was sick, and requested the officer to desist from levying the *fi. fa.* Whereupon the constable said he would levy the *fi. fa.* unless she paid to him \$3.90. She borrowed the money and paid it to the officer. It is charged that the defendant deliberately harassed, threatened, and humiliated Mrs. Burton, by threats of an illegal levy, into paying him money to which he was not entitled in law at the time, and that the defendant thereby extorted from her, by color of his office, money that was not due him. (6) He received a certain sum of money from a claimant of property on which he had levied, with the understanding that it would be returned to him upon the execution of proper claim and forthcoming bonds with good security. Such bonds were executed and tendered to the officer, who refused to accept them or to deliver the money to the claimant. It is charged "that the act of the said Lancaster in receiving a cash bond from a third party was illegal and improper, and that the taking and receiving of said money by color of his office was illegal and improper. Relator further charges

that the keeping of said money when proper bond and security were tendered him was illegal and improper." (7) The constable executed a writ of attachment by an excessive levy on household goods. The levy was made outside of the district where the officer held his commission, and the goods were taken to the courtroom of justice of the peace in the officer's district. It is charged "that the said defendant, in making the said grossly excessive levy and in removing said property as aforesaid, was guilty of the most reprehensible misconduct and misbehavior in office." Other amendments were allowed, amplifying the specific charges by supplying details of the averments. The defendant objected to the amendments, because the original petition was so defective in the statement of a legal cause of action that it did not serve as a basis for amendment, and that as amended no sufficient cause was alleged for his removal from office. Certain special demurrers were urged, and, with one exception, were overruled, and the general demurrer was also overruled. The exception is to the overruling of the demurrers.

[1] 1. Constables are subject to be removed from office on the same grounds and on the same proceedings as clerks of the superior court are, and on conviction for malpractice in office as justices of the peace are. Civ. Code 1910, § 4681. Clerks of the superior court "are subject to be removed from office by the judge of the said court for any sufficient cause, including incapacity or misbehavior in office, charges for which must be exhibited to the court in writing and the facts tried by a special jury, such clerk being entitled to a copy of the charges three days before trial." Civ. Code 1910, § 4897. Constables may therefore be removed from office for any sufficient cause, including official incapacity, misbehavior, or as a result of a conviction for malpractice in office. The first ground for removal is that prescribed for clerks of the superior court, made on written specification of charge, and the last is the automatic result of a conviction for malpractice in office. The petition in the present case is framed under Civ. Code 1910, § 4897, and the subject-matter of inquiry is the sufficiency of the various charges as alleging cause for removal of a constable under this code section. Sufficient cause means legal cause, and that which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature, directly affecting the rights and interests of the public. *Boggs Case*, 11 Coke, 93b; *State v. Duluth*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595. The specification that sufficient cause includes official incapacity and misbehavior would seem to import that these items of specification, were intended rather as an enlargement than a restriction, as to what constitutes sufficient cause to remove an officer. We do not think that the words 'sufficient

cause' should be construed to embrace any cause not affecting the competency of the officer and his official conduct.

[2] 2. A plaintiff in execution has control of the process, and may direct the executing officer as to the time and manner of enforcing it. *Hatcher v. Lord*, 115 Ga. 623, 41 S. E. 1007, 81 L. R. A. 353; *Gorham v. Gale*, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; *Isler v. Colgrove*, 75 N. C. 835; *Patton v. Hammer*, 28 Ala. 618. The inclusion of the officer's fee in the execution does not give the officer the power of enforcement contrary to the plaintiff's direction, since the court costs, embracing the officer's fees, are a part of the plaintiff's recovery, for the payment of which to the officer the plaintiff is ultimately bound. If the plaintiff prevent or obstruct the levying officer from executing the process, the officer may have judgment against the plaintiff for his costs, and have execution issued thereon. *Robertson v. Smith*, 37 Ga. 604. It may be that a sheriff or constable would be permitted to sell, in case of collusion between the parties and when the plaintiff is irresponsible. *Jackson v. Anderson*, 4 Wend. (N. Y.) 474. However, this record does not present such a case. The first count or charge as a basis for the constable's removal, when reduced to its bare facts, is that the constable insisted on a levy of the *fi. fa.* after the plaintiff's attorney had directed him to postpone his levy, unless his costs were paid. The constable was entitled to his costs, but was not entitled to enforce collection by a levy of the *fi. fa.* after he was directed by the plaintiff to withhold action for a time. Still we do not think the officer's insistence on the payment of his costs, or, on default thereof, that he would levy the *fi. fa.*, ground for removal from office, where there was no actual levy, and nothing to show that the officer was instigated by a desire to oppress the defendant, or other motive than a purpose to collect his costs in a manner supposed by him to be proper and legal.

[3] 3. That an officer may be rude and domineering in his methods of administering his office is not ground for removal, unless his rudeness extends to illegality of conduct or to oppression under color of office. Lack of civility in official acts very probably will cause the electorate to decline to re-elect an incumbent who is wanting in the temperamental qualities which the ethical standard of the community may prescribe, but is not sufficient, when disassociated from illegal conduct, for the officer's removal from office by the court. Individual idiosyncracies and temperament of an officer capacitated to dis-

charge his official duties is not the official incapacity recognized by the statute as a ground for removal from office.

[4] 4. It is official misbehavior which the statute specifies as a ground for removal from office, and not individual misconduct wholly apart from the discharge of official duty. *Hawkins v. State*, 54 Ga. 653. It is not alleged that the constable was acting in an official capacity when he was drunk, or that as a result, from such drunkenness, he was guilty of any wrongful official act or omission to act. The allegation of the conviction of the defendant in the recorder's court on the charge of drunkenness and disorderly conduct, without connecting such offenses with the defendant's office, is not good as an allegation of official misbehavior.

[5] 5. "Extortion shall consist in any public officer's unlawfully taking, by color of his office, from any person any money or thing of value that is not due to him or more than his due." Pen. Code 1910, § 802. With regard to specifications marked (5) and (6) in the foregoing statement of facts, the facts alleged make a case of extortion.

[6] 6. The last specification of official misbehavior is an excessive levy of an attachment on household goods, made by the constable outside of his bailiwick. It is alleged that the constable seized property three or four times in excess of the amount named in the attachment, and carried the same out of the district where the levy was made to the courtroom of the magistrate who issued the attachment, some five miles away; that the constable knew that he had no legal right to levy the attachment outside of the district of which he was constable; and that he deliberately and willfully removed the property for the purpose of prejudicing the rights of the defendant in attachment, and of making it more difficult for him to protect his property. A constable has no right to execute civil process outside of his district unless specially authorized by statute; and if he does so, knowing that he is without power to lawfully act, and with a purpose of oppressing the defendant, such conduct is official misbehavior, and is cause for removal.

[7] 7. The original petition charged generally that the defendant was guilty of official misconduct, and also specially that he was guilty of certain alleged misbehavior. Even though the particular matters specified be insufficient to constitute official misconduct, the petition was not so defective but that it could be perfected by proper amendments. *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318. Judgment affirmed. All the Justices con-

(136 Ga. 411)

FLORIDA COCA COLA BOTTLING CO. v. RICKER et al.

(Supreme Court of Georgia. June 15, 1911.)

*(Syllabus by the Court.)***1. EVIDENCE (§ 183*)—BEST AND SECONDARY—DILIGENCE—DISCRETION OF COURT.**

In order to admit secondary evidence, it must appear that the primary evidence, for some sufficient cause, is not accessible to the diligence of the party tendering such evidence. The question of diligence is one of sound discretion in the court.

(a) In this case there was no error in refusing to admit secondary evidence of a written assignment.

(b) If an assignee sent a written assignment to another state for record, and left it there, with no effort to obtain its return, it was not an abuse of discretion to hold that this did not sufficiently show that it was inaccessible to the assignee, so as to admit parol evidence of its contents at his instance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

2. CORPORATIONS (§ 448*)—CONTRACTS BEFORE INCORPORATION—ASSIGNMENT.

Where two persons took a written assignment of certain choses in action to themselves as individuals, a corporation not then in existence, but subsequently chartered, with the assignees as corporators, could not sustain a common-law action brought in its own name as the owner of such choses in action, by offering to show by parol that the assignees acted as its agents in taking the assignment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1789-1792; Dec. Dig. § 448.*]

3. PARTIES (§ 3*)—EQUITABLE TITLE.

An action dependent on the ownership by the plaintiff of a legal title to choses in action cannot be sustained by parol evidence tending to show that the plaintiff is the equitable owner of such choses.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 3; Dec. Dig. § 3.*]

4. NONSUIT.

There was no error in granting a nonsuit.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by the Florida Coca Cola Bottling Company against E. A. Ricker and the Commercial & Savings Bank of Macon. Judgment for defendants, and plaintiff brings error. Affirmed.

On March 18, 1908, the Florida Coca Cola Bottling Company sued out an attachment in the superior court of Bibb county against E. A. Ricker on the ground that the defendant was a nonresident. It was levied by serving a summons of garnishment on the Commercial & Savings Bank of Macon. During the term of the superior court to which the writ was made returnable, the plaintiff filed a declaration in attachment, alleging the foregoing facts, and also in substance as follows: On March 15, 1907, H. F. Haley and T. C. Parker, "acting for and in behalf of the Florida Coca Cola Bottling Company, purchased from the said E. A. Ricker, doing business as the Jacksonville Coca Cola Bot-

tling Company, a certain coca cola bottling plant, especially including open accounts. Amongst other open accounts due to the said E. A. Ricker, and so purchased by your petitioner from the said E. A. Ricker," were two specified accounts, amounting to \$781 and \$150, respectively. "Notwithstanding the fact that your petitioner had bought said accounts, the said E. A. Ricker, after having sold the same to petitioner, and after the same had become the property of petitioner," collected them on March 19th and 29th, respectively. The accounts were the property of the plaintiff, and when so collected Ricker became indebted to it for the amount of such collection. After the summons of garnishment, based on the attachment, had been served on the Commercial & Savings Bank of Macon, Ga., as garnishee, the Commercial Bank of Jacksonville, Fla., filed a bond with security in the superior court of Bibb county, reciting that the garnishee held \$3,375 which it had collected upon a draft drawn by Ricker and payable to the order of the Commercial Bank of Jacksonville, and that the Commercial Bank claimed the money thus held. The condition of the bond was that the Commercial Bank of Jacksonville should pay to the plaintiff the sum that might be found due to it by Ricker, upon the trial of any issue that might be formed upon the answer of said garnishee, or that might be admitted to be due in said answer, if untraversed. The plaintiff contends that the filing of this bond alone did not operate as a sufficient claim. The fund in the hands of the garnishee was paid to the Commercial Bank of Jacksonville upon the filing of this bond. That bank asserts some sort of claim or pretended claim against the funds on the ground that Ricker was indebted to it, and deposited as collateral security a bond, which was forwarded for collection. Plaintiff alleges that, if there was any valid claim on the part of the Jacksonville Bank, it was for less than the amount of the fund which was in the hands of the garnishee. "Petitioner has no actual knowledge of the facts recited in the foregoing paragraph, and, although it has repeatedly requested the attorneys of the Commercial Bank of Jacksonville to disclose what amount of indebtedness was claimed by the said bank against said bond, yet petitioner has been unable to get this information, and is now unable to allege the amount of the debt held by the Commercial Bank of Jacksonville, if any debt is so held. It is entitled to know the amount of the debt so claimed, so that it can tender such amount and release the bond." It alleges that the title "to said bond and coupons" was in Ricker at the time of their payment, and that the money paid to the Commercial & Savings Bank was his money and subject to garnishment. Plaintiff prayed discovery

from the Jacksonville Bank, and that it should have judgment against Ricker; that, in the event it should be determined that no claim had been filed by the Commercial Bank of Jacksonville, plaintiff should have judgment against the Commercial & Savings Bank of Macon, Ga., as garnishee; and, in the event it should be determined that a claim had been filed by the Commercial Bank of Jacksonville, plaintiff should have judgment against Ricker, and against the American Surety Company of New York, as surety on the bond filed by the Jacksonville Bank. It does not appear that any service of this declaration was made, though it was stated in the bill of exceptions that Ricker appeared and pleaded.

On the trial, evidence was introduced to show that on March 15, 1907, Ricker assigned to Haley and Parker certain enumerated personal property, including books of accounts, notes, and open accounts, and other assets of the Jacksonville Coca Cola Bottling Company, the "firm name" under which he was doing business; that one of these accounts, for \$781, had been paid to the Jacksonville Coca Cola Bottling Company on March 21, 1907, by a check payable to the order of the last-mentioned company and dated March 19th; and that another account, for \$150, had been paid by a check dated March 29, 1907, payable to the order of Ricker, indorsed by him, and stamped paid April 3d. Haley was introduced as a witness, and testified that the Florida Coca Cola Bottling Company was chartered on or about April 11, 1907, and as to this there was no conflict. He further testified that, after the assignment from Ricker to him and Parker, they made a written assignment, which he called a deed, to the Florida Coca Cola Bottling Company, "of the things we bought from Ricker." In attempting to account for the nonproduction of the paper, he testified, among other things, as follows: "I filed that deed in Jacksonville. Sending it down for filing was the last I have seen of it. The original never came back into your [Malcolm D. Jones's] office that I know of." When questioned by his counsel, he said he turned the paper over to Malcolm D. Jones. Mr. Jones was then introduced as a witness, and testified that he prepared the conveyance from Haley and Parker to the Florida Coca Cola Bottling Company, and had the paper in his possession; that about that time he was taken sick with fever; that he was not able to swear positively what became of the paper; that he had made diligent search in his office, and could not find it; and that he had asked Haley to make search for it wherever he thought he could find it. Haley was then recalled to the stand, and testified that he had made the search which Mr. Jones had requested him to make. When questioned by the court, he answered that he had sent the paper to

Florida for record. The court then asked: "And you have not seen it since?" To this he answered: "I have not seen it since, other than that I am positive I carried it to Mr. Jones. When it came back from record, I carried it to Mr. Jones and gave it to him. I am positive of that. I feel very positive that I got back the original from Jacksonville, certified to as having been recorded. It is three years ago, and when we looked for the paper I couldn't find it at all, and I made it a practice of carrying it to him [Malcolm D. Jones] when anything comes up. I have made a diligent search everywhere it is likely to be found, once when the case came up before, and yesterday again. I have never applied to the clerk in Jacksonville, Fla., for the paper, I was so positive Mr. Jones had it. When it came up before, Mr. Jones was ill, and I was positive he had it. Absolutely I carried all my papers to the office of Malcolm D. Jones. He has had full charge of all this transaction, and I turned over all the papers to him, and have never received that paper back from him." He was again asked: "Did you send the paper to Jacksonville, the transfer from Haley & Parker to the Florida Coca Cola Bottling Company?" To this he answered: "I don't think that I did. Malcolm D. Jones was getting up the bonds. He had entire charge of the bond matter. I don't know whether I sent it, or he, or how it was fixed." The presiding judge held the foundation for the introduction of parol evidence as to the contents of the written transfer from Haley and Parker to the Florida Coca Cola Bottling Company had not been sufficiently laid, and rejected parol evidence as to its contents. Parol evidence was also offered on behalf of the plaintiff for the purpose of showing that the Florida Coca Cola Bottling Company was organized solely on the assets of the Jacksonville Coca Cola Bottling Company, purchased from Ricker by Haley and Parker; that they were acting as agents for the Florida Coca Cola Bottling Company in making the purchase, and this was understood by Ricker; that the company issued its stock to Haley and Parker for such assets, and it was the company's money or bonds which went to pay Ricker; that all the assets which Haley and Parker had bought from Ricker were "turned over to the Florida Coca Cola Bottling Company"; and that Ricker was fully acquainted with the fact that Haley and Parker were buying the assets of the Jacksonville Coca Cola Bottling Company, not for themselves, but for the Florida Coca Cola Bottling Company, a corporation not then chartered, but for which an application for charter was pending, and which was afterwards chartered. This evidence was ruled out. Upon motion, a nonsuit was granted. The plaintiff excepted to this ruling, and to the rulings as to the rejection of evidence.

ent from those arising under contracts of subscription in connection with organizing a corporation.

[4] It was contended that under the decision in *Kelly v. Strouse*, 116 Ga. 872, 43 S. E. 280, and certain cases preceding it, "when a court passes upon a motion for a nonsuit, it decides only one question—that is, do the allegation and the proof correspond"; that there was a correspondence between the allegata and probata in the present case; and that it was error to grant a nonsuit, whether or not, under the evidence adduced by the plaintiff, it was entitled to any recovery. From what has been said above, it will be seen that the evidence did not sustain the allegation of the declaration. But, speaking for myself, I have never been able to satisfactorily reconcile decisions of the character referred to with the unequivocal statement of the Code that "if the plaintiff fails to make out a prima facie case, or if, admitting all the facts proved and all reasonable deductions from them, the plaintiff ought not to recover, a nonsuit will be granted." Civil Code 1895, § 5347; Civil Code 1910, § 5942.

Judgment affirmed. All the Justices concur.

(136 Ga. 450)

RAINES v. HINDMAN.

(Supreme Court of Georgia. June 17, 1911.)

(Syllabus by the Court.)

LANDLORD AND TENANT (§§ 63, 300*)—DISPOSSESSORY WARRANT—DEFENSES—EVIDENCE OF SALE OF PREMISES.

Certain premises were rented by the owner to another for a year, after the expiration of which the former sued out a dispossessionary warrant to evict the latter, on the ground that he was a tenant holding over, and because of the nonpayment of rent, and the alleged tenant arrested the proceedings by filing a counter affidavit. *Held*:

(1) The general rule that a tenant cannot dispute his landlord's title does not prevent the tenant from showing that the landlord parted with his title to the rented premises during the term of the tenancy.

(a) Where it is shown that the landlord parted with his title during the term of the tenancy, he cannot evict the tenant after the expiration of such term, on the ground that the latter is a tenant holding over beyond his term, or on the ground of the nonpayment of rent.

(b) This is true, though the tenant may not have attained to the grantee of the landlord.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 166-176, 1292-1294; Dec. Dig. §§ 63, 300.*]

Error from Superior Court, Floyd County; G. W. Maddox, Judge.

Action by Taylor Raines against George Hindman. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. A. H. Harris & Sons, for plaintiff in error. M. B. Eubanks, for defendant in error.

HOLDEN, J. The plaintiff in error, on the 1st day of January, 1908, made an affidavit that he rented to the defendant in error a certain tract of land for the year 1907; that the latter failed to pay the rent when due; that the plaintiff desired possession of the property and the defendant refused to give him possession thereof. Upon this affidavit a warrant was issued on January 1, 1908. In order to prevent eviction and arrest the proceedings, the defendant filed a counter affidavit in the language of the statute and gave the required bond. Other allegations were also made in the affidavit, which were stricken upon demurrer thereto. Upon the trial of the case the court directed a verdict in favor of the defendant, and the plaintiff excepted.

Upon the trial of the case the only evidence on behalf of the plaintiff was his own testimony, which was substantially as follows: He rented the land to the defendant for the year 1907. The rent was due about the 15th of October. Soon thereafter he demanded of the defendant payment of the rent. The latter has refused to pay him the rent due for 1907, and has refused to deliver the possession of the premises, though the plaintiff demanded of him such possession. The land is the same property that the plaintiff sold to Raper. The defendant introduced testimony substantially as follows: A deed from the plaintiff to Lewis Raper, dated November 23, 1907, wherein the plaintiff conveyed the rented premises to Raper and warranted the title to the same. Allegations in a petition for injunction filed by the plaintiff and Lewis Raper against the defendant, to the effect that the plaintiff bargained with one R. B. McArver for the rented premises on November 14, 1907, and a deed to the same was executed by the latter to the former, and on November 23, 1907, the plaintiff sold to Lewis Raper the property, making a deed to the same, and took from the latter two mortgages, dated November 23, 1907, to secure the balance of the purchase money, a part of which was due October 15, 1909, and the remainder October 15, 1910. The plaintiff objected to the admission in evidence of the documentary evidence just referred to; the main grounds of objection being that the tenant could not dispute the landlord's title to the rented premises until he had surrendered possession thereof to the landlord, and that the plaintiff had the right to recover possession of the property in order to deliver possession to the purchaser from him, and that there were no pleadings to authorize the admission of such evidence.

We do not think there was any error in the admission of the evidence objected to, nor in directing a verdict for the defendant. Under the common law, a chose in action was not assignable, and the landlord's grantee of the reversion could not maintain an action against

the lessee on a covenant of the lease, though the covenant might run with the land. Only the grantor, his heirs, or personal representatives could take advantage of a breach of covenant by the lessee. It was also a part of the feudal law that the lord could not transfer the rented premises without the consent of his vassal, because the latter was entitled to the protection of the former, and could not be deprived thereof without his consent, evidenced by his attornment to the grantee of the landlord, or in some other way. These restrictions upon the rights of the landlord's grantee were removed by various English statutes, as the necessity for transferring lands became greater. Under the statute of 32 Henry VIII, c. 34, the grantee of the landlord was entitled to sue the lessee on all the covenants in the lease. In this connection, see 1 Underhill on Landlord & Tenant, § 317; Broom's Common Law (9th Ed.) 556. The contract of the defendant with the plaintiff for the rent of the premises for 1907 was made prior to the sale by the plaintiff of the rented premises to Raper, and the latter took title to the property, subject to the right of the defendant to have possession of the premises during 1907 as a tenant. Raper would have the right to the possession of the premises after 1907, and would have the right to collect from the tenant any rent that might be due for the premises, at least after the year 1907. In 1 Underhill on Landlord & Tenant, § 319, it is said: "Usually a grantor cannot collect rent from his former tenants which has accrued after his sale of the reversion, unless he has expressly reserved his right to do so. This he will have to show, for the contrary will be presumed." After the expiration of 1907, the year for which the defendant had rented the premises from the plaintiff, Raper, the vendee of the plaintiff, had the right to evict the defendant as a tenant holding over. *Morrow v. Sawyer*, 82 Ga. 228, 8 S. E. 51; *Willis v. Harrell*, 118 Ga. 908, 45 S. E. 794. See, in this connection, *Grizzle v. Gaddis*, 75 Ga. 350. Raper had the right, after 1907, to dispossess the defendant as a tenant holding over, upon the failure of the latter to deliver possession to him; but the plaintiff, who leased the rented premises to Raper during the term of the tenancy, had no right after 1907, when the term of tenancy had expired, to evict the tenant on the ground that he was a tenant holding over, or that he had failed to pay rent. The summary remedy of evicting the tenant and recovering double rent does not exist in

behalf of both the original landlord and his grantee, but only in behalf of the latter.

As to whether the plaintiff could have dispossessed the defendant during 1907 for the nonpayment of rent need not be considered. The doctrine is generally true that the tenant must deliver possession to his landlord before he can dispute his title. Under this doctrine, one who holds land rented from another will be estopped from claiming that at the time the property was rented the landlord did not have title thereto. This doctrine, however, cannot be so extended as to prevent the tenant from showing that during the term of the tenancy the landlord's title expired by limitation, or that the same has been divested by judicial sale, or that the landlord has voluntarily parted with the title during the tenancy. Showing that the landlord had voluntarily parted with his title during the tenancy does not involve a dispute of the landlord's title at the time the contract for rent was made, but is an implied admission that the landlord had such title, but has parted therewith. The contention that another has acquired title from the landlord during the tenancy necessarily involves an admission that the landlord then had a title. The tenant is not estopped from showing that during the term of the tenancy the landlord has conveyed the title to the rented premises to another. *Beall v. Davenport*, 48 Ga. 165, 15 Am. Rep. 656; 2 *Tiffany on Landlord & Tenant*, § 277; 1 *Tiffany on Landlord & Tenant*, § 78n, p. 493; *Jones on Landlord & Tenant*, §§ 427, 703; 24 *Cyc.* 942 (e); *Powell on Actions for Land*, § 369; 2 *Underhill on Landlord & Tenant*, §§ 559, 134; 2 *McAdam on Landlord & Tenant* (3d Ed.) § 421, pp. 1343, 1347. At a judicial sale the purchaser becomes the landlord of the tenant of the defendant in *fi. fa.* *Dollar v. Roddenbery*, 97 Ga. 148, 151, 25 S. E. 410. The failure of the defendant to show that he has attorned to the grantee of his original landlord would not give the latter the right to have him evicted by a dispossessory warrant. In the case of *Pritchard v. Tabor*, 104 Ga. 64, 30 S. E. 415, the question for decision was whether or not the grantee of one held to be the landlord of another could maintain a dispossessory warrant against the latter as a tenant holding over, and it was held that such a proceeding could be maintained. In that case there was no question before the court as to whether or not the original landlord could maintain such a proceeding.

Judgment affirmed. All the Justices concur.

(128 Ga. 446)

**WADLEY SOUTHERN RY. CO.
v. KENNEDY.**

(Supreme Court of Georgia. June 17, 1911.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1066*)—HARMLESS
ERROR—STATEMENT BY COURT.**

An immaterial and unprejudicial misstatement of a party's contention in the court's summary will not require a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

2. CARRIERS (§ 280*)—TRIAL (§ 193*)—INSTRUCTIONS—EXPRESSION OF OPINION—DUTY OF CARRIER.

The charge copied in the second division of the opinion was not open to the criticism that it contained an expression of opinion on the facts.

(a) The rule of law requiring railroad companies to exercise extraordinary diligence in protecting their passengers from injury applies as well to the construction and maintenance of tracks as to the operation of cars thereon.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092; Dec. Dig. § 280;* Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

3. SUFFICIENCY OF EVIDENCE.

The verdict is supported by the evidence, and is not excessive in amount.

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Action by J. E. Kennedy against the Wadley Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. L. Gamble, for plaintiff in error. Oliver & Oliver, for defendant in error.

EVANS, P. J. The Wadley Southern Railway Company constructed a side track upon its main line to serve the interests of a patron of the road, who was operating a sawmill. The railroad company delivered empty cars and received the loaded cars on this siding, which was protected by a switch. The keys to the switch were carried by the employees of the railroad company. The employees of the sawmill firm forced out a staple in shifting the cars on the side track, for their convenience, and left the switch in an unclosed condition; and a passenger train ran into the switch and collided with the freight cars, and the shock of the collision threw the plaintiff, a passenger, against a forward seat, loosening her teeth and otherwise injuring the jaw. The same train had passed along at this point at 2 o'clock, and was on its return trip at about 7 o'clock, after dark, when it ran into the open switch. The switch was not protected by any light or other device to warn the engineer or others upon the train whether it was open or closed. The plaintiff recovered a verdict for \$1,500,

which the court refused to set aside on motion.

[1] 1. It is complained that the court, in the summary of the railroad's contention, stated that the switch was left open by a party unknown. Error is assigned upon this statement of the contention, because the evidence showed that the switch was opened and left open by the employees of the lumber company, without authority of the defendant and without its knowledge. The erroneous statement by the court that the defendant contended that the switch was left open by an unknown person, when in fact the contention was that it was left open by an employee of the lumber company, could not have harmed the defendant. The carrier was insisting that it was not liable because of the act of an unauthorized person, and whether the name of that person was known or unknown was immaterial to the actual defense set up.

[2] 2. The court charged: "On the other hand, I charge you, if you find from all the facts and circumstances of the case that the defendant company constructed this side track used by certain parties for the purpose of loading cars along its line for the purpose of transportation over its railway, and such parties using said switch left said switch open negligently, and it was known to the defendant company, or could have been ascertained by them by the exercise of extraordinary care and diligence, and it was not ascertained, and they failed to exercise such care and diligence, and the wreck occurred in that way, then I charge you that that was negligence on the part of the defendant company." This instruction is alleged to be erroneous, because it was an expression of opinion that the enumerated facts and circumstances constituted negligence, and because it imposed upon the carrier the duty of exercising extraordinary care and diligence in the discovery of the open switch. It was but a concrete statement of the principle that the failure to exercise due care constitutes negligence, and did not amount to an expression of opinion on the facts. With respect to the criticism that the charge imposed upon the carrier the duty of exercising extraordinary care and diligence in the discovery of the open switch, we do not think that the charge is erroneous for that reason. Extraordinary care is the measure of diligence required of a railroad company towards passengers, and this degree of care in the protection of passengers applies as well to the construction and maintenance of tracks as to the operation of cars thereon. *Macon, etc., Ry. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756.

[3] 3. The plaintiff in error asks that the verdict be set aside, because the recovery was excessive. The effect of the injury, as described by the plaintiff and her physician and den-

tists, was such that we are unable to say that the amount fixed by the jury was excessively large.

Judgment affirmed. All the Justices concur.

(126 Ga. 439)

SMITH v. THOMAS.

(Supreme Court of Georgia. June 17, 1911.)

(Syllabus by the Court.)

LANDLORD AND TENANT (§ 270*)—DISTRESS WARRANT—COUNTER AFFIDAVIT—WITHDRAWAL.

Where a distress warrant has been arrested by the defendant therein making a counter affidavit and replevying the property by giving an eventual condemnation money bond, he is estopped from withdrawing the counter affidavit over the objection of the plaintiff, thereby causing a dismissal of the case, and thus depriving the court of jurisdiction to render judgment on the bond; the defendant nevertheless retaining possession of the property so obtained. *Griggs v. Willbanks*, 96 Ga. 744, 22 S. E. 327.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1098-1148; Dec. Dig. § 270.*]

Error from Superior Court, Earley County; W. C. Worrill, Judge.

Action by H. G. Smith against Clarence Thomas. Judgment for defendant, and plaintiff brings error. Reversed.

R. H. Sheffield, for plaintiff in error. Calhoun & Rambo, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(126 Ga. 426)

PEYTON v. STEPHENS.

(Supreme Court of Georgia. June 16, 1911.)

(Syllabus by the Court.)

PARTITION (§ 14*)—RIGHT TO PARTITION.

Where the lands belonging to the estate of a decedent were divided by agreement between six of his seven surviving heirs, and the six parcels or shares into which the land was divided were allotted in severalty to the six heirs participating in the division, one who had purchased four of the parcels of land so allotted to the heirs, and who subsequently bought from one who inherited the interest of the seventh heir of the decedent, who did not participate in the division, would not, while holding and claiming as his own the four parcels or shares purchased as above stated, be entitled to a partition of another one of the several parcels of land, which had been set apart and allotted to one of the six heirs participating in the division.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 37; Dec. Dig. § 14.*]

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by J. T. Peyton against R. D. Stephens. Judgment for defendant, and plaintiff brings error. Affirmed.

J. T. Peyton brought his petition for partition, alleging that on the 3d day of July, 1901, he purchased from Henry R. Shurter, the latter being the sole heir of his deceased wife, who died seised and possessed of a one-seventh undivided interest in the estate of her father, Charles W. Landers, whose death antedated that of his daughter, all of the right, interest, and title which the said Shurter had inherited from his deceased wife, and took the deed of Shurter conveying the same. It is alleged that the estate of Charles W. Landers had never been administered; that the estate had never been divided and distributed to all of the heirs as provided by law; that a large tract of land situated in Habersham county was a part of the estate of Chas. W. Landers; and that Stephens, who is made the party defendant to the application for partition, holds and claims title to a certain described part of these lands, the same being designated as "lot No. 8 of the division of Charles W. Landers' estate." Stephens filed an answer to the petition, admitting that he held and claimed title to the lands as alleged in the application for partition—that is, the lands designated as "lot No. 3 of the division of the Charles W. Landers estate"—but denied that partitioner has any interest whatever in the same. Upon the trial of the issue made, the jury rendered a verdict in favor of the defendant. Whereupon the plaintiff, Peyton, made a motion for a new trial, which was overruled, and he excepted.

J. C. Edwards, for plaintiff in error. P. Cooley and J. B. Jones, for defendant in error.

BECK, J. It appears from the evidence in the record that, when the lands belonging to the estate of Charles W. Landers were divided by agreement between the living heirs of Charles W. Landers, the living heirs were of the opinion that Henry Shurter, who had intermarried with Lola Landers and who survived her, had no interest in the estate of Chas. W. Landers, although the death of the latter antedated the death of Henry Shurter's wife, and under this impression they made a division of the lands belonging to the Charles W. Landers estate, awarding and assigning certain parcels of land, which had been divided into six lots, to the living heirs of Charles W. Landers. The applicant for partition bought from the heirs of Charles W. Landers four lots of land awarded to the heirs under the distribution referred to, and subsequently bought all of the interest of Henry Shurter in the estate of Charles W. Landers, that is, a one-seventh undivided interest in that estate; and he now contends that he is entitled to a partition, not of all the lands belonging to the estate of Charles W. Landers, but of that

lot or parcel of land which had been awarded to Sanford Landers, one of the sons of Charles W. Landers, and which had passed by purchase to the defendant, Peyton.

We are of the opinion that the finding in this case in favor of the defendant was the only verdict that could have been rendered under the facts of the case. The interest which the petitioner took under the deed from Henry Shurter was a one-seventh undivided interest in all the lands belonging to the Charles W. Landers estate, and under that deed he would have been entitled, as against all the heirs of Charles W. Landers, to a partition of those lands. But where there had been a division of the lands of Charles W. Landers among his living heirs, as appears to have been made among those parties, and the several lots into which the land was divided were awarded to the several claimants, one who bought an undivided interest in the entire estate of Charles W. Landers could not, after having purchased four of the six lots or parcels into which the entire estate of Charles W. Landers had been divided by agreement, hold those lots which he had purchased and insist upon a partition of a single one of the segregated lots or parcels of land which had been set apart and awarded in the division of the Landers estate to one of the heirs. The deed of Henry Shurter conveyed to the petitioner a one-seventh interest in the entire body of land belonging to the estate of Charles W. Landers, but did not give to him a one-seventh interest in any particular segregated portion of those lands. We do not think that the petitioner can hold as his own the four parcels of land which he bought from the other heirs of Charles W. Landers as the lots which were awarded to them in the division of their ancestor's estate, and have that division of the estate held good so far as regards the lots of land purchased by him, and yet, without regard to the considerations which may have moved Sanford Landers, another one of the heirs, to consent to the division, claim and have awarded to him under partition proceedings a one-seventh interest in the parcel of land which was originally awarded to Sanford Landers.

Judgment affirmed. All the Justices concur.

9 Ga. App. 503)

SOUTHERN LIFE INS. CO. v. LOGAN.
(No. 8,101.)

(Court of Appeals of Georgia. June 7, 1911.
Rehearing Denied July 1, 1911.)

(Syllabus by the Court.)

1. INSURANCE (§§ 621, 646*) — ACTIONS ON POLICIES — RIGHT OF ACTION — BURDEN OF PROOF.

Where a policy of life insurance provides that the insured shall belong to a named divi-

sion of policy holders, and the insurance company therein promises, within a designated time after the death of the insured, to pay to the beneficiary, "out of the mortuary fund on hand in the division to which the member belongs, an amount not exceeding [a named sum], or the full amount raised by one mortuary assessment upon all members in good standing in said division at the time of the assured's death, not in excess of said sum," after the designated time has elapsed the beneficiary may maintain an action at law against the company upon the policy. Prima facie the beneficiary is entitled to recover the amount stipulated in the policy, but the insurance company may show in defense that it has made an assessment on all the members in good standing in the division involved and has not raised the amount stated, and thus diminish the recovery to the amount actually realized. The burden of showing how many members there are in the division, and whether the assessment regularly made would or would not have produced the amount named in the policy, is upon the insurance company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1542, 1543, 1645-1668; Dec. Dig. §§ 621, 646.*]

2. INSURANCE (§ 360*) — WAIVER OF FORFEITURE — NONPAYMENT OF ASSESSMENTS.

Though a policy of insurance may provide for the payment of assessments and semiannual dues, and may stipulate that "failure to pay semiannual dues or assessments, when due, renders this policy null and void," still if, at a time when the policy is legally in force, the company declines a tender of the assessments or dues, on the ground that the insured is not a policy holder, and notifies the insured and the beneficiary that it regards the policy as no longer of force and effect, it is not incumbent upon the insured or the beneficiary to continue to tender the dues or assessments. The notification in advance that the dues or assessments will not be accepted waives the tender of them.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 916-924; Dec. Dig. § 360.*]

3. INSURANCE (§ 151*) — CONTRACT — APPLICATION AS PART OF POLICY.

Under the act of August 17, 1906 (Acts 1906, p. 107), the application on which an insurance policy is based is not to be considered as part of the policy or contract between the parties, unless a copy thereof is attached to or accompanies the policy. Statements made in the application are not to be treated as warranties or covenants, on account of the failure or falsity of which the policy may be avoided, unless a copy of the application is attached to the policy or accompanies it, though representations contained in the application, if fraudulently made, may give to the insurance company the right to avoid the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 308-311; Dec. Dig. § 151.*]

4. INSURANCE (§ 645*) — ACTION ON POLICY — ISSUES AND PROOF.

Although in the proof at the trial it may be shown that one of the representations made in the application upon which the policy was issued, but which did not accompany the policy, was untrue, still, if the company desired to avoid the policy on account of this misrepresentation as an act of fraud, it was incumbent upon it to plead the matter specifically, and in the absence of such a plea it cannot take advantage of the particular misrepresentation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1632-1644; Dec. Dig. § 645.*]

5. APPEAL AND ERROR (§ 1002*) — REVIEW — QUESTIONS OF FACT.

The evidence as to whether the policy was procured by fraud was conflicting, but was

amply sufficient to support the verdict, and no sufficient reason appears for this court interfering with the discretion of the trial judge in refusing to grant a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error from City Court of Americus; C. R. Crish, Judge.

Action by L. L. Logan against the Southern Life Insurance Company. From a judgment for plaintiff, defendant brings error. Affirmed.

M. C. Edwards, for plaintiff in error. W. T. Lane and Shipp & Sheppard, for defendant in error.

POWELL, J. Mrs. Logan sued upon four policies of insurance issued by the defendant company (here plaintiff in error) upon the life of her father, W. T. Wilson. There were four separate policies, but they are alike in all of the substantial details; the only difference among them being as to the particular division of policy holders to which each of them relates. The salient provision of each policy is that in consideration of the statements and warranties contained in the application, and of the payment of the policy fee and semiannual dues and the mortuary assessments, "the Southern Life Insurance Company, upon satisfactory proof of the death of William Thomas Wilson, the assured, and the surrender of this policy properly receipted, will pay within thirty days to Lora Langford Logan (daughter), the beneficiary under this policy, out of the mortuary fund on hand in the division to which the member belongs, an amount not exceeding one thousand dollars, or the full amount raised by one mortuary assessment upon all members in good standing in said division at the time of the assured's death, not in excess of said sum." The policy also contains the following provision: "This contract is not binding upon the company until the policy fee is paid and the policy delivered to the assured while in good health. Failure to pay semiannual dues, or assessments, when due, cancels this contract and renders it null and void." The material part of the company's plea is as follows: "This contract is not binding on the defendant, for the reason that there was no contract, and this particular contract is void under the very terms of said contract. Paragraph 4 of each policy sued on states: 'This contract is not binding upon the company until the policy fee is paid and the policy delivered to the assured while in good health.' Said policies have never been delivered to the assured in good health. At the date of the delivery of the policies said W. T. Wilson was in bad health, which fact was known to said W. T. Wilson and was unknown to defendant. Said Wilson was afflicted with Bright's disease, or diabetes, and

other diseases, which were fatal to him, and was so afflicted at the time the policy was delivered. There was fraud in the procurement of said policy; said Wilson having stated, for the purpose of receiving said policy, that he was in good health, when in fact such was not true and said Wilson knew that same was not true. Immediately upon the discovery of this fact defendant canceled said policies, so notified plaintiff and said Wilson, and did not receive any premiums or dues; but said plaintiff, continuing her attempt to defraud said company, would not surrender said policies, but, knowing in all probability that her father's death was imminent, attempted to continue said policies to defraud said company. Defendant filed to the May term of Sumter superior court a petition to cancel said policies, setting up these allegations; but said Wilson died before the May term of court, and it was impossible to try said case, for want of parties. Defendant proposes to proceed to the final prosecution of said petition, and refers to same as part of the answer, in so far as same may be pertinent. Defendant says that no definite and fixed sum is promised to be paid, and, as members have the right to lapse policies at pleasure, it is impossible to ascertain what amount can be collected."

At the trial there was much evidence pro and con as to whether the insured was in good health at the time the policy was issued. According to some of the witnesses, a clear case of ill health and of fraud was established. According to a number of other witnesses, the insured's ill health did not begin until some time after the policy was issued, and at the time of the issuance of the policy he was in good health. The policy fee was duly paid upon the issuance of the policy, and subsequently the payments were tendered; but it also appears that shortly after the policy was issued the company tendered back the policy fee and refused to accept any payments from the insured or the beneficiary, asserting that the insured was not a policy holder and that the policies were obtained by fraud, because of misrepresentations as to the state of the insured's health at the time the policy was issued. There was no proof submitted by either party as to whether an assessment had or had not been made upon the members for the purpose of paying off this policy, or as to whether such an assessment would or would not have produced the amounts named in the policy. The jury found in favor of the plaintiff for the sum of \$1,000 and interest upon each of the policies, and the insurance company excepts to the judgment of the trial judge overruling the motion for a new trial.

[1] By demurrer, as well as by ground for motion for a new trial, counsel for the insurance company insist that the plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was not entitled to recover (at least not to recover more than a nominal sum), in the absence of proof that the assessments had been made, or that the membership of each division was such that the assessment thereon would have produced the amount sued for, or some other definitely ascertained amount. Cognate to this point and somewhat involved in it is the insistence that the liability under the policy is upon the surviving membership, and not upon the insurance company, and that it is not suable upon the policy, at least until it has been ascertained that the members of the divisions have paid into the mortuary fund the requisite amount to pay off the policy. We may dispose of this insistence at once by the statement that under the policy the company as such, and not the members of the divisions, contracts to insure and contracts to pay the amount of the insurance to the beneficiary within a designated time after the death of the insured. The amount to be paid may, in a sense, be conditional; but the promise to pay, as such, is not conditional. The point as to whether the burden is upon the plaintiff or upon the insurance company to furnish the data upon which the liability is to be determined is not a new one, and, while there is some conflict in the authorities, the point is now very well settled by the strong consensus of judicial opinion throughout the American states that, when the time stated in the policy has elapsed since the death of the insured, the beneficiary makes a prima facie case of liability for the full amount stated in the policy by showing the death of the insured, without further showing that the assessment has been made, or that the membership of the body upon which the assessment was to be made was such as that the assessment thereon would produce the amount designated. The company as a defense may show that the amount stated in the policy cannot be realized by an assessment, and thus diminish the recovery. Most courts base this doctrine upon the theory that the insurance company, and not the insured or the beneficiary, is in possession of the facts essential to showing whether the amount named could be raised by the assessment, and whether the assessment had been made or not. While there are a great many cases laying down this doctrine, the one of *Lake v. Minnesota Ass'n*, 61 Minn. 96, 63 N. W. 261, 52 Am. St. Rep. 538, is squarely in point, and is cited here as authority for the proposition, especially because of the fact that, as this case is reported in 52 Am. St. Rep. 538, it is followed by a lengthy note citing a large number of cases which assert the same doctrine. See, also, *Cooley's Briefs on the Law of Insurance*, p. 825 et seq.

[2] 2. Even should we concede that there is not sufficient evidence of the tender of all the semiannual dues and assessments that normally would have accrued against the pol-

icy holder in the present case, still the conclusion is irresistible that tender of them had been waived; for, before any of them became due and payable, the company repudiated the policy, and from time to time as they were tendered refused to accept them, and reiterated its repudiation of the policies—indeed, brought an action in the superior court, which was pending at the time of the death of the insured, to cancel the policies. There can be no doubt that this conduct on the part of the insurance company (which the jury by its verdict has found to be unwarranted) excused further specific tender. As Judge Russell pointedly says in *Arnold v. Empire Ins. Co.*, 3 Ga. App. 635 (5), 708, 60 S. E. 470, 480: "A formal tender is unnecessary, where express declarations are made by the party to whom money is payable that he will not accept it if tendered. The law takes one who makes such a statement at his word, and does not thereafter require the doing of the vain thing." In this connection it may be proper to note that counsel for the insurance company in his argument contends that there was not sufficient evidence that proofs of death had been submitted in accordance with the terms of the policy. Even if the company's repudiation of the policy did not waive this—see *Phenix Ins. Co. v. Searles*, 100 Ga. 97 (4), 27 S. E. 779—still there is in the record enough to show that this proof was duly made. The sixth paragraph of the petition alleges the furnishing of these proofs according to the company's requirements, and the answer does not deny this allegation of the petition. The answer does state that for lack of sufficient information the company is unable to admit or deny this paragraph; but, as this is a matter within the company's knowledge, the equivocal answer must be taken as an admission. *Raleigh R. Co. v. Pullman Co.*, 122 Ga. 700 (5), 50 S. E. 1008; *Jones v. Pope*, 7 Ga. App. 538, 540, 67 S. E. 280.

[3] 3. Exception is taken to an instruction of the court to the jury that, while the utmost good faith is required in all applications for life insurance, still, under the law of Georgia, for the answers of the insured in the application for insurance to be express covenants or warranties that the answers are true, the application must be attached to the policy, and that in this case, the application not being attached to the policies sued on, it was not a part of the contract sued on, and therefore that the answers given in the application were not express warranties or covenants that they were true. This charge follows the law as contained in the act of August 17, 1906 (Acts 1906, p. 107; Civ. Code 1910, § 2471). It was held by the Supreme Court, in *Johnson v. American National Life Ins. Co.*, 134 Ga. 800, 68 S. E. 731, that a failure to attach the application for life insurance to a policy

prevented such application from being treated as a part of the contract, or being introduced as evidence of such contract, or from being used to show that certain statements therein contained were warranted to be true; but it did not prevent the defendant from pleading that the insured had made a fraudulent statement as to his age, or health, and that he thus induced the insurance company to issue the policy, so that it was therefore void, not as a matter of contract, but because of fraud in the procurement. Taking the instruction excepted to in connection with the entire context, the court presented the case to the jury in accordance with the ruling in the case just cited. Counsel for the insurance company asks us to certify the question to the Supreme Court as to the review of this case; but as we are of the opinion that the ruling is sound, and that the Supreme Court would so hold, we do not grant this request. An attempt to attack the constitutionality of this act is made on the ground that the body contains matter different from what is expressed in the title; but as this difference between the act and the title is not definitely pointed out, the method of attack is insufficient to authorize a consideration of that question.

[4] 4. From the summary of the plea which we have given in the statement of facts, it will be seen that the insurance company pleaded certain acts of fraud for the purpose of avoiding the policy. In the course of the evidence it appeared that, several years before the date of the issuance of the policy in question, the insured had had an attack of typhoid fever, from which, however, as the evidence shows, he had fully recovered. In his application the insured stated that he had never been afflicted with any severe illness or accident. Counsel for the plaintiff in error now insist that this was such a fraudulent misrepresentation as to avoid the policy. We doubt that this fact alone would be of sufficient materiality to avoid the policy, in accordance with the rule announced in the Johnson Case, *supra*; but, irrespective of whether it would or would not, it is sufficient to say that this was not one of the issues involved on the trial, because the insurance company had not pleaded this fact as a defense. The rule is that the acts of fraud relied on must be specifically pleaded.

[5] 5. The insurance company, by its evidence, made a very strong showing upon its plea that the policy was procured by fraud, that the insured was in bad health at the time the application was made, and that his last illness had really begun when the policy was obtained; but there was a great deal of evidence introduced in contradiction of this, and the jury was fully authorized to find that at the time the application was made, the policy delivered, and the first pre-

mium paid, the insured was in good health, and that he was stricken with the serious illness some few days later. This was the real issue in the case, and it was fairly submitted to the jury. They, and the trial judge, heard all this testimony. They saw the witnesses. On these issues the jury has returned a verdict finding in favor of the plaintiff, and the trial judge has approved it. This court has no jurisdiction to interfere. A careful examination of the entire record shows that the case was legally tried and fairly submitted to the jury. The judgment in the plaintiff's favor must be sustained.

Judgment affirmed.

(9 Ga. App. 460)

SHAW v. CHILES. (No. 3,094.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. BROKERS (§§ 50, 10*)—COMPENSATION—PERFORMANCE OF SERVICES—TIME FOR PERFORMANCE—REVOCATION OF CONTRACT.

Where a property owner places it for sale in the hands of a real estate broker, the latter, in order to claim his commission, must perform the services to be rendered within the time set in the contract, if a given time be set, and, if no time be set, then within a reasonable time, under all the circumstances of the case. If there is no limit as to time, the principal may ordinarily revoke the agreement at any time; but he cannot, before a reasonable time has elapsed, revoke it capriciously or capiously, or in such a manner as would be unfair to the broker.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 68, 11; Dec. Dig. §§ 50, 10.*]

2. BROKERS (§ 54*)—PERFORMANCE OF SERVICES—"ABLE."

The word "able," as used in Civil Code 1910, § 3587, which provides that "the broker's commissions are earned when, during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner," means financially able.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 75; Dec. Dig. § 54.*]

For other definitions, see Words and Phrases, vol. 1, pp. 19, 20.]

3. WITNESSES (§ 414*)—EVIDENCE (§ 474*)—CORROBORATION OF WITNESS—TESTIMONY AS TO HANDWRITING—KNOWLEDGE OF WITNESS.

The plaintiff having contended that he made a contract with the defendant on a definitely specified day, and that at the time when the contract was made the defendant was engaged in the performance of the business of taking up tickets as a railroad conductor on a specified train, it was relevant for the defendant to prove, in corroboration of his own testimony denying the conversation and the making of the contract, that at the time named he was not employed in that service, and to prove by the chief clerk of the auditing department of the railroad that another person was during that period employed as train auditor upon that train, and that he made daily reports, sending in the tickets from that train, although this

clerk, as a witness, did not actually see the train auditor engaged in his duties, and though his knowledge of the handwriting of the reports was not derived from actually having seen the train auditor write, but merely from his business transactions with him.

(a) One person may have knowledge of the handwriting of another from having seen him write, from correspondence between them, or in any other way that would furnish a reliable basis for knowledge of the general character of the person's handwriting.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1287; Dec. Dig. § 414;* *Evidence*, Cent. Dig. §§ 2210-2213; Dec. Dig. § 474.*]

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by M. S. Shaw against M. S. Chiles. From a judgment for defendant, plaintiff brings error. Affirmed.

Denmark & Griffin and Hendricks & Christian, for plaintiff in error. B. K. Wilcox and J. R. Walker, for defendant in error.

POWELL, J. Shaw sued Chiles to recover a sum which he claimed to be due him for commissions as a real estate broker. The plaintiff claimed that the defendant had listed a farm with him for sale, with the understanding that he might have all he could obtain above \$5,000 as commissions, and that, if he could not sell it for more than \$5,000, the defendant would pay a commission of 5 per cent. on a sale of \$5,000. The plaintiff claimed that this agreement was made in August, 1909, and that in December of that year he sold the property for \$8,000 to one Mr. Heath, on the terms proposed by the defendant, namely, \$2,000 cash and the remainder in two equal deferred payments, and that the defendant had refused to consummate the sale, whereby he lost his commission. The defendant denied that he had ever made any such agreement. He contended that the only conversation that he had had with the real estate agent was in January, when he had merely expressed a willingness to sell, but named no price. By his plea he denied all the allegations of the petition, including the allegation that the proposed purchaser presented by the plaintiff was ready and able to comply with his offer. The jury, under the charge of the court, returned a verdict for the defendant. There are a number of exceptions, but many of them are unimportant, and, even if well taken, would not be sufficient to justify a reversal. Certain of them which present substantial questions will be discussed.

[1] The court in effect charged the jury that, if they should find that an agreement of the nature claimed by the plaintiff to have been made between him and the defendant, the defendant would be bound to pay the commissions, provided that the plaintiff presented a purchaser ready, able, and willing to buy on the terms proposed, and presented

him within a reasonable time, if no time limit was stated in the agreement. The objection made to this charge is that it confined the plaintiff to proof of a proposed sale within a reasonable time after the making of the agreement between him and the defendant. The contention is that the agreement remained open indefinitely, unless it was sooner withdrawn. The plaintiff in error relies with some confidence upon the case of *Reese v. Fellow*, 97 Fed. 167, 38 C. C. A. 94 (before the Circuit Court of Appeals of the Sixth Circuit, Judges Taft, Lurton, and Swann presiding), in which it is held that "brokers' agencies for the sale of property having no time limit may be terminated at any time by the principal, subject to the ordinary requirements of good faith," and from this they attempt to draw an argument *converso*, that, unless it is terminated by some affirmative act of the principal, the agency continues indefinitely. We do not think that the argument thus sought to be drawn is sound. When the owner of land has placed it for sale with a broker, without setting a time limit, he is bound to exercise such good faith toward his agent as that he will not capriciously withdraw the property for the purpose of defeating the agent's commissions about to be earned. If a time limit is set, the agent must complete his work within that limit; and, if the parties set no limit, the law sets the limit of reasonable time. After the expiration of the limit which the parties themselves have set, or the limit which the law sets in the absence of agreement on their part, the question of capriciousness in the refusal is not involved. By this fact are the case of *Reese v. Fellow*, *supra*, and the cases on which it is based, including *Stitt v. Huldekoper*, 17 Wall. 384, 21 L. Ed. 644, distinguished. It is an almost universal canon of construction that where a contract confers upon a party the right to do some act beneficial to himself, or the right to perform in such a way as will benefit himself, and no time limit is set, and from the nature of the contract the grant of the privilege is not of essentially permanent duration, the privilege must be exercised or performance consummated within a reasonable time.

[2] 2. The court, in charging the jury as to the proposition of law expressed in Civil Code 1910, § 3587, that "the broker's commissions are earned when, during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy, on the terms stipulated by the owner," explained to them that the word "able" meant financially able. The plaintiff in error excepts to this, contending that the broker in such a case is not an insurer of the solvency of the proposed purchaser, and that the ability referred to is merely ability to make the cash payment required, and ability

to execute the necessary papers evidencing the deferred payments. Counsel for plaintiff in error base this proposition upon what we think is a misconception of *Odell v. Dozier*, 104 Ga. 203 (2), 30 S. E. 813; *Fenn v. Ware*, 100 Ga. 563, 28 S. E. 238; *Moore v. Irwin*, 89 Ark. 289, 116 S. W. 662, 20 L. R. A. (N. S.) 1168, 131 Am. St. Rep. 97. These cases hold that the broker is never an insurer of the deferred payments, or of a full performance of the contract, unless made so by the terms of the agency, to the extent that, if the property owner accepts the proposed sale, the right of the broker to commissions is not defeated by any subsequent failure of the purchaser to perform his contract. But these cases in no wise militate against the proposition that the word "able," as used in the section of the Code which has just been quoted (and the Code section is merely a codification of a common-law principle, recognized generally throughout the entire country), means financially able. As the Supreme Court of Rhode Island said in *Butler v. Baker*, 17 R. I. 582, 23 Atl. 1019, 33 Am. St. Rep. 897: "We find no case which holds that a broker has fulfilled his undertaking by presenting a person as a purchaser who is not financially able to make the purchase." And a number of cases are there cited as authority for the proposition that the proposed purchaser must be financially able to buy. If the broker's principal once accepts the purchaser, he waives the right to question his financial ability, so far as the broker's rights to compensation are concerned. If he has refused the contract, the financial inability of the purchaser is a good defense to the broker's claim of commissions.

[3] 3. The plaintiff contended that he made the agreement, which the defendant denied, upon a train between Tifton and Jacksonville; that the defendant was conductor upon that train, and that the proposition was broached when the defendant, as conductor, came to the plaintiff as a passenger, in order to take up his ticket. The defendant testified that he did not take up tickets on the train on the day named, but that a named train auditor was employed at that time upon that train and took up the tickets. To corroborate his evidence as to this, he introduced the testimony of the head clerk of the auditing department of the railroad company, who testified that throughout the month involved the train auditor named by the defendant was engaged on the train in question, and that this auditor made return of the tickets to the general office in Macon. He did not know of his own personal knowledge that the auditor actually performed the duties on the train, or that the reports were in the train auditor's handwriting, except in so far as he knew the auditor's handwriting from a number of similar reports which he had received. This

evidence was objected to on the ground that it was irrelevant and that the witness' knowledge was not such personal knowledge of the facts as to render it admissible in evidence. We think that the evidence was properly admissible. Even though this chief clerk did not actually see the train auditor performing his duties, still the fact that he had come in every day with the reports and the tickets was a circumstance of some probative value. The fact that he did not know the auditor's handwriting from having seen him write was no sufficient reason for excluding his testimony as to the signatures to the train reports, as he knew the handwriting through a course of business dealings, and this is one of the methods by which one person may become acquainted with the handwriting of another, and through which he may testify as to the genuineness of the handwriting. *Bessman v. Girardey*, 66 Ga. 18 (1), 28.

Having carefully examined the testimony, the charge of the court, and the grounds of the motion for new trial, we find no reversible error in the record.

Judgment affirmed.

(9 Ga. App. 450)

GLAWSON et al. v. SOUTHERN BELL
TELEPHONE & TELEGRAPH CO.
(No. 2,956.)

(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. TELEGRAPHS AND TELEPHONES (§ 45*)—OPERATION—CARE REQUIRED.

A public telephone company is a public service corporation. It is under the duty of using ordinary care and diligence to afford the usual means of intercommunication to its subscribers, and to this end is under the duty of using ordinary care and diligence to keep its instrumentalities in working order; and the operators at the exchanges must use a like degree of care in answering calls and affording the necessary connection of subscribers' lines. A breach of this duty is a tort, and may give a cause of action. Only reasonable diligence is required; and in determining whether this degree of diligence has been exercised, the nature of the service, the delicacy of the instruments, and all other similar matters should be taken into consideration.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 45.*]

2. TELEGRAPHS AND TELEPHONES (§ 67*)—OPERATION—RIGHT OF ACTION FOR NEGLIGENCE.

An action to recover damages on account of a negligent homicide under Civil Code 1910, § 4424, is not an action seeking to recover for mental pain and suffering within the purview of the decisions holding that no recovery can be had in cases based on simple negligence, where no damage other than mental pain and suffering is shown.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 67.*]

3. TELEGRAPHS AND TELEPHONES (§ 67*)—COMPENSATORY DAMAGES—PROXIMATE AND REMOTE CONSEQUENCES OF INJURY.

In an action against a telephone company, wherein the petition asserts that the plaintiff's wife was threatened with an acute bodily disorder; that he had arranged with a physician, ready, willing, and able to come at once to her relief upon notification by telephone, if certain dangerous symptoms appeared; that the symptoms appeared, and the plaintiff endeavored to communicate with the physician by telephone, but through negligence of the agents of the telephone company the plaintiff was unable thus to summon the physician, and was unable to get in communication with him for several hours; that in the meantime the threatened disorder came upon his wife, and, before the physician could reach her after he received the belated summons, proved fatal, through her bleeding to death; that the disorder was one which is readily relievable by the appliances which were in the hands of the physician, and, if the physician had received the call promptly, he could have prevented the disorder from coming on, or, if it had come on, could, by means of the appliances at hand, have prevented any serious results; and that the sole cause of his wife's death was the fact that she bled to death through inability to get the necessary medical or surgical attention—the court erred in dismissing the petition on the grounds that it does not appear that the death of the wife was a legal and natural result of the defendant's negligence, and that damages for the homicide are too remote and speculative in their nature to be legally attributable to the wrong charged.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

4. DEATH (§ 89*)—ACTION FOR CAUSING DEATH—MEASURE OF DAMAGES.

In an action by a husband for damages on account of the negligent homicide of his wife, the measure of damages is prescribed by the Code as being the "full value of the life of the deceased," and mental anguish occasioned by the bereavement is not also recoverable.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 118; Dec. Dig. § 89.*]

Error from City Court of Americus; C. R. Crisp, Judge.

Action by J. L. Glawson and others against the Southern Bell Telephone & Telegraph Company. From a judgment dismissing the petition, plaintiffs bring error. Reversed, with directions.

R. L. Berner and J. A. Hixon, for plaintiffs in error. W. P. Wallis, B. J. Clay, and H. E. W. Palmer, for defendant in error.

POWELL, J. Glawson, on behalf of himself and minor children, filed a petition seeking to recover damages from the Southern Bell Telephone & Telegraph Company on account of the death of his wife, alleged to have been occasioned through the defendant's negligence. The trial court sustained demurrer to the petition, and the case comes to this court on exception to this ruling.

The petition alleges, in substance, that the defendant is a telephone company engaged in the public service of operating telephone exchanges and long-distance telephone lines, and that it holds itself out as ready and will-

ing to serve the public in this capacity; that Glawson and his family were subscribers to the defendant's exchange at Americus, and that one Dr. Prather, their family physician, was a subscriber to the same exchange; that Dr. Prather lived in Americus, and the plaintiff lived about seven miles away in the country; that on the 3d day of October, 1909, Mrs. Glawson, who was then about seven months advanced in pregnancy, was threatened with a miscarriage and Dr. Prather examined her condition and returned to the city, but agreed to remain at his residence, ready to answer any telephone call, and to come at once to Mrs. Glawson if his services were needed, and he so remained in readiness to come upon telephone communication. About 8 o'clock in the morning Mr. Glawson called up Dr. Prather and had a short talk with him about his wife's condition, but at the moment of that conversation it was not deemed necessary that the physician should come; but, immediately after this conversation was discontinued, Glawson found that more serious symptoms had set in, and went back to the telephone for the purpose of calling the physician to come at once. He was unable to get the operator in the central office at Americus to answer his call or to give him communication with the physician. He kept up his efforts to get into communication, and after a period of 2 hours and 20 minutes succeeded, and the physician came at once in his automobile, arriving within 20 minutes after the call reached him. In the meantime Mrs. Glawson's condition grew precarious, and neighbors who sometimes acted in the capacity of midwives were called in; also a negro was dispatched on a mule with a message for the physician to come at once. About an hour after Mr. Glawson began his attempt to summon the physician, the miscarriage set in, from which Mrs. Glawson bled to death; she having lived only about 20 minutes after the physician arrived. It is alleged that the failure of the telephone company's agent to answer the call was both willful and negligent; both simple and gross negligence being charged. It was alleged that there was in the central office a gong, which could be sounded at night by the ringing of the subscribers, so as to wake the operator if he were asleep, and that this gong had either been disconnected or was willfully disregarded in the present case, though the petition seems to be somewhat ambiguous in this respect, since it also seems to be alleged that the operator was awake at the time and had just answered a previous call from Mr. Glawson to the physician. It is alleged that the highway from Americus to the Glawson home was in excellent condition, and that Dr. Prather had an automobile in which he could have made the trip in 20 minutes, and

in which he did make the trip in that time when the message finally reached him. It is alleged that, if the message had reached the physician within a reasonable time after Mr. Glawson first attempted to get communication with him, the miscarriage of the wife could probably have been prevented, and, even if this could not have been prevented, the post-partum hemorrhage could have been stopped, and her death would not have resulted therefrom. It is also alleged that "in the checking of the post-partum hemorrhages there is nothing specially uncertain or problematic, but that the same can with certainty be done and performed by skillful physicians, and that said physician [Dr. Prather] had done and performed the same for his [Mr. Glawson's] wife various times before, had successfully attended her in the birth of five of her children, * * * and could have and would have checked and stopped said post-partum hemorrhages and saved the life of petitioner's wife, but for said delay." It is further alleged that Mrs. Glawson was not afflicted with any other malady or trouble that would have caused her death, and that her death resulted solely from her lack of medical attention, and the failure to get the physician to stop the post-partum hemorrhages "that drained her life blood away on said occasion," which would not have resulted if the physician had reached her in time. There is some amplification of all these allegations, but the foregoing fairly states the substance of the petition.

[1] 1. Two of the points involved in this case have recently been decided by this court. In *Southern Bell Tel. & Tel. Co. v. Beach*, 8 Ga. App. 720, 70 S. E. 137, it is held that "a corporation holding itself out as furnishing telephone service to the people of a community is a public service company, and is charged with the duty of furnishing, for a reasonable compensation, to any inhabitant of the locality served by it, the usual telephone service for legitimate purposes," and also that it is bound to exercise this function with ordinary care and diligence. Telephone companies in respect to this duty stand very much on the same footing with telegraph companies, though the particular modus operandi of transmitting the message is somewhat different. Telephone companies are under the duty of furnishing to their subscribers reasonably prompt and efficient service in the way of giving them connection with other subscribers. Of course, in considering the actual quantum of diligence required, the delicacy of the instrumentalities involved and the difficulty of keeping them in repair and in perfect working order must be considered; and it may be said that a telephone company is held to only ordinary diligence in keeping its plants, instruments, etc., in working order for the purpose of facilitating conversations between its subscribers. As a

part of the duties resting upon them, they should employ at the central office an adequacy of competent operators for such reasonable office hours as may be established, and, if night service is afforded, they are bound to use ordinary diligence in respect to the signals employed to give notice to the operator that some one is calling, and the operator must use ordinary diligence in answering the signal. Now in the present case it is alleged that the plaintiff and his family were subscribers to the defendant's exchange at Americus, and that he gave the ordinary signal, that the line was in order, and that by the negligence of the operator the signal was not answered, and as a consequence of this negligence communication was not established with the physician, who was also a subscriber. We have no hesitancy in holding that this sets up such a breach of public and private duty as constitutes a tort, and, if legal damage be shown, gives a cause of action.

[2] 2. The other proposition to which we referred as having been decided by this court was involved in the case of *Western Union Tel. Co. v. Ford*, 8 Ga. App. 514, 70 S. E. 65. In that case it was held that "while damages for mental and physical suffering alone, disconnected from any physical injury or pecuniary loss, cannot be recovered from a telegraph company for negligence in failing to transmit and deliver a telegraphic message with due diligence, yet the company is liable for any physical or bodily injury, or pecuniary loss, directly traceable to its negligent conduct as the proximate result thereof." In the case just cited the case of *Chapman v. Telegraph Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, and a line of cases which has been based thereon (especially the case of *Seifert v. Telegraph Co.*, 129 Ga. 181, 58 S. E. 699, 11 L. R. A. [N. S.] 1149, 121 Am. St. Rep. 210, in which it was held that there can be no recovery on account of mere negligence where no loss other than pain and suffering ensued), were distinguished. The *Ford Case*, just referred to, is very much in point, because in that case the injury complained of was the loss of an eye, which might have been saved if the telegraph company had not failed to deliver a message addressed to the physician, who, if the message had been promptly delivered, could have saved the eye.

We do not construe the present action as being a suit brought for pain and suffering alone. While mental anguish on the part of the husband and of the children who were bereft of wife and mother is set up, still, as will be seen later, these elements are to be eliminated. The action is based upon section 4424 of the Civil Code of 1910, which provides: "The husband may recover for the homicide of his wife, and, if she leaves child or children surviving, said husband and chil-

dren shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action." The next succeeding section of the Code provides that the word "homicide," as used in that context, includes "all cases where the death of a human being results from a crime or from criminal or other negligence." This section, as well as the section referred to above, provides that the measure of damages shall be the "full value of the life of the deceased, as shown by the evidence." The damages contemplated by these sections are not damages for pain and suffering, but are such as are intended to compensate for the loss of the monetary value which is assumed to exist in every human life, and which is somewhat measured by the decedent's earning capacity. In the light of the number of cases in which such recoveries have been allowed, it is hardly to be questioned that an action under these sections of the Code can be brought for simple negligence, and that in such cases the rule in *Chapman v. Telegraph Co.*, supra, and in *Seifert v. Telegraph Co.*, supra, is not applicable.

[3] 8. The only troublesome question in the case is whether Mrs. Glawson's death can be regarded as the legal and natural result of the defendant's tortious acts, or whether they are too remote or speculative in their character. While there is some insistence on the part of the defendant in error that the action sounds in contract, and that the rule of damages applicable to that class of cases (that only such damages as are in contemplation of the parties can be recovered) should be applied, still there can be no reasonable doubt that the petition sounds in tort, and that the rules of damages applicable to tort cases are to be applied. On this subject our Code provides (Civil Code 1910, § 4509): "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer." Also section 4510 provides: "Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. But damages traceable to the act, but not to its legal or natural consequence, are too remote and contingent." (In the Code as published, the word "material" has, by typographical error, been substituted for the word "natural.")

We are aware of the fact that the courts are in wide disagreement as to whether damages which result through the failure to get a physician, so that the progress of a malady can be checked or the effects of a wound can be allayed, and injurious results prevented, are speculative and remote within

the meaning of the rules just quoted. Some courts go almost to the extent of holding that it is impossible from a human standpoint to say what would be the result of a physician's services in checking almost any known disease or of relieving almost any imaginable physical hurt or injury. But to our minds this difficulty which many courts assume to exist as to this question is largely factitious. To attempt to anticipate the result of almost any human act is always more or less problematical, but the fact that a thing may be problematical does not always prevent its being capable of reasonably accurate solution through the ordinary functions of the human intellect. There are some diseases and human ills which so readily respond to the treatment of a physician, according to the general experience of mankind, as to make it merely an ordinary inference, such as we are daily accustomed to indulge and to act upon, to say that if the treatment were applied the malady would be relieved. On the other hand, there are many diseases the results of which are so uncertain, even when the best treatment is had, as to make the chances of recovery always a matter of doubt. Whether any particular disease or any particular ill stands within the category of the reasonably certain or of the doubtful is a question that must be determined as the individual cases are presented.

There are some diseases, such as cancer, tuberculosis, typhoid fever, meningitis, etc., as to which the court might say, as a matter of law (basing its conclusion upon the state of common knowledge), that the chances of recovery were always speculative and doubtful. There are other diseases as to which, perhaps, the court might say, as a matter of law, that they would yield to proper treatment, basing this conclusion upon the common knowledge of mankind. Between these two classes exists a wide class as to which common knowledge is not so well established; and in these cases the question as to whether the results of a physician's or a surgeon's services would or would not be doubtful or uncertain is a question of fact, and, being a question of fact, is a question for the jury. Juries are frequently called upon to settle the probability of things, and to determine according to human experience whether this or that result likely did ensue or will ensue from this or that somewhat problematic cause. For instance, it is a common thing for a court to submit to a jury the question as to whether an injury will prove permanent, and to allow them to assess the damages with reference to their finding as to this question—a question often problematical to a high degree.

Now, if it is practically certain that a physician, by the application of known and available remedies, can stop a post-partum

hemorrhage, such as the one which the decedent in this case suffered, and likewise practically certain that if the hemorrhage is not stopped the woman will die, and that if the hemorrhage is stopped she will recover; and if the decedent in the present case was suffering from a post-partum hemorrhage, and from nothing else that would likely have produced her death, and she did die, it seems perfectly plain to us that it is merely to indulge a natural and ordinary inference to say that the failure to get the physician, so that the remedies could be applied, was the direct and natural cause of her death. The petition alleges all these things, and we are not in a position to say as a matter of law that they are not true. We do not know whether they are true or not, and it is not a matter of common knowledge; and it seems to us that courts ought not to take judicial cognizance of things which they do not know, and which by common knowledge they cannot know. Yet the effect of insistence of counsel is that we ought to hold as a matter of judicial cognizance that the cause of the woman's death was speculative, and that the petition alleges a matter incapable of proof by ordinary methods. It may be that, when the dead woman's condition just prior to her death is described, those who are informed upon the subject can testify to the jury as to the course of human experience as to these matters, and as to what drugs and appliances the physician had by which the hemorrhage could have been stopped; and if it appears that it was not merely possible that the woman's life would have been saved, but that, with practical certainty, it would have been saved, the jury, without exercising any extraordinary function, may be able to say that the failure to get the physician was the direct, natural, controlling, and proximate cause of her death.

Those who hold that cases such as this are too problematic and speculative for solution by the jury seem to us to make an unwarranted distinction between causal acts of omission and causal acts of commission. For example, suppose that a woman had been recently delivered of a child, and that the physician or midwife had applied packing or some other appliance to her organs with a view of preventing a hemorrhage, and by some wrongful act of commission these appliances were removed and the hemorrhage ensued, but few courts, if any, would hesitate to hold that it was for the jury to say whether the removal of the appliances was or was not the proximate cause of the ensuing hemorrhage, and, if death should ensue, of the homicide. Still many of these same courts would refuse to let the jury pass upon the question as to whether a negligent act which prevented this same woman from procuring the benefits of these same medical or surgical appliances was the

proximate cause of her death, resulting from hemorrhages started on account of the lack of them. We do not see the difference. In the range of criminal law we find the courts holding that parents can be convicted of murder or of manslaughter for allowing a child to die through neglecting to supply the child with food, with clothing, or with medical attention. A number of such cases are referred to in Wharton on Homicide, § 452. As Wharton well says (§ 451): "A man who is apparently inactive is actually doing something, even though that something is the canceling of something else that he ought to have done. Even sleeping is an affirmative act, and may become the object of penal prosecution, when it operates to interrupt an act on the part of the defendant which the law requires of him, with the penalty of prosecution for his disobedience." Taking the cue from the last sentence in the quotation just made, we may ask that if the picket on duty sleeps, and the enemy slips by him and destroys the camp, is not the negligence of the sentinel the proximate cause of the injury to those whom he is engaged in guarding?

Now, coming back to the case at bar: We are going to reverse the judgment of the lower court in sustaining the general demurrer, and it will thus become a question of proof as to whether the woman's death in this case was the direct and natural result of the defendant's act or not. Before it will be proper to award the plaintiff any damages, the jury should be able not only to trace a connection between a negligent failure of the telephone company to give the plaintiff communication with the physician and the death of the woman, but they should also be able to say with practical certainty that her death was the natural consequence of the defendant's neglect. They must be able to go further and say that the death was not merely the imaginary or possible result of the tortious act, but that according to the course of human experience it was the direct result—that in all human probability this result would not have happened if the defendant's neglect had not happened, and that the consequences of the neglect itself, and not something else, preponderated most largely in causing her death. But, as the Code says, if these damages are the legal and natural result of the act done, they are not too remote to be recovered. For instance, if the jury should believe from the evidence merely that the physician would have had a chance of saving the woman's life, but that her condition was such and the character of the hemorrhage was such that it would not be possible, in the light of human experience in such cases, to say with practical certainty whether she would have survived or not, irrespective of the physician's coming, then they

ought to find for the defendant; on the other hand, if they find that the defendant was negligent in its failure to give the husband communication with the physician, and that the physician, stood ready and willing to come, and would have come upon the summons, and that he could have arrived at such a time as that his services would have been available, and that it is practically certain that, through his services and the application of such remedies as would have been at hand, he could have prevented or stopped the hemorrhage, and that by the stopping of it he would in all reasonable probability have saved the woman's life, and that by reason of the failure of these things the woman's death was directly brought about, the plaintiff may recover. We do not know what the evidence will be, and we are merely attempting to lay down certain rules which will so guide the jury as that their verdict will not be based on their speculations, or upon the conjuring up of imaginary or possible results, but upon what they find to exist with practical certainty accord-

ing to the law of ordinary human experience; and that is about all we have to guide us in any case.

[4] 4. The petition alleges the decedent's age, expectancy, and earning capacity, and thereby gives the basal facts for measuring the amount of the damages, in the event the jury finds that the plaintiff is entitled to recover. The plaintiff also sets up as an element of damage the mental anguish, etc., suffered through the bereavement. The measure of liability fixed by our Code in similar cases of homicide is the full value of the life of the deceased person, and additional damages are not allowed on account of mental anguish suffered on account of the bereavement occasioned by the death. Therefore, while, the judgment of the lower court sustaining the general demurrer is reversed, direction is given that the trial court shall cause the plaintiff so to amend his petition as to pray for only such damages as are allowable under the rule stated in the Code just referred to.

Judgment reversed, with directions.

(136 Ga. 443)

MENDEL v. LEADER et al.

(Supreme Court of Georgia. June 17, 1911.)

*(Syllabus by the Court.)***1. VENDOR AND PURCHASER (§§ 75, 81*)—CONTRACT OF SALE—CONSTRUCTION—QUESTION FOR JURY.**

Under the written contract the vendors of the land covenanted to free the title from incumbrances by January 1, 1908, or within a reasonable time thereafter. What would be a reasonable time is to be determined by all the attendant circumstances; and under the peculiar facts of this case it was for the jury to say whether the vendors' failure to comply by January 4, 1908, with the covenant to remove incumbrances, was a reasonable or unreasonable time.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 113-118, 136, 137; Dec. Dig. §§ 75, 81.*]

2. EVIDENCE (§ 461*)—PAROL EVIDENCE—CONTRACTS.

Where a written contract is unambiguous, it will be construed according to its plain meaning, without reference to extrinsic parol proof of the intention of the parties in making the instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

3. DAMAGES (§ 71*)—BREACH OF CONTRACT—ATTORNEY'S FEES.

Attorney's fees may be allowed in the computation of damages for breach of contract, where the defendant has acted in bad faith and caused the plaintiff unnecessary trouble and expense.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 146; Dec. Dig. § 71.*]

Error from Superior Court, Toombs County; B. T. Rawlings, Judge

Action by Carl Mendel against Moses Leader and others. From an order sustaining a demurrer to the petition, plaintiff brings error. Reversed.

The action was to recover damages for breach of contract. The plaintiff alleged that he entered into a written contract with the defendants, wherein the defendants contracted to sell to him for \$2,500 a certain tract of land which they had bought from Mrs. Grimes. The terms of sale were expressed as follows: "It is agreed that the payments shall be made as follows: One hundred (\$100) dollars cash in hand paid by said party of the second part, receipt whereof is hereby acknowledged; the sum of four hundred (\$400) dollars to be paid on the 1st day of January, 1908, or as soon thereafter as delivery of said lands can be made free from all leases or incumbrances; and the balance, the sum of two thousand (\$2,000) dollars, in twelve (12) months after the date of the delivery of the land, which delivery shall be from or at the time the attorneys pass on the title, and said sum of two thousand dollars shall bear interest at the rate of eight per cent. per annum from the date of delivery of said land as above." It was further provided that the defendants would make to the plaintiff a warranty deed to the land upon payment of the purchase money.

The plaintiff alleged that he contracted for the purchase of the land for the purpose of dividing it into lots and selling them, which purpose was known to the defendants at the time of making the contract; that, pursuant to its terms and acting on the faith of the contract, the plaintiff had the land surveyed and platted into lots; that he incurred certain expenses, which were itemized, in preparing for the sale of the lots, and had actually sold several of them, which sales he had to cancel because of the defendants' failure to remove the incumbrances from the land as they obligated to do; that the "defendants failed and refused to deliver said land in accordance with the terms of their contract; that your petitioner, on December 30, 1907, wrote to said defendants, offering to comply with his obligation in said contract, and offering to pay the amount he was due to pay on the 1st day of January, 1908, if said defendants would complete and comply with said obligations in their contract of sale, but defendants failed and refused to comply with said contract, or even to notice your petitioner's communication, until your petitioner afterwards, on the 4th day of January, 1908, wrote to said defendants, calling off said purchase and demanding the payment of the amount of the cash payment and the amount of your petitioner's expenses"; that the defendants never owned the lands, but held a bond for title from the Claxton Bank of Tattnall County; that they owed the bank \$1,700, with interest, which indebtedness became due on December 17, 1907; that this sum is still due the bank by the defendants, and the bank is threatening to proceed against the defendants and the land for the collection of the indebtedness; that the defendants did not and could not comply with the terms of their contract with plaintiff; and that they had acted in bad faith and fraudulently in making the contract of sale with him. There was attached an itemized statement of expenses alleged to have been incurred by the plaintiff in surveying, platting, dividing into lots, and selling them on the faith of the contract with the defendants to deliver the lands to plaintiff according to the terms of the contract. The prayers were for the recovery of these alleged expenses, the \$100 cash payment, and attorney's fees incurred by plaintiff, and for the cancellation of the contract of sale. The defendants demurred to the petition, and their demurrer was sustained and the petition dismissed.

Jones & Sparks and Sheppard & Hewlett, for plaintiff in error. Williams & Giles and Hines & Jordan, for defendants in error.

EVANS, P. J. (after stating the facts as above). [1] 1. There is no unequivocal statement in the contract as to the time when the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

purchaser was to be put in possession of the land. In the stipulations regulating the time of making the payments of purchase money, it appears that the second payment of \$400 was to be made on January 1, 1908, or "as soon thereafter as delivery of said lands can be made free from all leases or incumbrances," and the final payment was due "twelve months after the date of the delivery of the land, which delivery shall be from or at the time the attorneys pass on the title." From these stipulations it seems that the parties contemplated that the vendors were to put the vendee in possession as soon as the title had been passed on by the attorneys—that is, the legal title was found to be in the vendors—and that all leases or incumbrances were to be removed before the second installment of \$400 was to become due. Inasmuch as this installment was made payable on January 1, 1908, or "as soon thereafter as delivery of said lands can be made free from all leases and incumbrances," and in view of the other provisions as to the delivery of the land, it is fair to impute an intention on the part of the seller to free the land of leases and incumbrances by January 1, 1908, or within a reasonable time thereafter. The vendee had the right to demand of the vendors that on January 1, 1908, or within a reasonable time thereafter, the vendors clear the title of incumbrances. According to the petition it was in contemplation of the parties, at the time the contract of sale was made, that the vendee was purchasing the land for the purpose of dividing it into lots and selling the same. The contract of sale was made about four months before the second installment was to fall due, by which time it was contemplated by the parties that all incumbrances were to be removed. In the meantime the titles were to be examined, and, when passed on by the attorneys, the purchaser was to be put in possession, so that he might make the preliminary preparations for the sale of lots.

Construing the contract as evincing a mutual intention of the parties that the vendors were to clear the title of incumbrances by January 1, 1908, or within a reasonable time thereafter, we are confronted with the proposition whether, under the facts alleged, the time transpiring before the plaintiff's renunciation of the contract was so short as to deny the defendants a reasonable time within which they were to rid the land of incumbrances. When the time of performance of a covenant of contract is not fixed therein, but depends upon extrinsic facts known to both parties at the time of the execution of the contract, it is for the jury to determine, in the light of such facts, what a reasonable time is. When we consider the nature of this transaction as alleged in the petition, and the allegation that the defendants could not comply with their covenant to remove incumbrances, we cannot say as a matter of law that the vendors had not

breached their contract at the time the vendee notified them of his intention to abandon it because of their failure to remove the incumbrances. If the jury should find, from the attendant circumstances, that, at the time the vendee wrote to his vendors that he would not further perform his contract, a reasonable time had elapsed within which the vendors could have removed the incumbrances, then the failure of the vendors to remove the incumbrances from the land within such time would be an unreasonable delay, and the vendors' dereliction in this respect would be a breach of the contract. But if at the time the vendee wrote to the vendors that he would abandon the contract the vendors had not breached it, in that they had a reasonable time after January 1, 1908, to remove the incumbrances on the land, which had not expired, the renunciation of the contract by the vendee, accepted by the vendors, would bar the vendee of an action for its breach. Where both parties to a contract abandon it, one cannot recover for its breach by the other. *Eaves v. Cherokee Iron Co.*, 73 Ga. 459.

It is true that the petition does not allege that a reasonable time had elapsed when the plaintiff notified the defendants of his intention to abandon the contract. It is a rule of pleading that, where time for the performance is not specified in an agreement, it should be averred that it was to be done within a reasonable time, and that such reasonable time had elapsed when performance was required. *Osborne v. Lawrence*, 9 Wend. (N. Y.) 135. But where all the facts of the case are pleaded, the failure to specifically denominate the time appearing from such facts to be a reasonable time does not render the petition open to general demurrer on that ground. The plaintiff's case as stated is: (1) An executory contract for the sale of land, by the terms of which the vendors are to remove all incumbrances therefrom within a reasonable time after January 1, 1908; (2) a breach of that contract by failing to remove the incumbrances by January 4, 1908, under circumstances authorizing an inference that a reasonable time had elapsed by that date, within which the defendants ought to have removed the incumbrances; and (3) special damages resulting from the breach. The plaintiff alleged compliance with his contractual obligations, and it was error to dismiss the petition on general demurrer.

[2] 2. The amendment, which the court disallowed, alleged matters variant with the theory of the plaintiff's case as originally pleaded. The petition alleged a contract and its breach, and claimed resultant damages. The proffered amendment alleged that, 10 days after the execution of the contract, the vendee discovered that the vendors did not hold title to the land, but held under a bond from the Claxton Bank, and that the vendors assured him that they would

pay the indebtedness to the bank by the 15th of December, 1907, and that, acting on such representation, the vendee made the expenditures, the value of which was sought to be recovered in the original action. These assurances and the vendors' representations as to their title were fraudulently made to deceive, and did deceive, the vendee. It was further alleged that it was the intention of the parties in making the contract of sale that actual possession of the land should be delivered to the vendee by January 1, 1908, and that the words, "as soon thereafter as delivery of said lands can be made free from all leases or incumbrances," were intended to apply to such persons occupying buildings on the land to remove therefrom, in the event sickness or the weather should prevent their removal by January 1, 1908. The amendment was properly rejected. The amendment contained no prayer to reform the contract. Where a written contract is unambiguous, it will be construed according to its plain meaning, without reference to extrinsic parol proof of the intention of the parties in making the instrument. Nor would allegations of false representations made to induce the plaintiff's conduct, pleaded as a ground of rescission of the contract, be appropriate to a petition claiming damages for its breach.

[3] 8. The defendants demurred specially to the paragraph of the petition claiming attorney's fees as damages, because of the defendants' bad faith and fraudulent conduct in refusing to comply with their contract. "The expenses of litigation are not generally allowed as part of the damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them." Civil Code 1910, § 4392. The allegations of the petition, taken in connection with the paragraph directly attacked, were sufficient to bring the case within the cited section.

Judgment reversed. All the Justices concur.

(9 Ga. App. 501)

STEWART v. STATE. (No. 3,485.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

LARCENY (§ 55*)—EVIDENCE—SUFFICIENCY.

The hogs that, recently after the commission of the larceny, were found in a pen on the place occupied by the accused, were not identified as the hogs that had been stolen, and a conviction based solely on the inference of guilt arising from the unexplained possession of property recently stolen was unauthorized by the evidence, and must be set aside as contrary to law.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164-169; Dec. Dig. § 55.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Euley Stewart was convicted of larceny, and brings error. Reversed.

G. G. Bower, for plaintiff in error. W. B. Wooten, Sol. Gen., and F. A. Hooper, for the State.

HILL, C. J. Judgment reversed.

(9 Ga. App. 470)

LUMPKIN v. CITY OF ATLANTA.

(No. 3,032.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 107*)—INTOXICATING LIQUORS (§ 236*)—CRIMES OF WIFE—LIABILITY OF HUSBAND—ILLEGAL SALE.

A husband is not liable criminally for his wife's offenses, unless he aids, procures, or acquiesces in their commission. In order to show that the sale of a liquid denominated as a beer is unlawful, and consequently that the keeping of the liquid for sale is likewise unlawful, it must be shown that the beer in question comes within one of those classes whose sale is regulated by law.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 385; Dec. Dig. § 107;* Intoxicating Liquors, Cent. Dig. § 316; Dec. Dig. § 236.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

W. M. Lumpkin was convicted of violating an ordinance of the City of Atlanta, and brings error. Reversed.

Burton Cloud, for plaintiff in error. Jas. L. Mayson and W. D. Ellis, Jr., for defendant in error.

RUSSELL, J. The plaintiff in error was convicted in the recorder's court of the city of Atlanta of violating a municipal ordinance which forbids keeping for unlawful sale any spirituous, fermented, or malt liquors at any place within the limits of the city of Atlanta. He excepts to the judgment overruling his certiorari, and insists that the evidence adduced upon the trial was insufficient to authorize his conviction.

We think this contention is well sustained. The evidence upon the trial is set out fully in the answer of the recorder, and the following facts appear therefrom: The defendant's wife had a municipal license authorizing her to conduct a boarding house or lodging house at No. 16 Piedmont avenue, in the city of Atlanta. Rumor gave the house such a questionable reputation that the police decided to raid it, and ascertain the exact nature of the business being transacted there. As some of the officers were approaching the house they saw the defendant going down the alley. They stopped him and inquired his name. He gave his name correctly. They then asked him where he lived, and pointed to the house which was under suspicion. He

was required to return to the house, and when told that it was suspected that intoxicating liquors were being sold there, he readily agreed for the house to be searched, and gave the officers the keys. In going through the house the officers found a man in a drunken stupor upon a bed in one of the rooms, and a woman upon the same bed, who had a flask of whisky. On the lower floor of the house they found some beer and some empty bottles. Above the overhead ceiling in the room upstairs they found about 55 flasks of whisky. Both before and after the search the defendant emphatically denied that he had any whisky in the house, and after the officers discovered the whisky and beer the woman who was reputed to be his wife admitted that it was hers. Upon the trial a witness testified that he frequently sold the defendant's wife quantities of beer, and the woman who was found with the pint of whisky at the time of the raid testified that she bought it from Kirk Bane Lumpkin (the wife) and paid her for it. Kirk Bane Lumpkin admitted before the court that both the whisky and the beer were her property, and that the defendant, Will Lumpkin, knew nothing about it. There was no evidence that he had either bought or sold any of the proscribed liquids.

The only circumstance which really tends to criminate the defendant (outside of an admission that the beer in the house belonged to him, of which we will speak later) is the fact that the defendant's wife admitted that she had sold both whisky and beer. This raises the question of the extent of the husband's criminal liability for the acts of his wife, and the inquiry as to whether the evidence shows that the husband participated in any way in the criminal act of his wife. It may be stated in passing that there was no direct proof that these two persons are actually husband and wife. Neither of them so stated upon the trial, and it does not appear that any witness knew that the parties sustained to each other the relation of husband and wife, or that they held themselves out to be husband and wife, though two witnesses denominated the woman in the case as the defendant's wife, and the defendant neither affirmed nor denied that he was married. Granted that the woman, who was shown by undisputed testimony to have purchased the beer, and who was the only person who was shown to have sold any whisky, or to have known of the presence of whisky in its hiding place above the ceiling of the bathroom, was the wife of the plaintiff in error, the question which naturally arises is whether proof of a violation of a law by the wife in a house jointly occupied by herself and her husband, without more, will justify the inference that the husband was concerned in or authorized his wife's infraction of the law. If it had been shown that the husband was present at any sale of the intoxicating liquors in question, and acquiesced or

did not protest against it, or if it had been shown that he had purchased either the whisky or the beer, or that he assisted in secreting them, these circumstances might have had some probative value, and might have authorized the inference that he was in some way concerned in the violation of the ordinance; but there is no evidence to this effect. Of course, the fact that the house was rented by the wife, and that it was her place of business as a boarding house under the city license, is entirely immaterial, as is also the soundness of the woman's statement that it was her house, and that the plaintiff in error was a mere interloper, and only permitted to stay there by her clemency. Whether the man and the woman in this case were married or not, if he aided and abetted in any way in the violation of the municipal ordinance, he would be guilty.

On the other hand, the mere existence of the marriage relation and the occupancy of the same residence are not strong enough circumstances of themselves to support the inference (to the exclusion of every other reasonable hypothesis) that a husband has knowledge of and consents to every act done by his wife. A husband is not liable criminally for his wife's offenses, unless he aids, procures or acquiesces in their commission. It is just as reasonable to suppose, from the care used to secrete the whisky, that this defendant was unaware of its presence as that he knew it was being kept for illegal sale; for there is no evidence that he knew that any whisky was in the house. As to the beer, it is reasonable to suppose that he knew that it was kept in the house; but aside from the fact that there is no evidence that he knew that it was kept for sale, or for any other purpose than as a beverage, there is no evidence that it was intoxicating, or even such a beer as that it could not be sold without a license. One of the policemen testified that the defendant admitted that the beer was his; another, that he denied knowing anything about it. But, conceding that he admitted that the beer in the house was his, this would not establish the fact that it was such a beer as could not be lawfully sold by him, even without a license. Not every liquid called beer is judicially known to be intoxicating. *Cripe v. State*, 4 Ga. App. 832, 62 S. E. 567; *Snider v. State*, 81 Ga. 753, 7 S. E. 612, 12 Am. St. Rep. 850. Some beers are known to be nonintoxicating. In order to show that the sale of a liquid denominated as beer is unlawful, and consequently that the keeping of the liquid for sale is likewise unlawful, it must be shown that the beer in question comes within one of those classes whose sale is regulated by law. Persimmon, locust, corn, and other beers are perhaps not intoxicating. On the other hand, liquid may be called by the most innocent name, and yet the proof may show that the name is but a disguise, and that the sale of the fluid in question is prohibited by law.

Even if the large number of bottles of beer in the defendant's house were a suspicious circumstance sufficient to authorize the inference that the beer could only have been kept for sale (and this circumstance alone would not be sufficient to authorize conviction), a conviction cannot be supported in this case, because there is no evidence that the beer was of such character as that it would have been unlawful to sell it. On the other hand, even if the beer in question was intoxicating liquor, in the absence of any evidence that the husband knew that his wife was engaged in its sale, the conviction would not be authorized. Furthermore, though the husband must generally be recognized as the head of the house (*Patterson v. State*, 8 Ga. App. 454, 69 S. E. 591), still he is not criminally liable for the malfeasance of his spouse, unless he at least acquiesces in her offense. If he cannot prevent or dares not to protest in a case where the "weaker vessel" will not acknowledge his dominion, he may be an object of ridicule and pity, but is not subject to the penalties of the criminal law.

Judgment reversed.

(9 Ga. App. 466)

**JOHNSON COUNTY SAVINGS BANK v.
W. L. RICHARDSON & SON.
(No. 3,005.)**

(Court of Appeals of Georgia. June 29, 1911.)

(*Syllabus by the Court.*)

1. EVIDENCE (§§ 182, 818*)—PRINCIPAL AND AGENT (§ 22*)—LOST LETTER—PAROL EVIDENCE—AGENCY—DECLARATION OF PURPORTED AGENT—HEARSAY.

The evidence in behalf of the defendants was insufficient to rebut the presumption that the plaintiff purchased the acceptance for value before maturity. Parol evidence is admissible to prove the contents of a letter which has been lost or destroyed, if the letter has first been shown to have been written by a duly authorized agent of one of the parties to the cause pending. But agency cannot be established by mere declarations of the purported agent; and statements in a letter, in which the writer claimed that he was an attorney representing another, in the absence of proof to that effect, are objectionable as hearsay, and are without any probative value.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 601, 1194; Dec. Dig. §§ 182, 818; *Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

2. NEW TRIAL (§ 68*)—SUFFICIENCY OF EVIDENCE.

The verdict rendered, being wholly without evidence to support it, was contrary to law, and the court erred in refusing a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 135; Dec. Dig. § 68.*]

Error from City Court of Lumpkin; E. T. Hickey, Judge.

Action by the Johnson County Savings Bank against W. L. Richardson & Son. Judgment for defendants, and plaintiff brings error. Reversed.

G. Y. Harrell, for plaintiff in error. J. B. Hudson, for defendants in error.

RUSSELL, J. The defendants entered into a contract with the United Jewelers' Manufacturing Company for the purchase of an assortment of jewelry. It is unnecessary to consider the terms of the contract or its subsequent modification by the insertion of new terms which were ingrafted upon it; for the record really presents but one question, to wit, whether the plaintiff was a bona fide purchaser for value and before maturity of the acceptance which was admitted to have been executed by the defendants, and which is the foundation of the present suit. If the plaintiff purchased the paper for value, before its maturity, and without any notice of the defendants' counterclaim, the defendants would be precluded from setting up the defense which they attempted to present. As an innocent purchaser, the plaintiff would be protected, and entitled to recover upon the acceptance, no matter what might be the defendants' rights in a contest with the jewelry company. On the other hand, if the plaintiff really purchased the paper, or even took the formal written transfer, after its maturity, the plaintiff would be charged with notice, and subject to any equities which the defendants might be entitled to present as a defense to the action. The holder of a negotiable instrument is presumed to have purchased it for value, before its maturity, and without any notice of defects. Therefore, when the holder seeks to enforce the instrument, the burden rests upon the maker to prove affirmatively that the acceptance or other obligation was purchased after its maturity. The defendants attempted to do this, and the controlling question in this case is whether the acceptance was assigned to the plaintiff before its maturity. If it was not, the plaintiff would be entitled to recover, so far as that branch of the case is concerned. If it was, the defendants would be permitted to set up and establish any matter of affirmative defense which they would have been permitted to assert against the original payee. The defendants sought to show primarily that the plaintiff bought the note after its maturity. The acceptance purported to have been executed on April 18, 1908, and to have been indorsed and transferred in writing by the jewelry company to the plaintiff on May 18, 1908. It was payable six months after date, and consequently it was apparently assigned several months before its maturity.

[1, 2] The trial court permitted one of the defendants to testify, over objection, that he had received a letter from one Otto, an attorney, stating that he represented the jewelry company and requesting the payment of the defendants' acceptance; also

that he received another letter from Otto, after the maturity of the paper, soliciting payment for the jewelry company as holder. The witness also testified that thereafter he received another letter from Otto, in which he stated that he no longer represented the jewelry company for the collection of the paper, but represented the Johnson County Savings Bank for the purpose of collecting the paper in question. We think the court erred in admitting this testimony. There was no proof whatever that Otto was the agent of the jewelry company except his own statement to that effect, and agency cannot be shown by the mere declaration of one who claims to be an agent. If the jewelry company itself, after the maturity of the obligation, had demanded payment and asserted that it still owned the paper in question, and it had been shown that the jewelry company had possession of the note at the time of the declaration, any statements made by it would have been admissible, of course. Parol evidence of similar statements made by any person shown to be the agent of the jewelry company would likewise have been admissible, because it was shown that the letters were also destroyed. The proof upon the latter point was clear and distinct, and therefore the controlling question in the case is whether there was enough evidence of Otto's agency to charge the defendants with knowledge. We think not, and that the judge erred in admitting the statements upon that point. If the defendants could have shown that Otto was in fact the agent, as he said he was, then his statement that he no longer represented the jewelry company, but had taken up the matter for the Johnson County Savings Bank, would have been most material. As it was, there being no evidence of agency, except Otto's own declaration to that effect, the statements contained in the letter were merely hearsay, without any probative value whatever; and, this being true, the defendants, for lack of evidence, failed to rebut the presumption that the Johnson County Savings Bank was a bona fide purchaser of the negotiable instrument.

The remaining assignments of error are immaterial. A new trial should have been granted, solely because the evidence objected to was hearsay.

Judgment reversed.

(9 Ga. App. 477)

SEABOARD AIR LINE RY. v. PEEPLES.
(No. 3,041.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 773*)—DISMISSAL—FAILURE TO SERVE BRIEFS.

The failure to serve counsel of the opposite party with the brief of counsel for the plain-

tiff in error, as required by rule 15 (57 S. E. vi), may subject counsel to a penalty for contempt of court, but does not afford ground for dismissing the writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

2. RAILROADS (§ 439*)—KILLING STOCK—PETITION—DEMURRER.

There was no error in overruling the demurrer, which complained that plaintiff's petition did not point out the particular train or trains by which the plaintiff's cattle were killed, nor the hour of the day when any of the cattle were killed, nor the direction in which the train was going.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 439.*]

Error from City Court of St. Marys; D. S. Atkinson, Judge.

Action by D. T. Peebles against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Crovatt & Whitfield, for plaintiff in error.
S. C. Townsend, for defendant in error.

RUSSELL, J. [1] A motion is made to dismiss the bill of exceptions in this case, upon the ground that counsel for the plaintiff in error did not serve counsel for the defendant in error with a copy of their brief five days prior to the time set for its hearing upon the calendar of this court. Rule 15 (57 S. E. vi) of this court provides as follows: "Counsel for each party must exchange briefs (and written arguments, if any) with his opponent at least five days before the day set for the call of the calendar to which the case is assigned. This may be done by delivering a copy to his adversary personally or by mail." It appears, from the exhibits attached to the motion to dismiss, that counsel for the defendant in error was not served with a copy of the brief of opposing counsel until the 15th day of December, 1910, and the case was set for hearing upon the calendar on December 19, 1910. Clearly, therefore, rule 15 was not complied with. The brief should have been served prior to the 14th, as the intervening Sunday should not be counted as one of the five days allowed. However, this does not require the dismissal of the writ of error, though it may subject counsel for the plaintiff in error to a penalty for contempt of court, under the express provisions of rule 15, if the circumstances were such as to demand such action on the part of this court.

[2] 2. The plaintiff sought to recover in one suit damages for the killing of several head of cattle. In different paragraphs the petition set out the date on which each animal was killed, and the point on the line of the defendant company's railroad where the killing occurred, and thereafter alleged that all of the animals were his property, and were killed by the collision of an engine drawing a train of cars of the defend-

ant at the points and times designated, and was due to the negligence of the defendant. The negligence alleged was as follows: That the engine was not properly sanded; that the engineer did not keep a proper lookout, and by reason thereof did not discover the cattle on the track ahead as soon as he would otherwise have discovered them; that the engineer did not blow the whistle, and did not ring the bell, nor try to stop the train on discovery of the plaintiff's cattle on the track, but, on the contrary, ran the train in a very fast and reckless manner; that the engineer, after discovering the cattle on the track failed to stop the train or to blow the whistle and ring the bell, although he had ample time to have done so. It was also averred that the company was negligent in permitting grasses and other vegetation, suitable for grazing purposes and attractive and enticing to cattle, to grow and accumulate on its roadbed. The defendant demurred to the petition generally, as not containing any cause of action and as not stating sufficient facts to entitle the plaintiff to recover; also because the fact that the defendant permitted grasses attractive to cattle to grow on its roadbed was not negligence as related to the plaintiff, and because the petition failed to identify the different cattle alleged to have been injured, and to point out the particular train or trains by which in each instance the act was done, the hour of the day of its doing, and the direction in which the train was then going. The court sustained so much of the demurrer as to require the plaintiff to more fully identify the cattle alleged to have been injured, but overruled the general demurrer, and all other special demurrers, and the plaintiff amended his petition by setting out the marks upon the cattle. Exception is taken to the overruling of the demurrers. We think the court ruled properly. The plaintiff was entitled to denominate as acts of negligence the facts which he contended constituted negligence; and then it became a question of fact for the jury to determine, under the particular circumstances of the case, whether the acts omitted or committed in fact constituted negligence; and this the plaintiff did.

Judgment affirmed.

(9 Ga. App. 497)

GEORGIA RY. & ELECTRIC CO. v. RICH.
(No. 3,356.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. CARRIERS (§ 283*)—INJURIES TO PASSENGER—TORTS OF CONDUCTOR.

If a railway conductor, in the course of his duties on a car carrying passengers, strikes one passenger and knocks him against another passenger, injuring the latter, it is no defense to a suit brought against the company by the injured

passenger that the other passenger had used opprobrious language to the conductor.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 283.*]

2. CARRIERS (§ 348*)—INJURY TO PASSENGER—TORTS OF CONDUCTOR.

Under the evidence as it appears in the record, it was not error for the court to fail to charge the jury as to the general rule, usually applicable in tort cases, that the plaintiff cannot recover where he, by ordinary care, could have avoided the injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1404; Dec. Dig. § 348.*]

3. VERDICT AUTHORIZED.

The evidence fully authorizes the verdict.

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by M. J. Rich against the Georgia Railway & Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Colquitt & Conyers, for plaintiff in error. W. M. Smith and F. Roland Alston, for defendant in error.

POWELL, J. This much of the facts may be stated as being undisputed: The plaintiff, an old negro woman, was a passenger on a street car. The conductor demanded fare of a negro man, who replied that he had paid once and would not pay again. The dispute waged throughout a few short exchanges of words; when the conductor struck the man. The conflict in the testimony is as to whether the plaintiff was injured or not. The plaintiff testified that the conductor knocked the man down upon her, and thereby inflicted severe injuries upon her person; and her testimony is corroborated by those who saw the fresh physical signs upon her shortly after the occurrence. Several witnesses testified, for the defendant, that, while the conductor struck the man, he did not knock him down upon the plaintiff, but knocked him in another direction. The jury found a small verdict for the plaintiff. The defendant assigns as error the following instruction of the court to the jury: "If, in the dispute about the paying of the fare, the conductor was trying to get the fare, and the passenger used opprobrious words or abusive language to the conductor, and the conductor was justified in hitting him on account of such language, then the railroad company would not be liable, provided it used as to this plaintiff that extraordinary diligence which the law required him to use. While he might be justified in striking the passenger that he was in the fuss with, still he would not be justified in hurting this passenger, the plaintiff in this case, unless he still was in the exercise of that extreme care and caution which a prudent man would exercise under the same or similar circumstances."

[1] The contention is that, if the conductor was justifiable in striking the other passenger, his act would not be a tort against the

plaintiff; that the qualification as to the liability for a failure to exercise extraordinary care and diligence was improper and misleading. This instruction was certainly fully as liberal to the defendant as the law will warrant. Even if the law will ever excuse a railway conductor for resenting mere opprobrious language with violence (conductors being police officers, with power to arrest, see Penal Code 1910, § 926), we have no hesitancy in saying that if, in his so doing, he endangers and injures a passenger lawfully behaving himself upon the car, the conductor and his employer are liable for the injuries. Railway companies are under the duty of using extraordinary care and diligence to protect passengers, and conductors must use that high degree of care to protect them from the violent, though provoked, acts of themselves, as well as of others. We are not unaware of the trying situation in which street car conductors in many of our Southern cities are often placed by the insolent and designedly offensive conduct of that lower element of the negro race which makes it a point to take advantage of their position as passengers to use to street car employes, while on duty, wanton and insulting language which they would not dare to use under other circumstances. The writer, who happened to be in Atlanta when the race riot occurred some five years ago, believes that this one thing of the street car employes being required by their positions to endure in patience the insults of negro passengers was, more largely than any other one thing, responsible for the engendering of the spirit which manifested itself in the riot. All the members of this court were born in this state and have lived here ever since. We are well acquainted with the character of the negro race. We know that there are good negroes and bad negroes, that a good negro is a useful and often honorable citizen, and that a bad negro is just about the meanest, the most vicious animal ever created. So we can understand the practical phases of the situation involved in the case; but as judges we must lay down rules of law which are applicable to all races alike, and it will not do to say, as a general rule of law, that a railway conductor can be allowed to imperil the safety of his passengers by his acts of violence, provoked, even though most naturally, by mere insulting or abusive language.

[2] 2. There is complaint that the court did not instruct the jury that the plaintiff was under the duty of using ordinary care to avoid the consequences of the defendant's wrong, and that if she failed in this duty she could not recover. There was nothing in the evidence to require such a charge. *Of. G., F. & A. Ry. Co. v. Sasser*, 4 Ga. App. 276, 61 S. E. 505.

[3] The evidence fully authorized the ver-

dict, and there was no error in refusing a new trial.

Judgment affirmed.

(9 Ga. App. 494)

WILLIAMS v. HOLLAND. (No. 8,303.)
(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

COSTS (§ 277*)—DISMISSAL—RENEWAL OF ACTION—PAYMENT.

Where a plaintiff dismisses or discontinues his action, or suffers nonsuit, he has the privilege of recommencing the action only upon the payment of all the costs which accrued in the former suit, unless he files the pauper affidavit allowed by Civil Code 1910, § 5628. This condition as to payment of costs applies to all the costs, whether due to officers or to the opposite party, and applies whether a formal judgment taxing the costs has ever been entered or not.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1048, 1049; Dec. Dig. § 277.*]

Error from City Court of Statesboro; J. H. Smith, Judge.

Action by R. M. Williams against M. M. Holland. Judgment for defendant, and plaintiff brings error. Affirmed.

A. M. Deal, F. T. Lanier, and R. Lee Moore, for plaintiff in error. Brannen & Booth, for defendant in error.

POWELL, J. Williams sued Holland, and after there had been several trials in the city court, and after the case had come to this court on one occasion, and the grant of a new trial had been affirmed, he voluntarily dismissed his action, and a judgment in the following language was rendered: "Upon motion of counsel for the plaintiff, it is considered, ordered, and adjudged that the above-stated case of R. M. Williams against M. M. Holland be and the same is hereby dismissed, at the cost of the plaintiff, R. M. Williams." He renewed his suit, and plea in abatement was filed. It appeared from the evidence that, although the plaintiff before renewing his action, went to the clerk and to the sheriff and paid them such portion of the costs as had not been previously paid to them by the defendant, he made no payment or tender to the defendant of a certain amount of costs, which the defendant had paid out in the course of the proceedings which had been had in the former suit.

Civil Code 1910, § 5627, provides that "the plaintiff in any action, in any court, may dismiss his action either in vacation or term time and, if done in term time, the clerk or justice shall enter such dismissal on the docket." It is also provided by Civil Code 1910, § 5625, that where a suit is so dismissed or is discontinued, or a nonsuit is granted, the plaintiff "may recommence his suit on the payment of costs." The nonpayment of the costs upon the renewal of the action is a matter which must be raised by plea in

abatement, but, when so raised, is efficient to cause a dismissal of the recommenced action, unless, of course, the plaintiff has filed the pauper affidavit provided for in Civil Code 1910, § 5628. *Langston v. Marks*, 68 Ga. 435; *Bland v. Bird*, 134 Ga. 74, 67 S. E. 427. Not merely costs due to the officers are to be paid but costs due to the opposite party as well. *Sweeney v. Malloy*, 107 Ga. 80, 84, 32 S. E. 858. Payment, or at least a bona fide tender of payment is required, and no mere arrangement whereby some collecting officer gives a receipt without payment is sufficient so far as relates to the costs due to other officers or to private persons. *Board of Education v. Kelley*, 126 Ga. 479, 55 S. E. 238; *McLaurin v. Fields*, 4 Ga. App. 688, 62 S. E. 114.

The plaintiff makes the point that the judgment in the former suit did not tax the costs; but this makes no difference. The Code section on the subject includes no such condition as that the costs shall be taxed or a formal judgment rendered for them, in order to make payment of them a condition precedent to the recommencing of the action. When the judgment of dismissal in the former action was offered in evidence in this case on the trial of the plea in abatement, counsel objected to it on the ground that it was a nullity, because the amount of costs was left in blank. As pointed out by Judge Bleckley in *McLendon v. Frost*, 59 Ga. 350, it is not usual for the court, at the time of the rendition of the judgment, to enter up the amount of costs, and it is the duty of the clerk to fill in the blank later, which may be done at any time whenever it becomes necessary; and, following this, it was held in *Williams v. Sewell*, 121 Ga. 685, 49 S. E. 732, that a judgment for costs in which no amount is stated is not void. The court did not err in directing a verdict in favor of the defendant upon the plea in abatement.

Judgment affirmed.

(9 Ga. App. 479)

AMERICAN AGRICULTURAL CHEMICAL CO. v. GRAHAM. (No. 3,069.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 427*)—PAYMENT TO HOLDER—VALIDITY.

Where a promissory note is made payable to bearer, or is indorsed in blank, any person having it in possession will be presumed to be entitled to receive payment thereof, unless the maker has notice to the contrary; and payment to the person having possession of the note will be valid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1237; Dec. Dig. § 427.*]

2. BILLS AND NOTES (§ 537*) — PAYMENT — QUESTION FOR JURY.

On the trial of an action upon a promissory note payable to bearer, where the defendant set up that the note had been paid by installments, and it appeared that some of the

payments were made to one who held possession of the note at the time of the payments and was therefore presumptively entitled to receive such payments, but that another payment was made to one not in possession of the note and who showed no authority to receive such payment, and it did not appear that this last payment had reached the real owner of the note, the direction of a general verdict for the defendant was not authorized.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1885; Dec. Dig. § 537.*]

Error from City Court of Douglas; J. G. Cranford, Judge.

Action by the American Agricultural Chemical Company against T. L. Graham. Judgment for defendant, and plaintiff brings error. Reversed.

The American Agricultural Chemical Company sued T. L. Graham as maker of a note payable to it, or bearer, originally for the sum of \$102. There was a credit of \$40 thereon, dated November 9, 1906. The defendant admitted the execution of the note and pleaded payment in full.

The evidence in support of the plea was that of the defendant, as follows: "I am the defendant in this case, and executed this note sued upon. This note was given to Mr. Charlie Butler, who was agent for the plaintiff at the time. Mr. Butler is now dead. I have fully paid off this note. On Saturday before the 9th day of November, 1906, Mrs. R. C. Butler came to my house. She had the note, and demanded payment of me for the same. I saw the note, and knew she had it in her possession. On the Thursday next following, which was November 9, 1906, I paid to Mr. Samp Smith \$40 on this note at Bushnell, Ga., and took his receipt for same, and Mrs. Butler later told me that she received this money, which is the \$40 credited on the note. On March 1, 1907, on the stairway of the Union Banking Company building in Douglas, Ga., I paid to Mrs. R. C. Butler on said note \$40, and her son, W. M. Butler, gave me a receipt for same, signed by himself and R. C. Butler. Mrs. Butler at that time stated to me on the stairway, in the presence of her son, that she did not have the note with her, but that the same was at home in Bushnell, Ga.; and on the 25th day of March, 1907, I paid to W. M. Butler on said note, in the grocery store of W. W. Southerland, in the city of Douglas, Ga., \$10, for which he gave me a receipt, signed by himself and Mrs. R. C. Butler, his mother. On the 29th day of November, 1909, I paid to Levi O'Steen, attorney for plaintiffs, \$15.72. This last payment was made after the suit was filed, and, according to my contention, paid this note in full."

It was admitted that Mrs. R. C. Butler was the administratrix of the estate of Charlie Butler. There was no other evidence, and the plaintiff moved the court to

direct a verdict in its favor, on the ground that the defendant had failed to show any valid payments on the note, binding upon the plaintiff, for the reason that he had shown no agency between Mrs. R. C. Butler and W. M. Butler and the plaintiff, and had failed to show any authority whatever in either Mrs. R. C. Butler or her son, W. M. Butler, to collect the money on this note from the defendant for the plaintiff. The court overruled this motion, and the plaintiff excepted. The defendant then moved the court to direct a verdict in his behalf, which the court did, and to this direction the plaintiff excepted.

O'Steen & Wallace, for plaintiff in error.
Quincey & McDonald, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] The evidence of payment in support of the plea is sufficiently specific as to when, how, and to whom the payment was made. It is insisted by the plaintiff that the evidence did not disclose that the payments were made to the person or persons authorized to receive them. The note was made payable to bearer, and the person having in his possession a note made payable to bearer or indorsed in blank is presumed to be entitled to receive payment thereof, unless the payer has notice to the contrary; and the authorities even go to the extent of holding that payment to the person who has possession of the note will be valid, although he may be a thief, finder, or fraudulent holder. Ogden on Negotiable Instruments, 169. The evidence shows that Mrs. R. C. Butler, who was the administratrix of Charlie Butler, to whom the maker had given the note as the agent of the plaintiff, was apparently claiming the right to collect the note as the owner thereof. She was in possession of the note when the first payment of \$40 was made, and presumptively, therefore, had the right to collect it as the owner; it being a universal principle of law that the holder of a note payable to bearer is the owner of the note and entitled to collect it. *Paris v. Moe*, 60 Ga. 91; *Walton Guano Co. v. McCall*, 111 Ga. 114, 36 S. E. 469.

[2] This first payment of \$40 was not only made to Mrs. Butler, the holder of the note, but was indorsed as a credit on the note, and therefore there can be no sort of question but that this was a valid payment on the note, not only because it was paid to the party who held it, but because the amount was actually credited on the note; and the plaintiff only claims the balance on the note after this payment had been deducted from the face thereof. The second payment of \$40 was made three months after the first payment, and at that time the maker of the note, who paid it to the son of Mrs. Butler for her—Mrs. Butler admitting that she had

received the payment—did not know absolutely that Mrs. Butler still held the note; but, as she did hold possession of it on the occasion of the previous payment, it was reasonable and fair to presume that she continued to hold the note, as she was still collecting on it, and this presumption is aided by her statement, made as a part of the *res gestæ*, that she did have the note at her home. At least, these facts were sufficient to raise a presumption that she was entitled to receive this payment because the note was still in her possession, and to shift the burden to the plaintiff of showing that she did not have the note in her possession at the time of this second payment, and was not authorized to collect it. Now, as to the payment of \$10 made to the son, there is no evidence that he had the note in his possession when the payment was made, or was authorized to collect it.

As to the payment of the \$15.72 made to the attorney for the plaintiff after this suit had been filed, this was unquestionably a valid payment, because it was made to the attorney of record for the plaintiff, the payee and holder of the note at the time the suit was filed and when payment was made. Leaving out of consideration the first payment of \$40 credited on the note and the last payment of \$15.72, made to the attorney of record for the plaintiff, the evidence as to the validity of the other payments did not authorize the direction of a general verdict for the defendant.

Judgment reversed.

(9 Ga. App. 487)

MOORE v. SOUTHERN EXPRESS CO.
(No. 3,273.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 209*)—CERTIORARI
—RENDITION OF FINAL JUDGMENT.

The case was tried first before a magistrate, and then before a jury in the justice's court. The evidence demanded a verdict for the defendant, but the jury found in favor of the plaintiff. The defendant took the case by certiorari to the superior court. The judge of the superior court rendered a final judgment in favor of the defendant, but added a direction that the magistrate dismiss the action in his court. *Held*, that the judge should not have rendered final judgment, but should have sustained the certiorari, and should have sent the case back to the justice's court for another trial with direction that, if the evidence on the next trial was substantially the same as that on the former trial, the jury should render a verdict in favor of the defendant. *Holmes v. Pye*, 107 Ga. 784, 33 S. E. 816; *Baker v. Kendrick*, 71 S. E. 498.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 818-823; Dec. Dig. § 209.*]

Error from City Court of Floyd County;
J. W. Maddox, Judge.

Action by M. C. Moore against the South-

ern Express Company. Judgment for plaintiff before a justice was reversed on certiorari, and plaintiff brings error. Reversed.

Eubanks & Mebane, for plaintiff in error. J. Branham, Maddox, McCamy & Shumate, and Robt. C. Alston, for defendant in error.

POWELL, J. Judgment reversed.

(9 Ga. App. 469)

SOUTHERN RY. CO. v. GORDON.
(No. 3,015.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 145*)—RIGHT OF APPEAL—JURISDICTION OF AMOUNT.

The right of appeal from the judgment of a justice's court to the superior court, rather than to a jury in the justice's court, is determined by whether the amount claimed exceeds \$50. The right of appeal is not dependent upon the amount of the judgment which it is sought to review, but by the amount originally claimed. Even if some of the items sought to be recovered in the original suit in the justice's court are not recoverable, this does not affect the right of appeal, because the validity of this portion of the amount claimed to be due is one of the questions to be determined upon appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 479-489; Dec. Dig. § 145.*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action by M. Gordon against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Maddox, McCamy & Shumate and Geo. A. H. Harris & Sons, for plaintiff in error. Eubanks & Mebane, for defendant in error.

RUSSELL, J. Judgment reversed.

(9 Ga. App. 483)

SING SISK v. ANDERSON PHOSPHATE & OIL CO. (Nos. 3,087, 3,088.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 205*)—CERTIORARI—DISMISSAL.

A certiorari will not be dismissed because the magistrate fails to send up copies of the proceedings connected with the trial of the case in the court below, when the errors complained of in the petition as verified by the answer can be fully considered and determined without reference to such proceedings. *Peeples v. Tygart*, 6 Ga. App. 409, 65 S. E. 167; *Georgia Southern & Florida Ry. Co. v. State*, 116 Ga. 845, 43 S. E. 254 (1).

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 205.*]

2. APPEAL AND ERROR (§ 1092*)—REVIEW—GRANTING OF NEW TRIAL.

The first grant of a new trial on certiorari is discretionary, and will not be reversed, unless the evidence demanded the verdict in the

trial court. *King v. Turner*, 6 Ga. App. 499, 65 S. E. 321, and cases cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4315; Dec. Dig. § 1092.*]

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action between Sing Sisk and the Anderson Phosphate & Oil Company and others. From the judgment, Sing Sisk brings error. Affirmed.

I. H. Sutton and Robt. McMillan, for plaintiff in error. J. C. Edwards, for defendants in error.

HILL, G. J. Judgment affirmed.

(9 Ga. App. 487)

BECK & GREGG HARDWARE CO. v. G. E. LYNDON & CO. (No. 3,277.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

TRIAL (§ 260*)—INSTRUCTIONS—FAILURE TO CHARGE.

The only assignment of error relied upon is as to the failure of the court to charge the jury "as to the issue involved in the letters," which were introduced in evidence. As these letters of themselves presented no controlling issue, but merely illustrated the main issue, which was fairly submitted to the jury, the exception is not meritorious, especially as there was no written request to charge on this subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Error from City Court of Washington; Wm. Wynne, Judge.

Action between the Beck & Gregg Hardware Company and G. E. Lyndon & Co. From the judgment, the Hardware Company brings error. Affirmed.

F. H. Colley, for plaintiff in error. J. M. Pitner, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 469)

OSBORNE et al. v. DICKEY. (No. 3,030.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. ASSOCIATIONS (§ 18*)—CONTRACTS OF COMMITTEE—PERSONAL LIABILITY.

The members of a committee who undertake to act in behalf of an unincorporated association in contracting for a banquet are individually liable upon the contract; and even if a committee so contracting were authorized to act for a corporation, but that fact was not brought to the knowledge of the opposite contracting party at the time of the contract, he could, at his option, proceed against the individuals composing the committee.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 35; Dec. Dig. § 18.*]

2. REVIEW ON APPEAL.

There was no error in the admission of the testimony, or in the charge of the court. The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by Lon Dickey against L. S. Osborne and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Haygood & Cutts, for plaintiffs in error. Elkins & Wall, for defendant in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 465)

REDDISH v. REDDISH. (No. 2,924.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1094*)—REVIEW.

This being a possessory warrant case, and there being some evidence that possession of the property involved was obtained from the plaintiff by fraud or other illegal means, the judgment of the superior court, overruling the certiorari and entering final judgment in favor of the defendant, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1094.*]

Error from Superior Court, Forsyth County; N. A. Morris, Judge.

Action by Adeline Reddish against William Reddish. Judgment for defendant was affirmed on certiorari, and plaintiff brings error. Affirmed.

H. L. Patterson, for plaintiff in error. Wm. M. Johnson, for defendant in error.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 479)

HARWELL v. TOWN OF MANSFIELD. (No. 3,050.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 183*)—MARSHAL—DISCHARGE FROM OFFICE.

There was no error in directing a verdict for the defendant. Even though the municipal corporation had contracted with the plaintiff as town marshal for a period of one year, his refusal to carry a night clock authorized his discharge. It is within the power of municipal authorities to prescribe reasonable rules and regulations for the conduct of its police officers, and to discharge such officers if they refuse to obey them.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 472-481; Dec. Dig. § 183.*]

Error from City Court of Covington; W. H. Waley, Judge.

Action by J. L. Harwell, Jr., against the Town of Mansfield. Judgment for defendant, and plaintiff brings error. Affirmed.

Middlebrook, Rogers & Knox, for plaintiff in error. R. W. Milner, for defendant in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 485)

FISHER MOTOR CAR CO. et al. v. SEYMOUR & ALLEN. (No. 2,823.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 113*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

There was no error in overruling the demurrer, nor in refusing a new trial. One who seeks to recover for the negligence of another is not required to negative contributory negligence on his part.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 186-193; Dec. Dig. § 113.*]

2. NEGLIGENCE (§ 138*)—"ACCIDENT"—CULPABLE NEGLIGENCE.

So far as the requests for instructions to the jury were pertinent and proper statements of the law, they were clearly covered by the general charge. The judge did not err in his charge to the jury upon the subject of accident. Where there is culpable negligence, the result cannot be legally an accident. It was not error to instruct the jury that a pure accident must be "unmixed with the want of ordinary care by either party."

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 138.*]

For other definitions, see Words and Phrases, vol. 1, pp. 62-70; vol. 8, p. 7560.]

3. EVIDENCE (§ 492*)—OPINION EVIDENCE—NONEXPERT WITNESS.

The opinion of a nonexpert witness as to the speed of an automobile when he saw the machine in motion is admissible for the purpose of determining the rapidity at which the automobile was running. The comparative value of opinion evidence of expert and nonexpert witnesses is for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2270; Dec. Dig. § 492.*]

4. NEW TRIAL (§ 105*)—GROUNDS—CUMULATIVE EVIDENCE.

The newly discovered testimony was cumulative and impeaching.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 221-229; Dec. Dig. § 105.*]

Error from City Court of Emberton; W. D. Tutt, Judge.

Action by Seymour & Allen against the Fisher Motor Car Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Z. B. Rogers and Sam L. Olive, for plaintiffs in error. Jos. N. Worley, for defendants in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 493)

CARTER & CO. v. COSTON. (No. 3,296.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

ACCOUNT, ACTION ON (§ 19*)—BURDEN OF PROOF.

The plaintiff sued upon an account aggregating \$151.75, on which two items, amounting to \$75.19, were credited. The defendant answered denying the allegations of the petition, and further asserting that his account with the plaintiff for the time in question was only \$75, and that he had given his note for that sum, and had

paid it through the payments credited on the account. *Held*, that the suit was an action to recover only the excess of the account claimed after deducting the conceded payments; that the defendant's answer was not a plea of payment, was not an affirmative plea at all, but was merely a denial that the alleged indebtedness sued on ever existed; and that the court did not err in ruling that the burden of proof rested upon the plaintiff.

[Ed. Note.—For other cases, see Account, Action on, Dec. Dig. § 19.*]

Error from City Court of Leesburg; H. L. Lang, Judge.

Action by Carter & Co. against J. A. Coston. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. G. Martin, for plaintiffs in error. Beazley & Ragan, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 501)

CALHOUN v. STATE. (No. 3,471.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1159*) — SUFFICIENCY OF EVIDENCE.

The evidence in this case is wholly circumstantial, and the circumstances relied upon to support the verdict are too inconclusive for that purpose, and do not exclude every other reasonable hypothesis than that of the guilt of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3080; Dec. Dig. § 1159.*]

Error from Superior Court, Putnam County; J. B. Park, Judge.

Em Calhoun was convicted of crime and brings error. Reversed.

M. F. Adams and Roy D. Stubbs, for plaintiff in error. J. E. Pottle, Sol. Gen., for the State.

HILL, C. J. Judgment reversed.

(9 Ga. App. 493)

CARAKER v. HICKS et al. (No. 3,290.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

2. BILLS AND NOTES (§ 333*) — BONA FIDE HOLDER—EVIDENCE.

The note sued upon was made payable to L. W. Gardner, or order, and was transferred by Gardner to the plaintiff before maturity. It appeared that the note was given for the purchase price of certain mining stock, which one Joe Stump was selling as agent for the plaintiff, and that the note was taken to Gardner, who was another salesman, merely for convenience sake, with the understanding that he would transfer the same to the plaintiff. *Held*, that the plaintiff was not a bona fide holder of the note, notwithstanding he may have advanced money either to Stump or to Gardner upon the note, by way of payment of their commissions in the transaction or otherwise, and that, while the court erred in submitting to the jury the

question as to whether the plaintiff was or was not a bona fide holder for value, it was an error as to which the plaintiff cannot complain.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 333.*]

Error from City Court of Nashville; W. D. Buie, Judge.

Action between C. T. Caraker and S. A. Hicks and others. From the judgment, Caraker brings error. Affirmed.

Hendricks & Christian, for plaintiff in error. R. E. Dinsmore and J. P. Knight, for defendants in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 497)

GOODSON v. POWELL et al. (No. 3,320.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 19*) — NECESSARIES FURNISHED WIFE—LIABILITY OF HUSBAND.

While a wife has prima facie authority to bind her husband in the purchase of necessities for herself and their children, still the husband is not bound, when it affirmatively appears that the tradesman contracted with the wife individually, and extended the credit to her in her individual capacity, and that both parties to the contract so understood. *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 121-133; Dec. Dig. § 19.*]

Error from Superior Court, Walker County; Jno. W. Maddox, Judge.

Action by A. T. Powell and others against H. C. Goodson. Judgment for plaintiffs, and defendant brings error. Reversed.

D. F. Pope and Jno. W. Bale, for plaintiff in error. Earl Jackson and W. M. Henry, for defendants in error.

POWELL, J. Judgment reversed.

(9 Ga. App. 500)

MOSLEY v. CITY OF THOMASVILLE.

(No. 3,484.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 642*)—VIOLATION OF ORDINANCES—APPEAL—CONFLICTING EVIDENCE.

The prosecution of a person for the violation of a municipal ordinance may be sustained upon the testimony of one witness, although the testimony of that witness is contradicted by any number of other witnesses. In such a case, merely an issue of fact, and not an issue of law, is presented, and this court has no jurisdiction over issues of fact.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1415; Dec. Dig. § 642.*]

2. CRIMINAL LAW (§ 564*) — VENUE — SUFFICIENCY OF EVIDENCE.

Where a prosecution for the violation of a municipal ordinance took place in the police court of the city of Thomasville in the state of Georgia, and proceedings were brought in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

superior court of the county in which that city is located to review the legality of the conviction had therein, and it appeared that the witness who testified as to the commission of the offense located it as having been at the home of the defendant, and further testified that the home of the defendant "is in the city of Thomasville," it will be presumed, in the absence of proof to the contrary, that the witness referred to the city of Thomasville in the state of Georgia, and not to some other city of that name. Therefore the point that the venue was not proved, because the evidence does not disclose in what state or in what county the offense was committed, is not well taken. Cf. *Knox v. State*, 114 Ga. 272, 40 S. E. 233.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1277-1284; Dec. Dig. § 564.*]

Error from Superior Court, Thomas County; *W. E. Thomas*, Judge.

Bessie Mosley was convicted of violating an ordinance of the City of Thomasville, and brings error. Affirmed.

Snodgrass & MacIntyre and Fondren Mitchell, for plaintiff in error. T. N. Hopkins and J. H. Merrill, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 487)

SHARP v. MORGAN. (No. 3,283.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

LANDLORD AND TENANT (§ 262*)—PLEADING (§ 246*)—LANDLORD'S LIEN—AMENDMENT OF AFFIDAVIT—JURISDICTION.

An affidavit made for the purpose of foreclosing a landlord's lien is amendable to the same extent as if it were an ordinary declaration. *Boyce v. Day*, 3 Ga. App. 275, 59 S. E. 980; Civ. Code 1910, § 5708. The jurisdiction of the court may be shown by amendment. Civ. Code 1910, § 5682.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 262.* *Pleading*, Cent. Dig. §§ 676-683; Dec. Dig. § 246.*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action by G. W. Sharp against Mat Morgan. Judgment for defendant, and plaintiff brings error. Reversed.

Sharp & Sharp, for plaintiff in error. Eubanks & Mebane, for defendant in error.

POWELL, J. Judgment reversed.

(9 Ga. App. 500)

WATTS v. STATE. (No. 3,487.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 762, 785*)—CREDIBILITY—DETECTIVES—INSTRUCTIONS—OPINION OF COURT.

On the trial of one for a violation of the prohibition law, where the principal witness for the prosecution was an employed detective, the trial judge charged as follows: "I charge you that, while you may consider the witness' manner of testifying, and his interest or want of

interest in the case, yet it is entirely legitimate for the city of Dublin to employ detectives to run down and ascertain those who violate the law." Held: (1) This instruction was not erroneous because "it placed the detective witness on an equal basis of credence with other witnesses wholly disinterested." (2) This instruction did not convey an intimation of opinion by the court as to the credibility of the witness, was not an inaccurate statement of the law relative to the standard by which the detective's evidence should be weighed, and was not calculated to make the jury believe that the law looked with favor, instead of distrust, upon this kind of testimony.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1774; Dec. Dig. §§ 762, 785.*]

2. CRIMINAL LAW (§§ 789, 806*)—INSTRUCTIONS—REPETITION—REASONABLE DOUBT.

Where the trial judge, in the beginning of his charge to the jury, properly instructed them that they could not convict the accused unless they believed he was guilty beyond all reasonable doubt, he was not required to repeat this instruction when directing the jury as to the form of their verdict in the event they found the defendant guilty. The principle of reasonable doubt in criminal cases is so well established and so well known that the law does not require a trial judge to make constant repetition of the rule throughout his charge. One clear and distinct enunciation of the rule in the beginning, or at the conclusion, or elsewhere in the charge is sufficient to enlighten the jury on this subject.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1973, 1991; Dec. Dig. §§ 789, 806.*]

3. REVIEW ON APPEAL.

No error of law appears, and the evidence fully supports the verdict.

Error from City Court of Dublin; K. J. Hawkins, Judge.

Love Watts was convicted of crime, and brings error. Affirmed.

Howard & Hightower and R. Earl Camp, for plaintiff in error. Geo. B. Davis, Sol., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 483)

ARNOLD-FORREST HORSE & MULE CO. v. FLEEMAN. (No. 3,264.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. EXECUTION (§ 166*)—AFFIDAVIT OF ILLEGALITY—WHEN ALLOWABLE.

An affidavit of illegality cannot be used as a substitute for certiorari or other appellate procedure. If the affiant was regularly served with process or voluntarily appeared and pleaded in the main suit, he cannot by his affidavit of illegality assail the judgment because of mere errors of law which took place upon the trial.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 486; Dec. Dig. § 166.*]

2. EXECUTION (§ 166*)—CLAIMS OF THIRD PERSONS—AFFIDAVIT OF ILLEGALITY.

A garnishee was served, and answered, denying indebtedness. The answer was traversed. The plaintiff served upon the garnishee notice to produce certain books and papers at the trial. Because of an alleged failure of the garnishee to produce the books and papers, the court en-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

tered judgment against the garnishee as if by default. *Held*, that any error on the part of the court as to his right to enter judgment against the garnishee for his failure to produce the books was a mere error of law, affecting the correctness of the trial, but not rendering the judgment a nullity, and this is true irrespective of whether the notice to produce, the disobedience to which afforded the alleged reason for the rendering of the judgment of the justice, was ever legally served or not; that an error of the character indicated must be corrected by certiorari or other appellate procedure, and cannot be reached by affidavit of illegality. [Ed. Note.—For other cases, see Execution, Cent. Dig. § 486; Dec. Dig. § 166.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Trial of an affidavit of illegality between the Arnold-Forrest Horse & Mule Company against J. C. Fleeman. From the judgment, the company brings error. Affirmed.

Morris Macks and F. M. Hughes, for plaintiff in error. Horton Bros. & Burress, for defendant in error.

POWELL, J. Judgment affirmed.

(69 W. Va. 261)

STATE v. DURR.

(Supreme Court of Appeals of West Virginia.
April 25, 1911.)

(*Syllabus by the Court.*)

1. INTOXICATING LIQUORS (§ 231*)—ILLEGAL SALE—EVIDENCE.

In defense of an indictment for selling intoxicating drinks, the article sold being labeled "Temperance Beer," the defendant has right to show that it is not intoxicating.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 291; Dec. Dig. § 231.*]

2. INTOXICATING LIQUORS (§ 236*)—ILLEGAL SALE—EVIDENCE.

Upon trial of an indictment for selling intoxicating drinks, if the evidence show a sale of beer, the state has made a prima facie case for conviction, and need not give evidence that the beer is intoxicating; but the defendant may give evidence to prove that the beer sold is not intoxicating.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 316; Dec. Dig. § 236.*]

Error to Circuit Court, Randolph County.

E. W. Durr was convicted of selling intoxicating liquors, and brings error. Reversed and remanded.

J. L. Wamsley, C. H. Scott, James Coberly, and W. E. Baker, for plaintiff in error. Wm. G. Conley, Atty. Gen., and H. G. Kump, Pros. Atty., for the State.

BRANNON, J. An indictment charged E. W. Durr with selling, without license, spirituous liquors, wine, porter, ale, or beer, and drinks of like nature. He was found guilty by a jury, and judgment for \$50 fine and 60 days' imprisonment was rendered against him.

[1] On the trial the evidence was that he

sold a drink called and labeled "Temperance Beer." The defendant offered to give evidence, by persons who knew and had drunk and tested it, that it was not intoxicating, and that the stomach could not contain enough of it to produce intoxication. The court rejected the evidence proposed. The argument of the prosecution is that beer is specifically named in Code 1906, c. 32, § 1, as a prohibited drink; that the sale of beer is unlawful without license, and no proof of its intoxicating character is required; that when once it is shown that beer is unlawfully sold the offense is proven, and there can be no evidence by the defendant that it is not intoxicating. I do not conceive that the word "temperance" before the word "beer" is material, any more than would be the word "apple" before the word "brandy." Whisky, brandy, gin, rum, and some other liquors are, by judicial cognizance, known to be intoxicating, and no proof that they are is required; nor is any evidence admissible to the contrary, when it has been proven that such liquors have been sold. 23 Cyc. 61. But we have the question in this case whether beer stands on like ground, though specified in the statutes. Is it, like whisky, to be held conclusively intoxicating? Where the thing sold is not by judicial cognizance known to be intoxicating, it must be proven to be so. "If the liquor be not judicially known as a prohibited liquor, then it must be alleged that it is an intoxicating, spirituous, distilled, malt, fermented, alcoholic, or vinous liquor, if the terms used in describing it are not judicially noticed as being descriptive of such liquor, and these allegations established by proof." Woollen & Thornton on Intoxicating Liquors, § 78. Where whisky, brandy, or other known spirituous liquor is sold, it is not necessary to allege that the particular liquor was sold, because our statute prohibits sale of spirituous liquors, and, such drinks being known to be spirituous, it is not necessary to prove their character.

[2] The cases of State v. Gillispie, 63 W. Va. 152, 59 S. E. 957, and State v. Good, 56 W. Va. 215, 49 S. E. 121, and State v. Cool, 66 W. Va. 86, 66 S. E. 740, are not authority on the question before us; that is, can the defendant, selling beer, prove that it is not intoxicating? They do hold that, as to drinks not mentioned in the statute, such defense may be made; they do hold that, as to such drinks, intoxicating quality is the test. They involved drinks called "malt," "senoj cider," and "rikk," not by name mentioned in the statute, and not judicially known to be spirituous and intoxicating, and in such cases the intoxicating quality is the test, and open to proof on both sides; but in this case we have the sale of beer, a drink prohibited by name in the statute, and prima facie intoxicating. We hold that, when it is proven that

a liquor called "beer" has been sold, the case is proven *prima facie*; but, as all beers are not intoxicating, the defense that it is not is admissible. Woollen & Thornton on Intoxicating Liquors, § 76, says: "Whether or not courts will take judicial notice that beer is an intoxicating or malt liquor has been one of much contrariety of opinion, and this arises from the fact that there are many kinds of beer well known to be neither malt, nor fermented, nor intoxicating liquors. Therefore, upon a proof of a sale of 'beer,' and nothing more, many cases hold that it is not shown that there was a sale of either malt or intoxicating liquor. But by the better line of cases, on proof of a sale of 'beer,' even without additional words, the courts will construe it as a sale of fermented, malted, or intoxicating liquors, and the burden is upon the person claiming it is not a malted, fermented, or intoxicating liquor to show that fact. These decisions are based on the primary meaning of the word 'beer.' 'Webster,' said the Supreme Court of Indiana, 'defines beer to be "a fermented liquor made from any malted grain, with hops and other bitter flavoring matter." In other words it is a malt liquor, which the same author declares to be "a liquor prepared for drink by an infusion of malt, as beer, ale, porter, etc." It may, therefore, be said that beer is a liquor infused with malt and prepared by fermentation for use as a beverage. As a consequence, when "beer" is called for at a place at which intoxicating drinks are sold, the bartender, having in view the primary meaning as well as the common use of the word, is justified in inferring and must reasonably infer that malted and fermented beer is wanted. If any other kind of beer is desired, it is expected that qualifying words will be used, such as spruce beer, root beer, small beer, ginger beer, and the like, thus attaching a remote and secondary meaning to the word "beer" as descriptive of particular beverages. When, therefore, a witness testifies to the sale or giving away of beer under circumstances which make the sale or giving away of any intoxicating liquors unlawful, the *prima facie* inference is that the beer was of that malted and fermented quality declared by the statute to be an intoxicating liquor, and the court trying the case ought to take judicial notice of the inference which there arises from the use of

the word "beer" in its primary and general sense.' So, where the term 'lager beer' is used in testimony, the inference is that an intoxicating beer was meant. In days gone by, when the term 'strong beer' was used to distinguish it from 'small beer,' courts took judicial notice that it was intoxicating. Where a statute declares that lager beer is an intoxicating liquor, it cannot be shown that it in fact is not, for the Legislature has fixed its status by a statute the courts cannot question. The courts cannot, however, take notice that rice beer is an intoxicant; that is a question for the jury."

We know as a court, people know, that there are beers innocent, and not intoxicating, and extensively used, and some that are intoxicating, and it seems consonant with reason, with justice, that one charged with selling "beer" should be allowed to prove that it is of a kind not intoxicating. In every case it is a jury question upon the evidence. *State v. Oliver*, 26 W. Va. 422, 53 Am. Rep. 79, is cited. We do not think it is apposite in this case. It held that sale of cider or crab cider was not unlawful; the reason being that it was not named in the statute, and did not come under the head of spirituous liquors, and not a "mixture" or "preparation" known as "bitters," producing intoxication. As the court held it immaterial that crab cider was intoxicating, the state would use that case in this case to show that whether the beer sold was intoxicating is irrelevant and evidence on that question not admissible; but that case does not so direct in this case. It was under a statute (Laws 1877, c. 107, § 1) prohibiting sale of spirituous liquors, and saying that all "mixtures or preparations known as 'bitters' or otherwise, which will produce intoxication shall be deemed spirituous liquors." Since then, in 1887 the section (as amended by Laws 1885, c. 17) was amended by inserting the word "liquids" in addition to "mixtures" and "preparations" (Laws 1887, c. 29), and now cider would be a liquid, and, if strong enough to produce intoxication, would be, in law, deemed spirituous liquor, and evidence to prove and disprove its intoxicating properties would be admissible.

We think that the circuit court erred in rejecting all the evidence proposed to deny the intoxicating quality of the beer.

Judgment reversed; case remanded.

(186 Ga. 479)

SOUTHERN RY. CO. v. FARRAR LUMBER CO.

(Supreme Court of Georgia. June 21, 1911.)

(Syllabus by the Court.)

CARRIERS (§ 94*) — FAILURE TO DELIVER FREIGHT — ACTION BY CONSIGNEE — EVIDENCE.

Excluding from consideration hearsay testimony, which has no probative value, the verdict directed by the court was demanded under the other evidence introduced upon the trial.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 94.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by the Farrar Lumber Company against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Maddox, McCamy & Shumate, for plaintiff in error. C. D. McCutchen, for defendant in error.

HOLDEN, J. The Southern Railway Company transported a car of shingles from Jellico, Tenn., to Dalton, Ga., for delivery to the Farrar Lumber Company, and insisted as a condition precedent to delivery that the consignee pay a freight charge of something over \$400, which included its own charges for transportation over its line and an advance payment made by it to the Louisville & Nashville Railroad Company of about \$370. The lumber company tendered the amount of freight charges on the shipment from Halsey, Ky., to Dalton, Ga., and demanded the goods, and, upon the Southern Railway Company refusing to comply with this demand, brought trover to recover them. Upon the trial of the case, the court directed a verdict in favor of the plaintiff, and the railway company excepted.

It appears from the evidence that, several months prior to the shipment from Jellico to Dalton, the lumber company procured the shipment of the shingles from the state of Washington, consigned to its order at Halsey, Ky., to which point they were carried by various connecting lines, arriving at destination by the Louisville & Nashville Railroad. The secretary of the lumber company testified that that company directed the Louisville & Nashville to deliver the shingles to the Red Ash Coal Company at Halsey, and that this was done; that the coal company, to which company the lumber company sold the shingles, was to pay the freight, which the lumber company was to deduct from the invoice price of the shingles; that he did not authorize the railroad company to deliver them without collecting the freight charges; and that the railroad company extended credit to the coal company for the freight. It appears from the evidence that the coal company used something over 30,000

of the shingles, and that the shipment remained in their possession for some length of time—several months, as we infer from the testimony. Thereafter, about the 1st of February, 1909, the unused shingles were carried from Halsey to Jellico, and the joint agent of the Southern Railway and the Louisville & Nashville at the latter point billed them to the lumber company at Dalton. This agent testified: That he "couldn't say by what authority they were brought there [Jellico]. The conductor brought them in there. When I sent these shingles to Dalton, I made an entirely new transaction out of it. They were in an entirely different car from the cars on which the original charges were based." He further testified that he paid the advance charges (which included everything except the freight from Jellico to Dalton) to the Louisville & Nashville Railroad, and tacked these charges onto the freight bill to be collected by the Southern Railway at Dalton. The secretary of the lumber company testified that, learning that the coal company had become involved financially, he commenced taking steps to protect his company with respect to the shingles, and accepted a proposition of the manager of that company to take back the unused shingles and credit the account of the coal company therewith; that soon thereafter he was notified that the Louisville & Nashville Railroad had seized the shingles, and he employed a lawyer at Jellico to stop them there, "and finally the railroad company turned them over to us at Jellico, and I instructed our lawyer to have them forwarded here to Dalton. * * * I did get my shingles back at Jellico, and they were forwarded to Dalton by the Southern Railroad. * * * I wanted the Southern Railway to bring those shingles from Jellico to Dalton for me, and I pay the freight from there here; and I so directed it, and it was done. When these shingles reached Dalton, the agent of the Southern Railway very promptly placed them at our side track." No attempt has been made to detail the evidence, but the foregoing substantially states the facts from the standpoint of the lumber company.

The Southern Railway Company contends that after a small portion of the shingles had been used the coal company became involved financially and the Louisville & Nashville Railroad Company retook the remainder of the shingles; the coal company paying it the contract price for those which it had used. This contention is made in the brief of counsel, where it is further stated: "The coal company advised Farrar of the situation, and he agreed to take back the shingles in settlement of his account against the coal company. Farrar then directed the shingles shipped to Dalton, Ga., which was done." This contention has its basis in statements

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

contained in certain letters which were introduced in evidence by the plaintiff, and is supported only by this hearsay evidence, which has no probative value. In a letter from the freight claim agent of the Louisville & Nashville Railroad Company to the lumber company, introduced in evidence, this statement appears: "I understand the contents of this car [referring to the car in which the shingles originally reached Halsey, Ky.] was sold to the Halsey Red Ash Coal Co., Halsey, Ky., and that consignees opened this car without authority and removed the shingles without payment of freight."

Discarding this purely hearsay testimony, along with other testimony of the same character, the proven facts in the record make substantially the following case: The lumber company sold a car of shingles to the coal company. The shipment was consigned to the lumber company at Halsey, and it directed the railroad company to deliver it to the coal company; it not appearing that any instructions were given with respect to the collection of freight. The railroad company delivered the shingles and gave credit for the freight. Civil Code 1910, § 2741, declares: "The carrier has a lien on the goods for the freight, and may retain possession until it is paid, unless this right is waived by special contract or actual delivery." The hearsay evidence before adverted to is not proof that the coal company obtained possession by a trespass, and there is no evidence that there was any fraud on the carrier whereby he was induced to part with the goods. The delivery to the coal company under the facts established constituted a waiver of its lien for freight charges. Afterwards—just how and when it does not clearly appear—the Louisville & Nashville regained possession of the greater portion of the shingles. There is no proof, other than hearsay, how this possession was acquired. It appears from the positive testimony in behalf of the plaintiff that it took back the unused shingles from the coal company, agreeing to credit its account with them, and thus obtained the title thereto; the title to the shingles having gone into the coal company upon the railway company delivering them to it under the instructions of the lumber company. As against this title, the plaintiff in error shows only a possession obtained from the Louisville & Nashville Railroad for the purposes of shipment; and this possession the lumber company claims to be derived through it, as its secretary testified that the shingles were turned over to it by the Louisville & Nashville at Jellico, and were to be shipped to the lumber company at Dalton. The Louisville & Nashville Railroad, having once lost its lien by an actual delivery of the freight at Halsey, could not revive that lien merely by afterwards

getting possession of the shingles. Jones on Liens, § 310.

The question as to whether or not the carrier still had a lien for the original freight charges would be the same in this case, whether or not the original delivery to the coal company at Halsey was a delivery to them as purchaser, passing title, or a delivery to it as agent of the lumber company, title remaining in the latter. It is enough that there was an actual delivery under such circumstances as to occasion a loss of the lien. Even if the delivery was to the agents of the lumber company, so that the latter still owed the freight as a debt, this fact could not avail the defendant in the present action, since the plaintiff in either event would have the title to the goods, and the defendant only the right to retain possession until the payment of the amount of his lien for freight. It being undisputed that the plaintiff tendered all freight charges other than those accruing on the original shipment from the state of Washington to Halsey, Ky., a verdict in favor of the plaintiff was demanded, and the court did right in so directing.

Judgment affirmed. All the Justices concur.

(135 Ga. 286)

LANHAM & SONS CO. v. CITY OF ROME
et al.

BOSWORTH v. SAME.

(Supreme Court of Georgia. June 14, 1911.)

(Syllabus by the Court.)

1. VALIDITY OF STATUTES—PASSAGE THROUGH LEGISLATURE.

The attack upon the passage of the acts of the Legislature here involved is controlled by the decisions in *De Loach v. Newton*, 134 Ga. 739, 68 S. E. 708, and *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 69 S. E. 725.

2. CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—SPECIAL ASSESSMENTS.

Where a municipal charter authorized the paving of streets and the assessment of a specified portion of the cost thereof upon lots abutting upon them, required notice to be given to the owners of such lots, and provided a method by which such owners should have an opportunity to question and have a judicial determination as to the validity and amount of such assessments in proceedings for their collection, this satisfied the constitutional requirement of due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

3. CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—SPECIAL ASSESSMENTS.

A statute which afforded such opportunity for contest by means of an equitable proceeding for injunction was not obnoxious to the provision of the fourteenth amendment of the Constitution of the United States which declares that no state shall deprive any person of property without due process of law, because such act required that the contesting property owner should pay the amount which he admit-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ted to be due, if any, and that this should be set out in the proceedings and verified.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

4. MUNICIPAL CORPORATIONS (§ 527*)—SPECIAL ASSESSMENTS—COLLECTION—STATUTES—REPEAL.

While the act of 1907 (Acts 1907, p. 897), and the act of 1908 (Acts 1908, p. 904), amending the charter of the city of Rome, were repealed by the act of 1909 (Acts 1909, p. 1255), the last-mentioned act covered the subject-matter of the two former, and substantially re-enacted their provisions, with certain changes. It did not destroy the right of the municipality to collect executions which had previously been issued for assessments upon abutting property for street paving.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1243; Dec. Dig. § 527.*]

5. APPEAL AND ERROR (§ 1078*)—OBJECTIONS—ABANDONMENT—BRIEFS.

A ground of attack upon executions issued to collect assessments for street paving, alleging that they did not follow the law under which they were issued in relation to the property upon which a levy should be made, will be treated as abandoned, where not referred to in the brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

6. MUNICIPAL CORPORATIONS (§ 536*)—SPECIAL ASSESSMENTS—OBJECTIONS—WAIVER.

As the acts of the Legislature under which these proceedings were had were not unconstitutional for any reason urged against them, as an ample opportunity was furnished to the owners of abutting lots to contest the amount of the assessments or the legality of the proceedings to levy and collect them, if owners of such property did not pursue the remedy thus provided, but proceeded by general equitable petition to enjoin the collection of such assessments, on the ground that the proceedings were not in accordance with the law and certain items of the assessments were improper, an injunction was properly refused.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1253; Dec. Dig. § 536.*]

Error from Superior Court, Floyd County:
Geo. L. Bell, Judge.

Actions by the Lanham & Sons Company and by E. L. Bosworth against the City of Rome and others, to enjoin the collection of a street assessment. Judgment for defendants in each case, and plaintiffs bring error. Affirmed.

Maddox & Doyal and M. B. Eubanks, for plaintiffs in error. Max Meyerhardt, Nathan Harris, J. Branham, and Lipscomb, Willingham & Wright, for defendants in error.

LUMPKIN, J. Lanham & Sons Company and Bosworth each filed an equitable petition against the city of Rome, seeking to enjoin against executions which had been issued against them and their lots, respectively, on account of a street improvement. In each case the injunction was refused, and exception was taken. The cases were argued together in this court.

The grounds of attack by the plaintiffs may be summarized under the following general heads: (1) That the act of the Legislature under which the executions were issued was unconstitutional on account of the defects in the record as to the method of its passage; (2) that the original act, as amended, was in violation of the fourteenth amendment of the Constitution of the United States; (3) that the original and amended act were repealed by the subsequent act creating a new charter for the city of Rome; (4) that there was a failure to comply with the act in regard to the methods of procedure, both before and after the work was done; (5) that certain items included in the assessments were improper.

By the act of August 22, 1907 (Acts 1907, p. 897), the charter of the city of Rome was amended, and, among other things, provision was made in regard to grading, paving, and macadamizing the streets. By the eighth section the board of public works was directed to cause a survey to be made of the streets, sewerage, and waterworks system, and to proceed as in the act set forth. By the ninth section an assessment of one-third of the cost of paving or macadamizing such a street was authorized to be made against the owners of abutting property, which should become a lien on such property, "to be enforced by execution issued as provided for collecting other city taxes." By the act of August 11, 1908 (Acts 1908, p. 904), the charter of the city of Rome was again amended. It was provided that, upon the completion of one or more sections of pavement between intersecting streets, the board of public works should ascertain the proportionate cost chargeable to owners of abutting property, and certify this to the mayor and city council; that the latter should make an examination, and, if the action were found correct, they should approve it, and cause the clerk to give written notice of the result to such owners of abutting property; that the amount so assessed should become immediately due and payable; that a copy of the notice should be served on the owner or occupant; and that the city should proceed immediately to collect and pay over the money to the board of public works. It was also provided that if any owner of abutting property should desire to contest the amount of the assessment thereon, or the legality of any proceeding growing out of or connected with the pavement of the streets of the city, he might do so by means of an application for a writ of injunction, but that no temporary restraining order or permanent injunction should be granted unless and until such contestant should first pay to the city the full amount admitted by him to be due, with interest thereon; and it was required that these facts should be fully stated in detail in the petition and verified by the applicant.

On August 17, 1909, an act was approved the purpose of which was to amend, consolidate, and supersede the several acts incorporating the city of Rome, and to create a new charter and municipal government therefor. Acts 1909, p. 1255. This included provisions in regard to the board of public works, the paving of streets, etc., of a generally similar nature to those in the former act, but declared that the previous acts were repealed. The method of contesting the amount of the assessment against abutting property or the legality of any proceeding growing out of or connected with the pavement of the streets, provided by the last-mentioned act, was by means of an affidavit of illegality, stating the cause of such illegality and the amount which the affiant admitted to be due. The amount so admitted was required to be paid to the levying officer before the affidavit should be received; and upon the filing of such affidavit it was to be returned to the Superior Court for trial. The work involved in the present controversy was done after the passage of the act of 1908, and upon the refusal to pay the assessment executions were issued in May, 1909. In January, 1910, they were levied and petitions were filed to enjoin further proceedings under them.

[1] 1. The objections made to the passage of the acts involved are concluded by the decisions in *De Loach v. Newton*, 134 Ga. 739, 68 S. E. 708, and *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 69 S. E. 725.

[2] 2. The next question which arises is whether the act of 1907 (as amended by that of 1908) and the act of 1909 were void, on the ground that they afforded no due process of law by which the owner of property abutting on a paved street might contest the amount and legality of the assessment. On behalf of the plaintiffs in error it was contended that they did not do so, and that therefore such an assessment amounted to taking property without due process of law. In *Londoner v. City and County of Denver*, 210 U. S. 373, 385, 28 Sup. Ct. 708, 52 L. Ed. 1103, referring to the assessment, apportionment, and collection of taxes, it was said that due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal or by publication, or by a law fixing the time and place of the hearing. In *Hagar v. Reclamation District, etc.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, it was said: "The law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the fourteenth amendment to the Constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it, either before that amount is determined, or in subsequent proceedings for its collection." *Winona & St.*

Peter Land Co. v. Minnesota, 159 U. S. 526, 537, 16 Sup. Ct. 83, 40 L. Ed. 247; *Kentucky Railroad Cases*, 115 U. S. 321, 331, 6 Sup. Ct. 57, 29 L. Ed. 414.

[3] In *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 385, it was held that a statute which gives a person against whom taxes are assessed a right to enjoin their collection, and have their validity judicially determined, afforded due process of law, notwithstanding he was required to give security in advance. The legislative act then under consideration authorized an injunction to stay the wrongful collection of a tax. It regulated the proceedings, and declared that they should be treated as preferred cases, and imposed a double tax upon a dissolution of the injunction. It was argued that this was not due process of law, because the judge granting the injunction was required to take security of the applicant, and that no remedial process could be within the meaning of the Constitution which required such a bond as a condition precedent to its issue. Of this argument Mr. Justice Miller said: "It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another." If an assessment is not wholly unlawful, but only excessive, it does not deprive an owner of abutting property of due process of law for the act giving such remedy to require him to pay what he admits to be due in order to contest that part which he claims to be excessive. Such a requirement is recognized as a sound rule of equity. In *National Bank v. Kimball*, 103 U. S. 732, 733, 26 L. Ed. 469, it was said that a person should not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax until the precise amount which he ought to pay is ascertained by a court of equity. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663. Both the act of 1907, as amended by that of 1908, and the act of 1909, required notice of the assessment to be given to the owner of property abutting upon the paved street, and provided a legal method of contesting the legality of the proceedings and the amount of the assessment. Neither of them denied to the property owner due process of law in this respect. *Speer v. Mayor and Council of Athens*, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402.

Counsel for plaintiff in error cited, in regard to what is known as the "front foot rule" of assessment, the case of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. That decision has been discussed by the Supreme Court of the United States in several other later cases. See *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21

Sup. Ct. 625, 45 L. Ed. 879; Tonawanda v. Lyon, 181 U. S. 389, 21 Sup. Ct. 609, 45 L. Ed. 908; Webster v. Fargo, 181 U. S. 394, 21 Sup. Ct. 623, 45 L. Ed. 912; Cass Farm Co. v. Detroit, 181 U. S. 396, 21 Sup. Ct. 644, 45 L. Ed. 914; Detroit v. Parker, 181 U. S. 399, 21 Sup. Ct. 624, 45 L. Ed. 917; Wormley v. District of Columbia, 181 U. S. 402, 21 Sup. Ct. 609, 45 L. Ed. 921; Shumate v. Heman, 181 U. S. 402, 21 Sup. Ct. 645, 45 L. Ed. 922; Farrell v. West Chicago Park Commissioners, 181 U. S. 404, 21 Sup. Ct. 609, 45 L. Ed. 924. It would not be profitable to enter into a discussion of the views entertained by the majority and minority of the court in those cases. It might not be amiss, however, to suggest that if the general rule is to allow assessments by the front foot, and the exception is only where such an assessment becomes confiscatory in character, whether wholly or partially so, it would seem that the person who seeks to bring himself within the exceptional status ought to allege facts sufficient for that purpose. In the case at bar, as we have stated, the plaintiffs in error were afforded ample opportunity to contest the assessments, either as to their amount or legality; and neither on the face of the statute nor in the pleadings or evidence was there anything to show that the assessment was confiscatory in character, either wholly or partially. Indeed, the Norwood Case seems to have been put into the brief of the plaintiff in error rather suggestively and tentatively than as applicable to any substantial point made by the pleadings or evidence.

[4] It was contended that the acts of 1907 and 1908 were repealed by that of 1909, and that this destroyed any right on the part of the city to collect executions issued prior to the passage of the last-mentioned act. It has been said that, as a general rule, the repeal of a statute without any reservation takes away all remedies given by the repealed statute. But where a new statute is a substantial re-enactment of an old one, and expressly recognizes and makes provision in regard to rights and remedies which accrued under it, the general rule is not applicable. Section 6 of the Civil Code of 1910 declares that "laws looking only to the remedy or mode of trial may apply to contracts, rights, and offenses entered into or accrued or committed prior to their passage; but in every case a reasonable time subsequent to the passage of the statute should be allowed for the citizen to enforce his contract, or protect his right." The act of 1909 did not merely repeal the prior acts and stop. It dealt with the same general subject-matter of the board of public works, and the pavement and improvement of streets, and in the same general manner. It made provision for the contest of the amount or legality of the assessment by means of an affidavit of illegality; and it recognized and substantially preserved the existing order of things. It expressly referred to executions issued under the act of

1907, and authorized their transfer. It declared that all the rights, powers, titles, property, easements, and hereditaments then belonging to the city of Rome should be vested in it under its new charter. Such an enactment did not destroy the right of the city to collect executions issued under the act of 1907, nor did it leave the owner of abutting property without a remedy to contest the amount or legality thereof.

[5] The executions involved in these cases commanded that the city marshal should cause to be made the amount of the assessment, with interest, "of the goods, chattels, lands, and tenements of [the named owner of abutting property], and especially of the property" abutting on the paved street, describing it. They were levied on the property of the plaintiffs so described. In the equitable petitions it was alleged that such executions were against the plaintiffs personally, as well as being made a special lien against the property abutting on the street which had been paved, "while, under the law, it could only be issued as a judgment in rem against the particular property abutting on said street so paved." By the expression "under the law" reference was doubtless made to the legislative act, and no attack was made upon the act itself in reference to this provision. This complaint was not referred to in the brief on behalf of the plaintiff in error, and will therefore be treated as abandoned. It is accordingly unnecessary to compare the provisions of the act with the *fi. fa.* issued under it.

[6] As we have held that the acts of the Legislature under which these proceedings were taken were not void for any of the reasons urged against them, and that the charter of the city of Rome furnished an ample remedy to the owner of an abutting lot to contest the amount of such assessment or the legality of the proceedings to levy and collect it, the present petitions, as brought, would not authorize an injunction. *Regenstein v. City of Atlanta*, 98 Ga. 167, 25 S. E. 428. We do not, therefore, deal with the numerous complaints made in regard to a failure by the city officials to comply with requirements of the act before and after the work was done. The injunction was properly refused in both cases.

Judgment affirmed in each case. All the Justices concur.

(126 Ga. 519)

CARR v. RATLEDGE et al.

(Supreme Court of Georgia. June 23, 1911.)

(Syllabus by the Court.)

RULINGS ON DEMURRER.

The petition was not subject to general demurrer, nor was it subject to any of the special demurrers overruled by the court.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. H. Ratledge and others

against H. J. Carr. Judgment for plaintiffs, and defendant brings error. Affirmed.

Dodd & Dodd and J. B. Stewart, for plaintiff in error. Lavender R. Ray and J. B. Stewart, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 455)

LOUISVILLE & N. R. CO. v. SMITH.
(Supreme Court of Georgia. June 19, 1911.)

(Syllabus by the Court.)

1. DAMAGES (§ 173*)—PERSONAL INJURIES—EVIDENCE.

Where damages are claimed for a negligent injury to a finger, it is not error to allow questions properly illustrating the extent of the injury in its effect upon the injured person's pursuit of his ordinary vocation in life.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 173.*]

2. NEW TRIAL (§ 40*)—INSTRUCTIONS.

Where contributory negligence of the plaintiff is not pleaded, either as a complete defense or in mitigation of damages, it is not ground for new trial, in the absence of a written request, that the court omitted from his instructions the principle that, if plaintiff and defendant are both at fault, the former may recover; but his damages will be diminished in proportion to the amount of default attributable to him. Southern Ry. Co. v. Hooper, 110 Ga. 779, 36 S. E. 232.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 62-66; Dec. Dig. § 40.*]

3. INSTRUCTIONS.

The charge of the court was applicable to the case, and properly adjusted to the issues raised by the pleadings. The evidence authorized the verdict.

Error from Superior Court, Fannin County; T. A. Brown, Judge pro hac.

Action by W. D. Smith against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. Butt and D. W. Blair, for plaintiff in error. O. R. Dupree and Gober & Griffin, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(136 Ga. 456)

STRICKLIN v. BROTHERTON.
BROTHERTON v. STRICKLIN.
(Supreme Court of Georgia. June 19, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 856*)—GRANTING OF NEW TRIAL—REVIEW.

The court below granted a first new trial upon special grounds, contained in the motion, complaining of certain instructions of the court to the jury, and overruled the motion as to the other grounds. Both parties excepted to the judgment of the court. It cannot be said that the verdict was demanded by the evidence, and, that being the case, the judgment granting a first new trial will not be disturbed; and this

court will not inquire into the sufficiency of the grounds upon which a new trial was granted, nor those which were overruled, but the court below, having itself granted a new trial, will be allowed, at the next hearing, to deal with the case de novo under the evidence as it may then be developed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3423; Dec. Dig. § 856.*]

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action between Beatrice Stricklin, by her next friend, and Napoleon Brotherton. From a judgment of the court granting a new trial, both parties bring error. Affirmed on the main bill of exceptions, and cross-bill of exceptions dismissed.

W. E. Mann and W. H. Payne, Jr., for plaintiff in error. Samuel P. Maddox and Jas. E. Rosser, for defendant in error.

BECK, J. Judgment affirmed on the main bill of exceptions; cross-bill of exceptions dismissed. All the Justices concur.

(9 Ga. App. 464)

EASTERLING v. STATE. (No. 3,300.)
(Court of Appeals of Georgia. June 7, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1106*)—WRIT OF ERROR—DISMISSAL.

When it appears that the clerk of the trial court has failed to transmit to the Court of Appeals within the time prescribed by law, the bill of exceptions and the transcript of the record, and that an attorney for the plaintiff in error "has been the cause of the delay, by consent, direction, or procurement of any kind," the writ of error will be dismissed. Civil Code 1910, §§ 6185, 6186; Budden v. Brooks, 123 Ga. 882, 51 S. E. 727; Wilson v. State, 124 Ga. 30, 52 S. E. 81; Pope v. State, 93 Ga. 216, 18 S. E. 649; Calhoun v. State, 91 Ga. 112, 16 S. E. 379.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2890-2892; Dec. Dig. § 1106.*]

2. CRIMINAL LAW (§ 1106*)—WRIT OF ERROR—DISMISSAL—DELAY IN FILING TRANSCRIPT.

The bill of exceptions in this case was filed in the clerk's office of the city court on January 4, 1911. The transcript of the record was certified by the clerk on March 14, 1911, and reached the Court of Appeals March 16, 1911. The clerk of the city court certified that the delay was caused by reason of the fact that the attorney for the plaintiff in error requested him not to send the case up, and finally said that he would dismiss the case. The clerk further certified, that subsequent to this request by the attorney for the plaintiff in error he certified and sent up the record as soon as possible, in pursuance of the request made by the solicitor general that he do so. The facts place the attorney for the plaintiff in error in the attitude of consenting to, directing, or procuring the delay of the clerk in making out and certifying a transcript of the record within the time prescribed by the statute. For these reasons the writ of error is dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2890-2892; Dec. Dig. § 1106.*]

Error from Superior Court, Tattnall County; P. E. Seabrook, Judge.

Boy Easterling was convicted of crime, and brings error. Dismissed.

H. H. Elders and Hines & Jordan, for plaintiff in error. N. J. Norman, Sol. Gen., and Edwin A. Cohen, for the State.

HILL, C. J. Writ of error dismissed.

(9 Ga. App. 488)

BATTLE v. ATKINSON. (No. 3,285.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. CARRIERS (§ 196*) — ACTION FOR FREIGHT EARNED — SET-OFF AND COUNTERCLAIM — DAMAGES.

Where an action is brought by a carrier to recover freight charges upon a shipment delivered by the carrier to the defendant without requiring payment of the freight it is permissible, under the procedure in this state, for the defendant to file a plea of recoupment, setting up that the carrier damaged the shipment, and thereby to set off the amount of these damages against the plaintiff's recovery, and, if the damages exceed the amount of the freight charges, to recover a judgment against the carrier for the excess.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 881; Dec. Dig. § 196.*]

2. CARRIERS (§ 196*) — ACTION FOR FREIGHT CHARGES—SET-OFF—DAMAGES.

Under the act of Congress commonly known as the "Hepburn Act" (Act July 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1906, p. 1149]), a common carrier cannot accept anything but money in payment of freight and other transportation charges. Nevertheless, if in the course of the transportation the carrier has damaged the goods, and has delivered them without requiring payment of the charges at the time, and brings an action against the shipper for the recovery of the charges, there is nothing in the letter or the spirit of the act of Congress which prevents the defendant from filing a plea of recoupment, alleging the damages done to the shipment, and setting them off against the plaintiff's recovery of the freight charges, and, if the damages exceed the freight charges, recovering a judgment against the carrier for the excess.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 881; Dec. Dig. § 196.*]

Error from City Court of Moultrie; J. D. McKenzie, Judge.

Action by H. M. Atkinson, receiver, against J. J. Battle. Judgment for plaintiff, and defendant brings error. Reversed.

T. W. Mattox and T. H. Parker, for plaintiff in error. J. H. Merrill, J. A. Wilkes, and Rosser & Brandon, for defendant in error.

POWELL, J. The receiver of the Atlanta, Birmingham & Atlantic Railroad Company brought suit in the city court of Moultrie against Battle for the recovery of \$387 and interest on an account for freight charges on two cars of live stock shipped from a point in Illinois to Moultrie, Ga.; it being alleged that at the time of the arrival of the

live stock at destination it was important for them to be unloaded promptly, that for that reason the defendant was allowed to take possession without first paying the freight bill and other charges, that the shipment was delivered upon the defendant's promise to pay these amounts as soon as they could be ascertained, and that he had failed and refused to do so. The defendant's answer admitted that the account sued on was prima facie correct, that it represented correctly the amount of freight charges due upon the shipment, and that the shipment had been delivered to him without these things being paid for. He denied that he had made any express promise to pay them, but admitted that he would be liable therefor, were it not for the other matters which he pleaded, namely, that the shipment was delivered in bad condition, having been damaged in transit, and that he accepted the shipment from the agent of the railroad company on the understanding that the damages would be adjusted and paid within a few days, which had not been done; that the damage caused to the shipment in the course of transportation amounted to \$1,225, for which amount he pleaded recoupment against the plaintiff's claim, and a judgment for the excess. The plaintiff demurred to this answer, contending first that it was an effort to set off a cause of action ex delicto against a cause of action ex contractu, which is not permissible in this state, and then that to allow the defendant to maintain this defense against the suit for freight charges would be in violation of the act of Congress of June 29, 1906, which provides: "No carrier shall refund or remit, in any manner or by any device, any portion of the rates, fares and charges so specified." The court sustained the general demurrer to the defendant's answer and struck the defense.

[1] The first question presented is one of local jurisprudence. It merely involves the question of whether a defendant, under the procedure in this state, can recoup damages to a shipment in an action brought by a carrier for the recovery of the freight charges. This question is determined by the Code of this state. Civil Code (1910) § 4350, provides: "Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligation or independent covenants arising under the same contract." Section 4353 provides: "Recoupment may be pleaded in all actions ex contractu, where from any reason the plaintiff under the same contract is in good conscience liable to defendant. And in all cases where, under the laws of this state, recoupment may be pleaded, if the damages of the defendant shall exceed, in amount, those of the plaintiff, the defendant

shall in such cases recover of the plaintiff the amount of such excess." Whether recoupment may be pleaded or not depends, not so much upon whether the defendant who seeks it asserts it as if it arose *ex contractu* or *ex delicto*, but upon whether, for any reason, the plaintiff in good conscience is liable to the defendant for the amount under the same contract. The plaintiff in this case sued to recover compensation for the services it had performed in the execution of its part of the contract, and the defendant seeks to recoup certain losses which he incurred by reason of the fact that there was a failure on the plaintiff's part to perform this contract as it should have been performed. Therefore the plea of recoupment was permissible, under the practice in this state.

[3] 2. The other point presents a federal question. Is there anything in the act of Congress, commonly known as the "Hepburn Act," which would prevent a court from allowing the defendant to take advantage of this right of recoupment as against the carrier's suit to recover charges upon a shipment? Under the act of Congress and the decisions that have been made in reference thereto relating to the carrier's charges for interstate shipments, it is now settled beyond controversy that no device or arrangement of any kind is permissible by which the carrier can accept anything but money in payment of freight charges, and that the sum so charged must be the published rate applicable to all persons alike and subject to no rebate for any cause whatever. The act of June 29, 1906, amending the previous law, prohibited the carrier from charging, collecting, or receiving from any person or persons, not only a "greater or less compensation" for any services to be rendered than is charged, collected, or received from all other persons for like services, but also from charging, collecting, or receiving "different compensation"; and to require one person to pay in money and to allow another person to pay in commodities or in promises, or in any other way than in money violates this prohibition. *L. & N. R. Co., v. Mottley*, 219 U. S. 487, 31 Sup. Ct. 265, 55 L. Ed. —; *Chicago Ry. Co. v. United States*, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. Ed. —. The carrier cannot agree to collect less than the published rate from the shipper in consideration of a release of a claim for unliquidated damages arising out of other transactions. *Union Pac. Ry. Co. v. Goodridge*, 149 U. S. 690, 13 Sup. Ct. 970, 37 L. Ed. 896. This much may be taken as established; and still, with this as one of the postulates of the proposition before us, we are of the opinion that the court has the right to allow the plea of recoupment, and to allow the defendant to avail himself of the defense, provided he makes proof of the facts at the trial. The established rates and charges are allowed and are payable as compensation for the

performance of a contract of carriage executed according to its express and implied terms, and there is nothing in the letter or the spirit of the federal statute on the subject tending to defeat or diminish the carrier's liability for damages arising from its failure to perform its contract accordingly. The contract of the carrier is not merely for transportation, but for safe transportation, for the carrying of the goods without causing damage thereto, and even for the insuring of their safety to the extent of the recognized rule as to the liability of a common carrier as a quasi insurer of goods bailed to it for carriage. If the carrier has completed transportation and has collected the usual charges from the shipper, but has damaged the goods or has allowed them to become damaged by causes for which it is liable, the shipper has a right of action against the carrier for the damage, and these damages are payable in money, just as the carrier's claim for transportation charges is payable in money. The United States Supreme Court referred to this principle (that the carrier must pay as well as be paid only in money) in the *Mottley Case*, *supra*, saying, "The passenger has no right to buy tickets with services, advertising, releases, or property, nor can the railroad company buy services, advertising, releases, or property with transportation."

Here we have a case where the carrier did not receive cash for the transportation, and where it did not pay cash in settlement for the damages it had done to the shipment; and it brings its action against the shipper, asking the court to lend the aid of its processes for the collecting of the money due for the freight charges, and the defendant merely asks the court, while it has both parties thus before it, also to collect for him the money due by the carrier for its delinquency in executing the same contract. The amount due to the one party is liquidated, and the amount due to the other is unliquidated; but the court has the means and the power to liquidate the latter claim, and to place it upon the same footing as the former. The very object of allowing pleas of recoupment and set-off and all similar pleas is to prevent a multiplicity of suits, and to enable the court, when it has all the necessary parties before it, to adjudge all their respective rights, and to render a judgment which will finally end the controversies pending between them. Now, if the shipper had sued the carrier in a separate action and had recovered judgment, say for the \$1,200 he alleged to be the amount of the damage done to the shipment, and the carrier had paid over to him twelve \$100 bills, there would certainly be nothing in the spirit or the letter of the act of Congress to prevent the shipper from taking four of these bills and paying to the carrier its claim for the freight charges. The effect of the

plea in the present case is simply a prayer on the defendant's part that he be allowed to consummate this same end through the offices of the court, which the plaintiff has first invoked. It is true that the court, in rendering its judgment, will dispense with the necessity of the plaintiff's paying over the full amount of the damages, and of requiring the defendant to hand back the amount due the plaintiff, and will strike a balance, and will merely render a judgment requiring the losing party to pay the difference; but it is not with mere incidentals such as these that the act of Congress deals, or which it was intended to prohibit. It is the substance of the thing at which the act of Congress aims, and the form which the transaction assumes is immaterial. No matter how plausible or ingenious may be the form of the transaction, if the spirit or the letter of the act is violated, the transaction is illegal. And, on the other hand, any form may be adopted which does not violate the letter or the spirit of the law; and for the court to proceed to adjust the respective rights of the parties in a transaction such as this is in no sense a device for the remitting or the refunding of any portion of the rates and charges with which the act of Congress deals. It is not a means by which a particular shipper can pay anywise differently from what other shippers may pay, for every shipper standing in a similar situation may pay the same way; that is to say, the rule which we are now announcing is that the damages due to the shipper may be recouped against a suit for the freight charges in any and all cases where the carrier sues for the freight, and it appears that the carrier did not perform shipment according to his contract, but damaged it in the course of the transportation. We think, therefore, that the court erred in striking the defense.

Judgment reversed.

(9 Ga. App. 432)

KUNIANSKY v. HOGAN. (No. 3,084.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

GARNISHMENT (§ 241*)—PROCEDURE—JUDGMENT AGAINST GARNISHEE.

A. sued B. in a justice's court on an account, and had process of garnishment issued and served. The garnishee answered, admitting indebtedness, and setting up that this indebtedness was exempt from process of garnishment, because it was an indebtedness for daily, weekly, and monthly wages. B. dissolved the garnishment by giving the statutory bond. Before obtaining a judgment against B., and without any traverse of the garnishee's answer, the justice rendered a judgment on the dissolution bond in favor of A. for the amount of the indebtedness admitted by the garnishee's answer. Held, that this judgment was erroneous, first, because there was no previous judgment entered against the main defendant; and, secondly, be-

cause there was no traverse of the garnishee's answer and no judgment rendered finding the property or funds in the hands of the garnishee subject to the garnishment. Civil Code 1910, §§ 5281, 5282, 5292; *Smith v. Kennedy*, 125 Ga. 880, 54 S. E. 731, and cases cited.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 241.*]

Error from Superior Court, Fulton County; G. L. Bell, Judge.

Suit between Lewis Kuniansky and W. J. Hogan. From the judgment, Kuniansky brings error. Affirmed.

Geo. W. Brooks, for plaintiff in error. S. C. Crane, for defendant in error.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 473)

JONES, Deputy Sheriff, v. SPILLERS et al. (No. 3,084.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. EXEMPTIONS (§ 84*)—PRIORITY—LIEN FOR SUPPLIES.

A mortgage lien given to a merchant for supplies, fertilizer, etc., to enable the mortgagor to make a crop, is not superior to the statutory exemption allowed under Civil Code 1910, § 8418, and the personal property so set apart as exempt is not subject to be seized and sold under an execution issued on a foreclosure of the mortgage.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 109; Dec. Dig. § 84.*]

2. REPLEVIN (§ 120*)—FORTHCOMING BOND—BREACH OF BOND.

Where a *fi. fa.*, issued on a mortgage given for supplies furnished to the mortgagor, was levied on personal property, and subsequently the property was replevied and a forthcoming bond given, but before the sale day the property was set apart as a statutory exemption under Civil Code 1910, § 8418, the levying officer could not make a sale of the property, and there was no breach of the forthcoming bond by reason of a failure to produce the property on the day of sale.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 120.*]

Error from City Court of Cordele; E. F. Strozler, Judge.

Action by J. H. Jones, Deputy Sheriff, for use, etc., against Julia Spillers and others. Judgment for defendants, and plaintiff brings error. Affirmed.

In the year 1908 the Royal Supply Company furnished supplies, fertilizer, etc., to E. J. Spillers for the purpose of making his crop for that year, and he executed to the supply company a mortgage on his crop of cotton, corn, cane, potatoes, and peas, to secure this indebtedness. The mortgage recited that it was given for fertilizers and supplies to enable the mortgagor to make his crop for that year. The indebtedness for these supplies was not paid, and the Royal Supply Company foreclosed its mortgage and had an execution issued and levied on the mortgagor's crops, gathered and growing.

The wife of the mortgagor filed her claim to a portion of the property levied on, claiming that it was not subject to the *fl. fa.*, for the reason that it was set apart as exempt from levy and sale in accordance with Civil Code 1895, § 2866 (Civil Code 1910, § 3416). She gave a forthcoming bond to the deputy sheriff. When the claim case was called for trial in the city court of Sylvester, the claim was withdrawn. The Royal Supply Company brought suit on the forthcoming bond, alleging that there had been a breach of the bond, for the reason that the property claimed had been disposed of by the claimant. Mrs. Spillers and her surety were both sued, and they filed an answer, in which they contended that there had been no breach of the bond, for the reason that the property was not subject to levy and sale, because it had been set aside as exempt in accordance with the Code section cited above. On the trial of this case the plaintiff proved its allegations, and proved the value of the property set out in the forthcoming bond. In fact, these allegations were not disputed; but in support of their plea the defendants offered in evidence a properly exemplified copy of the homestead exemption granted by the ordinary. On objection this evidence was excluded by the court, and the jury returned a verdict for the plaintiff. The defendants duly made a motion for a new trial on the general grounds, and on the special ground that the court erred in excluding the documentary evidence of the homestead exemption. The trial judge granted the motion, on two specific and controlling grounds: (1) That it was erroneous to exclude the exemption papers, for the reason that there could be no breach of the defendant's bond, inasmuch as the property had been set aside as exempt from levy and sale; and (2) that the mortgage lien on the crop, even though for supplies furnished to make the crop, unless the supplies were furnished by the landlord, was inferior to an exemption of personalty set aside in accordance with section 2866 of the Civil Code of 1895. Exceptions to the grant of a new trial on these two specific grounds were duly made, and the case is brought here for review.

J. T. Hill and J. W. Dennard, for plaintiff in error. Pearson Ellis, for defendants in error.

HILL, C. J. (after stating the facts as above). [1] The one controlling question raised by the record is whether a mortgage lien on crops, given for supplies furnished to the mortgagor to make the crops, the mortgagee not being the landlord, is superior to an exemption of personalty (or "short homestead") set aside in accordance with section 2866 of the Civil Code of 1895 (Civil Code of 1910, § 3416). This section provides that the property so set apart "shall be exempt from levy and sale by virtue of any process whatever under the laws

of this state." The act of 1874 (Acts 1874, p. 19), codified in section 2873 of the Civil Code of 1895 (Civil Code 1910, § 3423), provides that property exempted from levy and sale as provided for in section 2866, supra, "shall not be exempt from levy and sale for the purchase money, or state and county or municipal taxes"; and it is insisted by the plaintiff in error that, under former rulings of the Supreme Court, supplies furnished to make the crops are in the nature of purchase money. He relies upon the case of *Tift v. Newsom*, 44 Ga. 600, in which it was held that "where a factor makes advances to a planter and takes a lien upon the growing crops, under the Revised Code [1873] § 1977 [section 1978], such advances are in the nature of purchase money, and the lien is therefore superior to the wife's title, where the crop was set apart to her as personalty under the homestead laws, after it was made"; and it is insisted that this decision has never been overruled.

The Code section referred to therein was taken from the act of 1873 (Acts 1873, p. 43), which provides that "landlords * * * and all other persons furnishing supplies, money, farming utensils, or other articles of necessity to make crops, and also all persons furnishing clothing and medicines, supplies, or provisions for the support of families," etc., "shall have the same right to secure themselves from the crops of the year in which such things are done or furnished, upon such terms as may be agreed upon by the parties," etc. By the act of 1874 (Acts 1874, p. 18), the act of 1873, except in so far as it referred to landlords, was repealed, and section 1978 of the Code of 1873, as thus changed, appears in the Code of 1895, as section 2800, and section 2800 by its terms restricts the right of a lien for supplies furnished by landlord to tenant; and this is the law as it now stands. Civil Code 1910, § 3348. In *Watson v. Williams*, 110 Ga. 321, 35 S. E. 344, it is held that "personalty set apart as exempt under section 2866 of the Civil Code [1895] is not subject to levy and sale except for 'the purchase money' and taxes"; and in that case it was also held that "farm products so set apart are not subject to be seized under an execution issued on the foreclosure of a laborer's lien, notwithstanding it be shown that the amount due the laborer was for work done in making the products which were set apart as exempt." And in *Willcox v. Cowart*, 110 Ga. 320, 35 S. E. 283, it is held that property exempted under section 2866 of the Civil Code of 1895 is not subject to a debt for fertilizers used thereon.

[2] We deduce from these authorities and the Code sections cited that, under the law as it now exists in the state, no one but a landlord has a statutory lien for supplies furnished which is superior to that of the statutory or what is commonly known as the "pony" exemption, or any of the exemptions not waived or not subject to waiver. The

decision of the Supreme Court in the case of *Chalker v. Thompson*, 72 Ga. 478, is really controlling on the question raised in this case. In that case the Supreme Court held that where a *fi. fa.* was levied on property, and the defendant in *fi. fa.* replevied the property and gave a forthcoming bond therefor, but before the day of sale had it exempted to him as the head of a family, the levying officer could not make a sale of the property, and there was no breach of the forthcoming bond by reason of the failure to produce the property on the day of sale. We therefore conclude that the trial court was right in granting a new trial on both of the specific grounds mentioned. The documentary evidence showing that the property levied upon, which was claimed by the wife and for which she gave a forthcoming bond, had been duly set apart as a homestead under section 2866 of the Civil Code of 1895, was admissible for the purpose of showing that there was no breach of the forthcoming bond, and also for the purpose of showing that the property so exempt and set apart was not subject to the execution issued on the mortgage foreclosure.

Judgment affirmed.

(9 Ga. App. 466)

CAVANAUGH v. BIGGIN. (No. 2,982.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 119*)—PLEADING—EVIDENCE.

Where three separate and distinct acts of negligence are relied upon for a recovery, it is not necessary to a recovery that proof should be made of each and all, if the defendant's liability to respond in damages would be shown by establishing the commission of one or more of them; and in such a case it was not error for the trial judge to instruct the jury that if the plaintiff proved the negligence of the defendant in one or more of the ways stated in his petition, and such act was the proximate cause of the injury, the plaintiff could recover. *Savannah Ry. Co. v. Evans*, 121 Ga. 392 (5), 49 S. E. 308.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 200-218; Dec. Dig. § 119.*]

2. TRIAL (§ 255*)—INSTRUCTIONS—NECESSITY OF REQUESTS—COMPARATIVE NEGLIGENCE—INSTRUCTIONS.

In a suit to recover damages for personal injuries, where the plaintiff contends, and the evidence introduced in his behalf supports his contention, that he is entitled to recover full damages, as being entirely without fault, and the defendant, on the contrary, insists that the plaintiff is not entitled to recover damages at all, because the defendant was without fault, and the injuries complained of were due entirely to the negligence of the plaintiff, and the evidence introduced in behalf of the defendant tends to establish this theory, the law of comparative negligence or diminution of damages is not necessarily applicable, and there was no error in the failure of the court to submit to the jury the law relating to this subject, in the absence of any request. *Hill v. Callahan*, 82

Ga. 109 (2), 8 S. E. 780; *Southern Ry. Co. v. Hooper*, 110 Ga. 779 (2), 36 S. E. 232.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REPETITION.

The pertinent written requests to charge were substantially covered by the general charge, and the charge as a whole was a full, clear, and correct presentation of the law applicable to every issue made by the pleadings and the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 651; Dec. Dig. § 260.*]

4. REVIEW ON APPEAL.

The controlling issues in the case were questions of fact. The evidence in behalf of the plaintiff entitled him to recover, and the damages awarded by the jury were fair and reasonable, and no reason whatever appears for granting another trial.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by H. L. Biggin, by next friend, against Augusta Cavanaugh. Judgment for plaintiff, and defendant brings error. Affirmed.

Saussey & Saussey and R. R. Richards, for plaintiff in error. Cann, Barrow & McIntire, for defendant in error.

HILL, C. J. Judgment affirmed.

(39 S. O. 260)

STATE v. BAZEN.

(Supreme Court of South Carolina. July 8, 1911.)

1. INDICTMENT AND INFORMATION (§ 140*)—DISQUALIFICATION OF GRAND JURORS—EVIDENCE.

A motion to quash an indictment on the ground that the foreman of the grand jury was disqualified under Const. art. 22, § 5, prescribing the qualifications of grand jurors, is properly denied, in the absence of proof of the disqualification.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 474, 475; Dec. Dig. § 140.*]

2. INDICTMENT AND INFORMATION (§ 10*)—DISQUALIFICATION OF GRAND JURORS.

The disqualification of a single grand juror does not invalidate an indictment, unless the grand jury was composed of only 12 men.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 55; Dec. Dig. § 10.*]

3. CRIMINAL LAW (§ 761*)—EVIDENCE—INSTRUCTIONS.

A charge assuming facts proved by the undisputed evidence and the reasonable inferences deducible therefrom, and applying the law thereto, is not a charge on the facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1754; Dec. Dig. § 761.*]

Hydrick, J., dissenting.

Appeal from General Sessions Circuit Court of Florence County; Ernest Gary, Judge.

"To be officially reported."

R. L. Bazen was convicted of manslaughter, and he appeals. Affirmed. A motion to quash the indictment on the ground that the

foreman of the grand jury was over the age of 65 years, and therefore disqualified from sitting as a juror, by Const. art. 22, § 5, was overruled.

J. W. Ragsdale and Le Roy Lee, for appellant. W. H. Wells, Sol., for the State.

JONES, C. J. The exceptions should be overruled, and the judgment affirmed.

There was no error in refusing to quash the indictment.

[1] First. Because there is nothing in the record showing that proof was made of the alleged disqualification of the grand juror. *State v. Brownfield*, 60 S. C. 514, 39 S. E. 2.

[2] Second. Because the disqualification of a single grand juror will not invalidate an indictment, unless it appears that the grand jury was composed of only 12 men. It is not disputed that the grand jury was composed of 18, including the alleged disqualified juror. *State v. Rafe*, 58 S. C. 379, 34 S. E. 660; *State v. Graham*, 79 S. C. 116, 60 S. E. 431. There was no error in the charge considered as a whole and in the light of the undisputed facts.

[3] No testimony was offered for the defense, and the only reasonable inference from the state's testimony was that the insulting language was used by defendant to the deceased in an angry, hostile manner, and that such language did actually bring on the difficulty. Hence there was no error for the court to assume these circumstances and charge the law applicable. It is not a charge on facts to assume as established those facts which are the only inferences that can be drawn from the testimony.

Under no view of the law and the testimony could a verdict more favorable to defendant be properly rendered. Hence there should not be a new trial.

Judgment affirmed.

GARY, A. J., and WOODS, J., concur.

HYDRICK, J. (dissenting). The defendant was tried for the murder of Lofton E. Poston, and was convicted of manslaughter and sentenced to three years at hard labor on the public works of the county or in the penitentiary.

The first ground of appeal alleges error in the refusal of the circuit court to quash the indictment on the ground that the foreman of the grand jury, which found the bill, was a disqualified juror, being above the age of 65 years. The record contains no other statement than that the motion was made on that ground before the petit jury was impaneled, and that it was refused. It was held in the case of *State v. Rafe*, 58 S. C. 382, 34 S. E. 660, that, before such an objection can avail appellant, he must make it appear that he was prejudiced by the fact that the juror was disqualified; and it is there said that if it appeared that every grand juror on the panel was disqualified, or that the

bill was found by a grand jury composed of only 12 men, one of whom was disqualified, the court would necessarily conclude that the bill was not found by a legal grand jury. Upon the principle announced in *State v. Rafe*, the case of *State v. Graham*, 79 S. C. 116, 60 S. E. 431, was decided. I desire to express my dissatisfaction with the principle stated in those cases, because it requires an impossibility, since, on grounds of public policy, no inquiry into the proceedings of a grand jury is permissible. According to these cases, there might be six disqualified jurors on the panel, each of whom in fact argued and voted in favor of finding a true bill, while six of the qualified jurors argued and voted against such action; yet, as that fact could not be shown, and because there were 12 qualified jurors on the panel, the bill could not be successfully assailed. Without entering upon any elaboration of the reasons, it seems to me that those decisions practically annul a mandatory provision of the Constitution, to wit, section 22 of article 5, which says: "The grand jury of each county shall consist of eighteen members, twelve of whom must agree in a matter before it can be submitted to the court. * * * Each juror must be a qualified elector under the provisions of this Constitution, between the ages of twenty-one and sixty-five years and of good moral character."

It appears from the testimony that what is called a "box party" was given at a neighborhood schoolhouse one night in January, 1910. The teacher, Miss Godwin, requested deceased to take charge of affairs, keep order, and attend to the finances. A cake was offered for sale to the highest bidder, and it was knocked down to the defendant, who, for some reason, not clearly stated in the testimony, refused to take it and pay for it. Deceased insisted on his paying for it, and suggested that, if he did not have the money, he could borrow it from some of his friends. During the colloquy defendant became angry and began to curse, and called deceased a "God damn son of a bitch," and asked him to go out to the road with him and settle it. The teacher went to defendant and requested him to leave. He said he would leave, but he was not done with it, as he had not been treated fairly. Deceased went out either with him or about the same time, and hot words were passed between them on the outside; the defendant again calling deceased a "God damn son of a bitch." A friend of deceased's interfered and induced him to go back into the house, where he remained some 20 or 25 minutes, and appeared to one of the witnesses to be in a normal frame of mind, and not to be very angry with defendant, so that the witness thought the difficulty was over with, and there would be no further trouble. After remaining in the house some 20 or 25 minutes, deceased again went out in company with two friends. At this point—when de-

ceased went out the second time—the testimony is not entirely clear upon the question whether the defendant immediately and again called deceased a son of a bitch, or referred to him as such, before anything was said by Arthur Poston, who was with deceased, or by the deceased himself, or whether Arthur Poston or the deceased first referred to the previous application of the epithet to deceased. Upon that point Arthur Poston testified that as deceased went out defendant said: "There comes the God damn son of a bitch I want to see." Deceased said: "Where is the man and who is the man that cursed me for a son of a bitch?" Defendant said: "Here he is. I am the man that cursed you for a son of a bitch." Thereupon they ran together, and, after passing a few blows, deceased ran into the house where it was found that he had received a stab in the neck of which he died in a few minutes. D. D. Prosser testified that, when deceased and Arthur Poston went out, Arthur Poston said: "Lofton, some one in this crowd (referring to a crowd standing on the outside) cursed you." Deceased said: "What one in this crowd cursed me?" Defendant stepped out of the crowd and said: "I am the man that done it." Still another witness, McIver Poston, testified that deceased said, when he came out: "Where is the man that cursed me for a son of a bitch?" That defendant replied: "I am the man that cursed you for a son of a bitch." This witness said, also, that defendant said nothing until deceased asked the question. Defendant offered no testimony, but relied on the plea of self-defense. Upon the law of that defense the court charged, in part, as follows: "The law will not permit one citizen to say to another, 'You are a damn son of a bitch,' and, if he resents it, to strike him to his death. The law will not permit him to say he killed him in self-defense, because the law says you did that which was reasonably calculated to provoke a difficulty, and the law is that where one does an act which is calculated to bring on an encounter, or bring on a difficulty, and he killed under those circumstances, the law will not allow him to shield the killing under the plea of self-defense on the wholesome principle that he was not without fault." The appellant contends that the charge above quoted was not only a charge upon the facts, but, also, that it was erroneous in failing to charge that opprobrious language used by one to another will not deprive the party using it of the right of self-defense, unless it is not only such that a reasonable person would expect it to provoke a difficulty, but also that it actually did contribute to bringing on the difficulty.

The provision of the Constitution prohibiting judges from charging juries in respect to matters of fact has been so frequently and so fully construed and explained that the question here presented requires only the application of settled principles. One of these is

that a judge must not, directly or indirectly, give the jury any intimation of his opinion on any material fact in issue. *State v. Addy*, 28 S. C. 14, 4 S. E. 814; *State v. Johnson*, 85 S. C. 285, 67 S. E. 453, and cases cited. In the language quoted the judge plainly told the jury that, if one man calls another a damn son of a bitch, he does that which is reasonably calculated to provoke a difficulty, and deprives himself of the right of self-defense. This was error, for in so charging the judge decided for the jury a material issue of fact. The court should not have said as matter of law that the application of that epithet by one to another would under all circumstances be reasonably expected to provoke a difficulty. Whether it would or not would depend upon a variety of circumstances—such as the relation of the parties, the time and place and manner, including the tone of voice and expression of countenance. The court recognized this principle in *State v. Rowell*, 75 S. C. 510, 56 S. E. 23, when it said as to language used by defendant: "The defendant's testimony as to the language used by him, and his manner in using it, made an issue of fact as to whether he had just reason to suppose his language to the deceased would probably result in a personal difficulty." Whatever we may say or think of the impropriety of persons using such harsh and ordinarily offensive epithets toward each other, it is, nevertheless, true that they sometimes do it in jest, when no offense is meant or taken. Moreover, the question whether the use of that epithet did or did not actually provoke the fatal encounter was one of fact, which should have been, but was not, submitted to the jury. The fact is that it was used several times during the first altercation of words without provoking a personal encounter. There was therefore ground for reasonable difference of opinion as to whether it did, in fact, provoke the fatal encounter; and, if so, whether that encounter was immediately brought on by the defendant again applying the epithet to deceased, when he came out of the schoolhouse the second time, or by Arthur Poston's calling deceased's attention to the fact that defendant had, either then or previously, applied the epithet to him, or by the deceased himself recurring to the previous use of the epithet; and, if the last, whether from the time that had elapsed deceased was not at fault in renewing the difficulty, for surely the law would not allow him to wreak vengeance upon defendant for the previous insult after the lapse of sufficient time for him to cool.

The charge complained of was also erroneous, in that it failed to instruct the jury that to deprive one of the right of self-defense opprobrious language used must, besides being such as should reasonably be expected to provoke a difficulty, actually have contributed toward bringing on the difficulty; for obviously, no matter how offensive language may be, if it, in fact, does not bring on, or

contribute to bringing on, the difficulty, it should not deprive him who uses it of his right of self-defense. In *State v. Rowell*, supra, the court stated the true rule to be "that the plea of self-defense is not available to one who uses language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on."

(89 S. C. 190)

OWEN et al. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. July 7, 1911.)

1. APPEAL AND ERROR (§ 966*)—REVIEW—DISCRETION OF COURT—CONTINUANCE.

The discretion of the trial court in ruling on a motion for continuance will not be disturbed on appeal, in the absence of abuse.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8837; Dec. Dig. § 966.*]

2. TELEGRAPHS AND TELEPHONES (§ 73*)—OPERATION—DELAY IN DELIVERING MESSAGE—ACTION.

In an action for delay in the delivery of a telegram, where there was testimony tending to show that the delay was unreasonable, a motion to direct a verdict on the ground that there was no testimony tending to show negligence was properly denied.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.*]

3. TELEGRAPHS AND TELEPHONES (§ 73*)—OPERATION—DELAY IN DELIVERING MESSAGE—ACTION.

In an action for delay in the delivery of a telegram, where the complaint alleged negligence and willfulness on the part of the defendant, a motion to direct a verdict was properly denied where there was evidence of negligence even if there was no evidence of willfulness.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.*]

4. TELEGRAPHS AND TELEPHONES (§ 69*)—OPERATION—DELAY IN DELIVERY OF MESSAGE—DAMAGES.

Though a telegram company made an effort to deliver a telegram, it does not follow that the addressee is not entitled to punitive damages, the time and degree of diligence used required to be taken into consideration.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 71; Dec. Dig. § 69.*]

5. TRIAL (§ 191*)—INSTRUCTIONS—INVASION OF PROVINCE OF JURY—DELIVERY OF TELEGRAM.

In an action for delay in the delivery of a telegram, a charge that the delivery of the message to the butler at the house where the addressee was residing was a good delivery was properly refused, as invading the province of the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

Appeal from Common Pleas Circuit Court of Hampton County; R. W. Memminger, Judge.

Action by Katie L. Owen and husband against the Western Union Telegraph Com-

pany. From a judgment for plaintiffs, defendant appeals. Affirmed.

Geo. H. Fearons, Warren & Warren, and Nelson, Nelson & Gettys, for appellant. W. S. Tillinghast and W. B. De Loach, for respondents.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiffs through the wrongful acts of the defendant in failing to deliver a telegram within a reasonable time.

The allegations of the complaint material to the questions involved are as follows: That on the 15th of May, 1908, the plaintiffs' daughter Daisy became suddenly ill at Yemassee, their home. That the plaintiff Katie L. Owen was at that time on a visit to relatives in Savannah, Ga. That about 8:30 o'clock a. m. the plaintiff delivered to the defendant for transmission the following message: "Yemassee, S. C. May 15th, 1908. To Eugene Owen, No. 603, 39th Street, West, Savannah, Ga. Tell mother to come home this evening. Daisy not well." That about 2 o'clock p. m. on that day the defendant's agent at Yemassee called on the plaintiff A. E. Owen and informed him that the message had not been delivered, as there was no such number and street in the city of Savannah; but, upon inquiry, it was discovered that the defendant had negligently, recklessly, and willfully changed part of the address by substituting the word "East" for the word "West," so that it then read: "No. 603, 39th street, East, Savannah, Ga." That, although the daughter was very ill, the telegram was mildly worded for fear of shocking her mother, but that the agent at Yemassee was informed of her serious illness. That, if the message had been delivered promptly, the plaintiff Katie L. Owen could have reached the bedside of her daughter at a much earlier hour than she did. The defendant denied the allegations of negligence, recklessness, and willfulness. The jury rendered a verdict in favor of the plaintiffs for \$500, and the defendant appealed upon exceptions which will be reported.

[1] First Exception. This exception assigns error on the part of his honor, the presiding judge, in refusing the defendant's motion for a continuance. Such motions are addressed to the discretion of the presiding judge, and his ruling is not subject to appeal, unless there has been an abuse of discretion, which has not been made to appear in this case.

[2] Second Exception. This exception raises the question whether there was error in refusing the defendant's motion to direct a verdict on the ground that there was no testimony tending to show negligence on the part of the defendant. The appellant's at-

torneys have not argued this exception; but, waiving such objection, it cannot be sustained, as the testimony tends to show that the delay was unreasonable.

[3] Third Exception. This exception assigns error in refusing to direct a verdict as to the cause of action for punitive damages.

At the close of all the testimony, one of the defendants' attorneys in making the motion for the direction of a verdict stated that it was made on the following grounds: "We have no further testimony to offer, and for the purpose of putting myself straight on the record I move that the court direct a verdict in this case, and my ground is * * * that here is evidence of diligence on the part of the company, uncontradicted evidence. * * * Now, the circumstances point clearly to the fact that the company made an effort to deliver, and that they made a failure, and that there was a mistake, and they immediately took it up and straightened up things. We submit that, if there was evidence of an effort to deliver, there could not be any willfulness or wantonness on the part of the defendant company, that being uncontradicted, and, taking the circumstances and the facts, it strikes me that it only becomes a question of law for the court to determine, and not a question for the jury. For that reason, we ask the court to direct a verdict for the defendant." In ruling upon the motion, his honor, the presiding judge, said: "Well, it appears to me that the case will have to go to the jury. The law is that unreasonable delay in delivering the telegram raises a presumption of negligence. Now, as to whether or not that unreasonable delay was not only negligence, but caused by willfulness and wantonness, the burden of proving which is up to the plaintiff, is a question for the jury in this particular case." The motion was for the direction of a verdict generally, and his honor, the circuit judge, so understood it. In the case of *Machen v. Telegraph Co.*, 72 S. C. 256, 51 S. E. 697, the rule as to nonsuits is thus stated: "The cases are numerous to the point that where the complaint alleges damages as the result of negligence, and as the result of willful misconduct, a nonsuit cannot be granted, as to the whole case, if there be any testimony tending to show damages, as the result of either negligence or willfulness. * * * In all the cases cited above the motion for nonsuit was directed to the whole case, and the point decided was that nonsuit was improper, if there be any evidence tending to support a verdict for damages, either for negligence or willful misconduct." This language is quoted with approval in the case of *Carter v. Telegraph Co.*, 73 S. C. 430, 53 S. E. 539. Under these authorities we are constrained to rule that the motion for nonsuit was properly refused.

[4] Fourth Exception. This assignment of error is based upon the proposition that punitive damages are not recoverable, if there is undisputed evidence of an effort to deliver a telegram. It is only necessary to say that time and the degree of diligence used in the efforts to deliver the message must be taken into consideration in determining this question. It would therefore have been error for the circuit judge to have charged the request without modification.

[5] Fifth Exception. This exception raises the question whether the presiding judge erred in refusing to charge that the delivery of the message to the butler at the house in which the addressee of the telegram was residing was a good delivery. This exception must be overruled for the reason that the presiding judge could not have charged as requested without invading the province of the jury.

Sixth Exception. This exception presents practically the same question as is raised by the fifth exception, and is therefore overruled.

Judgment affirmed.

(30 S. C. 237)

T. P. SIMS & SONS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. July 7, 1911.)

1. TELEGRAPHS AND TELEPHONES (§ 70*)—OPERATION—TRANSMISSION OF MESSAGES—MEASURE OF DAMAGES.

Where a telegram as delivered offered flour at \$5 per barrel, and the recipient sold a portion of the flour in advance on the basis of that price, and accepted the offer, but the telegram as sent was an offer at \$5.50 per barrel, and the market value of the flour, which the addressee was compelled to buy to fulfill his contract of sale, was at least \$5.50, the recipient is entitled to the difference between the price stated in the telegram as delivered and that stated in the telegram as sent.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 72, 73; Dec. Dig. § 70.*]

2. TELEGRAPHS AND TELEPHONES (§ 67*)—COMPENSATORY DAMAGES—SPECULATIVE DAMAGES.

Where the recipient of a telegram sold flour on the basis of the price named therein as delivered to him, and was required to pay for the flour a higher price named in the telegram as delivered to the telegraph company, his damages were not speculative so as to preclude recovery from the telegraph company.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; Robt. Aldrich, Judge. Action by T. P. Sims & Sons against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

John Gary Evans and C. C. Wyche, for appellant. J. B. Atkinson, for respondent.

GARY, A. J. This action was commenced before a magistrate, and is for damages alleged to have been sustained by the plaintiffs, through the negligence of the defendant, in erroneously transmitting a telegram.

The allegations of the complaint, material to the questions presented by the exceptions, are as follows: "That on August 3, 1909, there was delivered to the said defendant, by the El Reno Mill & Elevator Company, for speedy transmission and delivery at Spartanburg to the said plaintiffs, the following paid message: 'T. P. Sims & Sons, Spartanburg, S. C. Offer car best five fifty basis cotton delivered Spartanburg prompt shipment. El Reno M. & E. Co.' That the defendant had notice of the meaning of said message, and its importance, and that a mistake in transmission and delivery would probably result in loss to plaintiffs, if said offer contained therein was accepted. That the said message, as delivered by defendant to plaintiffs, did not contain the word 'fifty,' which meant 50 cents on each barrel of flour, and plaintiffs were led to believe that they were getting an offer of flour at \$5 a barrel. That the plaintiffs accepted the said offer contained in said message as delivered, ordering 150 barrels, and immediately resold the said flour, upon a \$5 basis. That by reason of the negligence, carelessness, and gross inattention of duty of defendant, the said plaintiff was compelled to pay \$75 more than he was led to believe he would, by reason of his acceptance of the offer as delivered as aforesaid."

The defendant denied each and every allegation of the complaint. At the close of the plaintiffs' testimony, the defendant's attorneys made a motion for a nonsuit, which was refused. The defendant did not introduce any testimony. The jury, in the magistrate's court, rendered a verdict in favor of the plaintiffs for \$75, and the defendant appealed to the circuit court, but the appeal was dismissed. The defendant then appealed to the Supreme Court on exceptions, which will be reported.

[1] We will consider exceptions, 1, 2, 5, 6, and 7 together; as the appellant's attorneys in their printed argument state that they raise practically the same question, to wit, whether there was any testimony tending to show that the plaintiffs have been damaged by the error in transmitting the message. The testimony tends to show the following facts: On the 3d of August, 1909, the El Reno Mill & Elevator Company delivered to the defendant for transmission the following telegram addressed to the plaintiffs: "Offer car best five fifty basis cot-

ton delivered Spartanburg prompt shipment." When this telegram was delivered to the plaintiffs, it did not contain the word "fifty," and when the plaintiffs replied by telegram, they supposed they were accepting an offer of the car load of flour, at five dollars per barrel; and, immediately resold it at the price of \$5.50 per barrel. On the 5th of August, 1909, the plaintiffs received another telegram from the El Reno Mill & Elevator Company, notifying them that the offer was to sell the flour at \$5.50, and not \$5, per barrel.

In his testimony, T. P. Sims, one of the plaintiffs, said, "I sold 150 barrels of the flour. I got \$5.50 per barrel. The flour was not shipped at \$5 a barrel. I sold the flour on the basis of the first telegram. It is my custom to sell flour for future delivery, both before and after ordering it. In consequence of the telegram omission, I had to pay \$5.90 per barrel for the 150 barrels sold. I sold the flour the same day I ordered it. I sold the flour to my son B. A. Sims, on the 3d or 4th of August. He lives with me. The flour was not shipped, they stating that the telegraph company made a mistake. I get all my prices by wire and sell by wire." The record contains this statement: "The plaintiff remits all amounts he lost over \$75—the amount sued for."

As there was testimony tending to show that the plaintiffs entered into a contract with B. A. Sims, for the sale of the flour, at the price of \$5.50 per barrel, before they had notice that there was a mistake in the transmission of the message, also that the market value of the flour which they were compelled to buy, in order to fulfill their contract with B. A. Sims, was at least \$5.50 per barrel, it is only necessary to cite the cases of *Bowie v. Tel. Co.*, 78 S. C. 424, 59 S. E. 65, and *Eureka Cotton Mills v. Tel. Co.*, 88 S. C. 498, 70 S. E. 1040, to show that the defendant was liable for the difference between \$5, the price per barrel stated in the telegram delivered to the plaintiffs, and \$5.50, the price per barrel stated in the telegram delivered by the El Reno Mill & Elevator Company, to the defendant for transmission. These exceptions are therefore overruled.

[2] The only other proposition argued by the appellant's attorneys is that, if there were damages, they were merely speculative, and not recoverable, as the defendant did not have notice of them, when the message was delivered for transmission. The cases just cited show that the exceptions assigning error in this respect cannot be sustained. Appeal dismissed.

(136 Ga. 561)

HORKAN v. CITY OF MOULTRIE et al.
(Supreme Court of Georgia. July 13, 1911.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 232*)—CONTRACTS—VALIDITY.

A council of a municipality cannot make a binding contract by which it undertakes to obligate the municipality to furnish "free of charge," for an indefinite time in the future, sufficient water for the closets in a given building situated within the corporate limits, in consideration of the owner of the building allowing the municipality to lay its sewers through his land.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 665; Dec. Dig. § 232.*]

2. MUNICIPAL CORPORATIONS (§ 248*)—CONTRACTS—ESTOPPEL TO DENY VALIDITY.

Such a contract, being ultra vires and void, could not be ratified by the continued use, under the contract, of the sewer through the land by the municipality; nor would the benefit thereby received estop it from subsequently setting up the invalidity of the contract.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 684-686; Dec. Dig. § 248.*]

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by G. A. Horkan against the City of Moultrie and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Shipp & Kline, for plaintiff in error. J. A. Wilkes, for defendants in error.

FISH, C. J. Horkan, in his petition against the city of Moultrie, alleged in substance as follows: In 1907 he was the owner of described strips of land situated within the corporate limits of the defendant city. During that year, and while he was the owner of such land, he agreed to allow the city "to put its sewers along and across said land, * * * in consideration of which the said city of Moultrie agreed to furnish to this petitioner, free of charge, sufficient water and sewer service for the purpose of water-closets in petitioner's building immediately west of said strip of land." In consideration of this contract the city laid its sewers through the land. Petitioner, relying on the contract, put closets in the building. The city used the sewers so laid continuously from 1907, and is now using the same. The city has recently presented to petitioner a bill aggregating a named amount for the water used in the closets for the months of October and November, 1909, and has notified petitioner that, unless the amount of the bill shall be paid at once, the water will be cut off from the closets. Petitioner alleged "that he and his property will be irreparably damaged if said contract is violated," and that the city will violate the contract, unless restrained from so doing by the court. The prayer was for injunction requiring the city

and its officers "to desist from cutting off the water in said building." The petition was dismissed on general demurrer, and the petitioner excepted.

[1] 1. One of the grounds urged by counsel for the defendant in error, in support of the judgment of the trial judge in sustaining the general demurrer to the petition, was that the contract set forth in the petition was void, for the reason there was no limitation fixed as to the time of its continuance. In our opinion this point was well taken. There has been, before various courts, the question of the legal power of a municipal corporation to make a contract or to grant a license extending over a period beyond the official term of the body granting the privilege or the license. The decisions on the question are not uniform. All legislative bodies are limited in their legal capacity in such a manner as not to deprive succeeding bodies of the right to deal with matters involving the same questions as they may arise from time to time in the future, and as the then present exigencies may require. The weight of authority sustains the doctrine that a municipal corporation may make a valid contract to continue for a reasonable time beyond the official term of the officers entering into the contract for the municipality. 3 Abbott's *Municipal Corporations*, § 904. We have found no case, however, that would tend to support a contract made by a city council in behalf of the municipality to furnish water indefinitely to one of its citizens, in consideration of his permitting it to lay a sewer through his land. Succeeding councils would necessarily have the power, we think, to change the water rates from time to time as circumstances might require or justify, in order to obtain sufficient revenue to maintain its waterworks system on the one hand, and, on the other, in order to serve all its patrons at reasonable rates and on equal terms. To allow one council to legally bind the city by a contract of the kind here in question might so tie the hands of its successors as to result in great injury to the municipality and to the public. *Trustees v. City of Jacksonville*, 61 Ill. App. 190. In the case just cited it was held that a city could not bind itself by contract to furnish water for a period of years at a fixed rate. "Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot * * * be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts; but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." 1 Dillon's *Municipal Corporations* (4th Ed.) § 97. Our Civil Code of 1910 (section 892) declares that "one coun-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

city cannot by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government." If this could not be done by an ordinance, of course it could not be done by a contract. Power in a municipality of making and changing, by ordinance, water rates from time to time, whenever necessary to protect the city in its revenues and to enable it to furnish to all on equal terms and at reasonable rates, is a legislative or governmental power, and therefore cannot be legally bargained or bartered away by one council, so as to forever deprive succeeding councils of the right to exercise it. See *Tarver v. Mayor, etc., of Dalton*, 134 Ga. 462, 67 S. E. 929, 29 L. R. A. (N. S.) 183.

[2] The fact that the city has continuously since the execution of the contract, and solely by reason thereof, used the sewer laid through the land of the defendant in error, and is now deriving a benefit under the contract by the use of the sewer, will not amount to a ratification of the contract, or an estoppel upon the city so as to prevent it from contending that the contract was void. *Town of Wadley v. Lancaster*, 124 Ga. 354, 52 S. E. 335.

Judgment affirmed. All the Justices concur.

(136 Ga. 473)

ROBERTS v. HILTON & DODGE LUMBER CO.

(Supreme Court of Georgia. June 21, 1911.)

(*Syllabus by the Court.*)

PUBLIC LANDS (§ 148*)—SURVEYS.

The court did not err in granting a nonsuit.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 148.*]

Error from Superior Court, Camden County; C. B. Conyers, Judge.

Application by H. M. Roberts for a warrant to survey vacant land, opposed by the Hilton & Dodge Lumber Company. Judgment of nonsuit was entered for the Lumber Company, and Roberts brings error. Affirmed.

J. L. Sweat, for plaintiff in error. Crovatt & Whitfield, for defendant in error.

EVANS, P. J. H. M. Roberts made application to the ordinary of Camden county for a warrant to survey a certain tract of land, alleged to be vacant and subject to grant under the headright laws. The Hilton & Dodge Lumber Company caveated the application, and for cause of caveat averred that it was the true and lawful owner of the land, and that the land was not vacant and subject to be granted to applicant under the headright laws. On the trial of the caveat in the superior court, the plaintiff was nonsuited, and he excepts.

In certain parts of the state grants of land by the state were issued under what is known as the "headright system." Each head of a family entitled to a grant of land, preliminary to procuring its issuance by the Governor, was required to make an application for a warrant to survey the land alleged to be vacant and subject to grant under headright to the land court (finally devolved upon the ordinary) of the county where the land was located, who issued a warrant of survey to the county surveyor. This application was subject to caveat by a claimant of the land. All caveats were entered in the office of the county surveyor (later filed with the ordinary), and were returned by that official to the superior court, where the case was tried in the same manner as is usual in all cases for the trial of titles to land. *Roberts v. Palmer*, 14 Ga. 349; Civil Code 1895, §§ 3223-3236. It was necessary that the application and warrant should so describe the land as to identify it, and enable the surveyor, from the description given in the warrant, to enter upon the particular lands to be surveyed. *Miller v. Woodard*, 29 Ga. 753. Unless particularity in description were observed, great confusion in the issuance of grants would result. If no caveat was filed, the grant was issued by the Governor as a matter of course. The proceedings in the land court were recorded in that court, and the grant was recorded in the office of the Secretary of State. The purpose of the law was that only one grant should issue to the same tract of land, and consultation of these records to a large extent prevented duplicate grants. In the trial of a caveat to the issuance of a warrant, the applicant held the affirmative of the issue, inasmuch as such issues were tried under the rules pertaining to the trial of title to land. So, when the caveator denied that the land was vacant and that it was subject to grant under headright, the burden was on the applicant to establish these two essentials to his right to a warrant.

The applicant testified to the effect that the land was vacant and had never been occupied; that he lived within a mile and a half of the tract of land for which he sought a warrant to survey, and that he was familiar with the lines of the adjacent landowners; that the tract contained 400 acres, bounded as described in his application, and composed mostly of swamp land; that he had never examined the grant records in the office of the Secretary of State at Atlanta, nor the records in the ordinary's office of Camden county, but that he had examined copies, from the office of the Secretary of State, of grants to different landowners around the alleged vacant land; that according to the records and papers produced by the agent of the caveator the land was granted neither to the Hilton & Dodge Lumber Com-

pany nor to the Hilton & Dodge Timber Company. The applicant's testimony, which was the only evidence submitted, was insufficient to make a prima facie case that the land had not been previously granted by the state.

Judgment affirmed. All the Justices concur.

(136 Ga. 543)

MAYOR, ETC., OF CITY OF SAVANNAH v. STANDARD FUEL SUPPLY CO.

(Supreme Court of Georgia. July 11, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

Under the evidence, there was no abuse of discretion in granting an interlocutory injunction in this case.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Standard Fuel Supply Company against the Mayor, etc., of the City of Savannah. Judgment for plaintiff, and defendant brings error. Affirmed.

H. E. Wilson and David C. Barrow, for plaintiff in error. R. R. Richards and Saussey & Saussey, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 534)

ALABAMA GREAT SOUTHERN R. CO. v. JONES.

(Supreme Court of Georgia. June 23, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

There was no error requiring a new trial in any of the rulings of the court, nor in the failure to charge, nor in the refusal of the requests to charge. The evidence was sufficient to support the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Dade County; A. W. Flite, Judge.

Action by Flem Jones against the Alabama Great Southern Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. E. Goodhue and Foust, Payne & Tatum, for plaintiff in error. Reuben R. Arnold, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 564)

ENGLEHART-HITCHCOCK CO. v. CENTRAL INV. CO.

(Supreme Court of Georgia. July 13, 1911.)

(Syllabus by the Court.)

1. MORTGAGES (§ 535*)—FORECLOSURE—SALE—EFFECT OF LIEN.

An owner of realty, after conveying the same to secure a debt, contracted for improve-

ments on the property with one who, before making the contract and before making improvements thereunder, knew that proceedings were pending in the federal court to have the property sold under the security deed; and the improvements were completed before the sale under these proceedings. The one making the improvements did not intervene in the foreclosure proceedings, nor claim any of the proceeds arising from the sale, but filed his claim of lien within three months after completing the improvements. At the judicial sale under the foreclosure proceedings, the holder of the debt secured by the deed, and for whose benefit the proceedings were had, purchased the property. Held, the judicial sale divested the property from the lien for improvements, and the purchaser thereat obtained title to the property freed from such lien. Civil Code 1910, § 3365; De Give v. Meador, 51 Ga. 160; Loudon v. Coleman, 59 Ga. 653.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1556; Dec. Dig. § 535.*]

2. MORTGAGES (§ 535*)—FORECLOSURE—SALE—RIGHTS OF CONTRACTOR FOR IMPROVEMENTS.

The one making the improvements could not, after such sale, foreclose his alleged lien against the property, nor obtain against the purchaser a judgment for the contract price or value of the improvements, though the purchaser knew, when he purchased the property, that the owner had contracted for the making of the improvements, and gave his assent to the owner making such contract when made. Durham v. Mayo, 32 Ga. 192.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 535.*]

3. REVIEW OF EVIDENCE.

The evidence was insufficient to authorize a finding that the purchaser at the judicial sale had at any time agreed to be liable for the contract price or value of the improvements, or had in any way become legally liable to pay therefor.

4. AWARD OF NONSUIT.

The court committed no error in awarding a nonsuit at the conclusion of the evidence introduced by the plaintiff.

Error from Superior Court, Fulton County; Geo. Bell, Judge.

Action between the Englehart-Hitchcock Company and the Central Investment Company. From the judgment, the Englehart-Hitchcock Company brings error. Affirmed.

E. Marvin Underwood and Smith, Hammond & Smith, for plaintiff in error. H. A. Etheridge and E. L. Douglas, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 483)

SHARPE v. COLUMBUS IRON WORKS CO.

(Supreme Court of Georgia. June 22, 1911.)

(Syllabus by the Court.)

PLEADING (§ 248*)—PETITION—AMENDMENT—NATURE OF CAUSE OF ACTION STATED.

A petition in an action based on promissory notes given by the defendant to the plaintiff is not amendable by adding thereto an action ex delicto, on the ground that the defendant has fraudulently converted to his own use collateral

notes belonging to the plaintiff, and has refused to pay over the same on demand.

[Ed. Note.—For other cases, see Pleading, Gent. Dig. §§ 686-709; Dec. Dig. § 248.*]

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Action by the Columbus Iron Works Company against J. E. Sharpe. Judgment for plaintiff, and defendant brings error. Reversed.

The substance of the petition was as follows: The defendant is indebted to the plaintiff in a given amount on certain promissory notes made by the defendant and payable to the order of the plaintiff. A copy of one of the notes is attached to the petition, and the other notes are similar, except as to dates and amounts, which are set forth. The defendant delivered to the plaintiff, as collateral security for such notes, the notes of other parties, payable to defendant, which collateral the plaintiff delivered to the defendant upon his written agreement to collect the same and turn over the proceeds to plaintiff, at stated periods, to be applied to the principal indebtedness. The defendant executed to the plaintiff a chattel mortgage, as well as a mortgage on realty to secure the payment of the principal indebtedness. Defendant is insolvent. He has collected a large amount on the collateral notes, and has admitted that he has converted the same to his own use, except a given amount. He has removed the personalty, on which the mortgage was given, beyond the limits of the state, and by consent of the plaintiff has sold the same upon condition that he would pay over the proceeds on his indebtedness to the plaintiff, but has so paid only a part of such proceeds. The plaintiff has demanded of the defendant the proceeds of the collateral notes collected by him, and the delivery to the plaintiff of the collateral notes uncollected; but the defendant has refused to comply with such demands. The conduct of the defendant in appropriating the proceeds of the collateral notes to his own use and in refusing to turn over to the plaintiff the remaining collateral notes, and his conduct in disposing of the mortgaged personalty and converting the proceeds to his own use, and in refusing to turn same over to the plaintiff, constituted a fraud and wrong against the plaintiff. The prayers are for judgment for the balance due on the notes given by the defendant to the plaintiff, for injunction restraining the defendant from making any further collection on the collateral notes, for the appointment of a receiver, and for process. It does not affirmatively appear from the record that a receiver was appointed; but the record shows that the court approved the report of a receiver, and ordered that the proceeds of the sale of the property made by the receiver, less a given amount

given him for his services, be credited on the notes given by the defendant to the plaintiff.

The defendant filed a plea to the effect that his petition in bankruptcy was pending, and that the debt, the foundation of plaintiff's action, was scheduled, the plaintiff named as one of his creditors, and that he was seeking a discharge from such debt. The plaintiff thereafter offered an amendment, setting forth the amount of the collateral security notes, and also setting forth the description of one of the tracts of lands which was mortgaged to secure the notes sued on, and amended the prayers of the petition, so as to ask for the foreclosure of the mortgage on realty as to the lot of land described, and for a sale of such land in order that the proceeds might be applied to the payment of the principal indebtedness due by the defendant, and that a decree be rendered declaring that the conversion of the collateral notes described in the original petition was a violation of the trust reposed in the defendant by the plaintiff, and a fraud upon him, and that plaintiff have a judgment or decree for the value of the same. The defendant demurred to the amendment and moved to strike the same, upon the ground, among others, that by the amendment the plaintiff sought to recover a verdict for the amount of the collections made by the defendant on the collateral notes and alleged to have been fraudulently converted by him to his own use, thus seeking to add a cause of action *ex delicto* to one arising *ex contractu*. The demurrer to the amendment was overruled, and the court refused to strike the same. The plaintiff introduced evidence showing the value of the collateral notes, the amount of the collections thereon which had been paid to the plaintiff, and showing the balance due on the notes executed by the defendant to the plaintiff. The defendant introduced no evidence. There was a verdict in favor of the plaintiff for \$8,545.55, which was the balance due on such last-mentioned notes, as shown by the evidence in behalf of the plaintiff. The jury further found: "We also find that the defendant did fraudulently convert to his own use the sum of \$13,979.03." Judgment was entered, reciting the verdict, and directing that the plaintiff recover of the defendant \$8,545.55 generally, that the mortgage on the described realty be foreclosed, and that the plaintiff recover of the defendant said sum, to be levied on the mortgaged premises. The defendant filed a bill of exceptions, assigning error upon the refusal of the court to sustain the demurrer to the amendment, and to strike the same, and upon the final judgment rendered by the court.

T. T. Miller and Hatcher & Hatcher, for plaintiff in error. J. H. Martin and A. W. Cozart, for defendant in error.

(136 Ga. 542)

FISH, C. J. (after stating the facts as above). In the view we take of the case it is necessary to pass upon but one of the points raised by the assignments of error. This point is: Did the court err in overruling the ground of the demurrer to the amendment, and of the motion to strike the same, that the amendment sought to add a cause of action *ex delicto* to one arising *ex contractu*? In our opinion the court did err in this respect. In the original petition the plaintiff sought to recover the balance due on certain promissory notes executed by the defendant and payable to the plaintiff's order. While it was alleged in the original petition that the defendant had delivered to the plaintiff, as collateral security for such notes, other notes payable to the defendant, which latter notes the plaintiff had redelivered to the defendant under an agreement that he was to collect the same and turn over the proceeds to the plaintiff, and that the defendant had made collections of such collateral notes and had refused upon demand to pay the same to the plaintiff, there was no prayer in the original petition for a recovery for the collections. Such allegations may have been pertinent in view of the prayers for injunction and a receiver, but they would not authorize an amendment to the petition praying for a recovery for the value of the collateral notes on the ground that they had been fraudulently converted by the defendant to his own use. The amendment set forth a cause of action essentially sounding in tort, that is, the fraudulent conversion by the defendant of collateral notes belonging to the plaintiff; and, of course, it needs no citation of authority to sustain the proposition that such a cause of action could not be joined in a case of this character in an action based on contract.

Judgment reversed. All the Justices concur.

(136 Ga. 542)

WATSON v. STATE.

(Supreme Court of Georgia. July 11, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

There being no complaint that any error of law was committed upon the trial, and the evidence being sufficient to authorize the verdict, the court did not err in refusing to grant a new trial.

Error from Superior Court, Jasper County; Jas. B. Park, Judge.

John Watson was convicted of crime, and brings error. Affirmed.

Greene F. Johnson, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

GRANT v. STATE.

(Supreme Court of Georgia. July 12, 1911.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

The evidence is sufficient to support the verdict, which has the approval of the trial judge; and, as no error of law is complained of, the judgment denying a new trial is affirmed.

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Dan Grant was convicted of crime, and brings error. Affirmed.

J. D. Sparks, for plaintiff in error. J. H. Thomas, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

EVANS, P. J. Affirmed. All the Justices concur.

(136 Ga. 404)

McCRAV v. HARRISON.

(Supreme Court of Georgia. June 15, 1911.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS (§ 102*)—COMPUTATION OF LIMITATIONS—EXISTENCE OF TRUST.

Elizabeth McCray, as executrix of the will of Seleta L. Harrison, brought an action, returnable to the September term, 1909, of Hancock superior court, against Maggie L. Harrison, as administratrix of the estate of W. T. Harrison. The substance of the petition was as follows: The plaintiff's testatrix was a legatee under the will of her father, W. D. Harrison. W. T. Harrison, her brother, qualified and acted as sole executor of such will until January, 1900. Under a decree rendered in October, 1901, in two suits for an accounting and settlement, brought against W. T. Harrison, respectively, by two of the sisters of plaintiff's testatrix, in the superior court of Washington county, which were consolidated and tried together, it was in effect adjudged that such testatrix, as one of the five legatees under the will of her father, W. D. Harrison, was entitled to one-fifth of the proceeds of the sale of certain lands in Johnson county, which had been sold by W. T. Harrison by agreement of such legatees, and that W. T. Harrison had failed, on demand, to account to plaintiff's testatrix for her share in such proceeds. The petition alleged that the effect of such decree "was to wind up finally the affairs of the estate of W. D. Harrison; the only duty required of W. T. Harrison being the duty of turning over the proceeds of the sale of said Johnson county lands to each of the heirs at law, and this being a duty which he owed individually, he having held it up to then, claiming the right to hold the same under said will." The petition further set forth that W. T. Harrison, the defendant's intestate, was indebted to the plaintiff's testatrix a given sum as her portion of the rentals of the land belonging to the legatees of her father's estate for the years 1901 and 1902, together with her portion of the interest on such rentals from 1902. Held that, under the allegations of the petition, W. T. Harrison, the defendant's intestate, did not, after the decree against him in Washington superior court in his individual capacity, as shown by a copy of such decree attached as an exhibit to the petition, sustain a fiduciary relation towards the plaintiff's testatrix, and therefore the rule as to the limitation of actions in cases of subsisting

trusts was not applicable, and under the ordinary statute of limitations, it not appearing that the case set forth fell within any of the exceptions thereto, the plaintiff's cause of action was barred, and the court did not err in sustaining a demurrer to the petition on that ground.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 495-505; Dec. Dig. § 102.*]

Error from Superior Court, Hancock County; H. G. Lewis, Judge.

Action by Elizabeth McCray, as executrix of the will of Seleta L. Harrison, against Maggie L. Harrison, as administratrix of the estate of W. T. Harrison. From a judgment sustaining a demurrer to the petition, plaintiff brings error. Affirmed.

R. L. Merritt, for plaintiff in error. W. H. Burwell and R. H. Lewis, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(136 Ga. 564)

CRUMMEY v. SPELL.

(Supreme Court of Georgia. July 13, 1911.)

(Syllabus by the Court.)

NEW TRIAL (§ 125*)—MOTION—STATEMENT OF GROUNDS.

The only assignment of error contained in the bill of exceptions is that the court erred in overruling the motion for a new trial. The grounds of the original motion for a new trial were that the verdict was contrary to law and the evidence and without evidence to support it. The only ground of the amendment to the motion was that the verdict was contrary to a portion of the charge set out in the amendment, which ground, under many rulings of this court, amounted merely to the general ground that the verdict was contrary to law. The verdict was authorized by the evidence, and the court did not err in refusing to grant a new trial.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 125.*]

Error from Superior Court, Wayne County; T. A. Parker, Judge.

Action between E. Crummev and E. T. Spell. From the judgment, Crummev brings error. Affirmed.

James W. Poppell and Wilson, Bennett & Lambdin, for plaintiff in error. Jas. R. Thomas, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(136 Ga. 586)

WHEELER et al. v. MOZLEY et al.

(Supreme Court of Georgia. July 13, 1911.)

(Syllabus by the Court.)

DISMISSAL OF APPEAL—FAILURE TO TRANSMIT TRANSCRIPT.

This case comes within the ruling pronounced in Wheeler v. Crawford, 135 Ga. 148, 69 S. E. 22, and Brunswick Book Co. v. Torsch

Co., 112 Ga. 537, 37 S. E. 737, and the bill of exceptions is dismissed.

Error from Superior Court, Cobb County; J. P. Brooke, Judge pro hac.

Action between D. M. Wheeler and others and J. E. Mozley and others. From the judgment, Wheeler and others bring error. Dismissed.

J. S. James, for plaintiffs in error. H. B. Moss and D. W. Blair, for defendants in error.

EVANS, P. J. Dismissed. All the Justices concur.

(136 Ga. 541)

THIGPEN v. THIGPEN et al.

(Supreme Court of Georgia. July 11, 1911.)

(Syllabus by the Court.)

BASTARDS (§ 102*)—INHERITANCE FROM MATERNAL GRANDFATHER.

Plaintiff brought suit to recover a distributive share in the estate of his maternal grandfather, who died subsequently to the date of the death of plaintiff's mother. It appeared from the evidence that the plaintiff was a bastard. Being such, he was not capable of inheriting from the grandfather; and consequently the court did not err in holding that he could not recover, and in directing a verdict accordingly. Civil Code 1910, § 3029.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 264, 255; Dec. Dig. § 102.*]

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by L. A. Thigpen against J. M. Thigpen and others. From the judgment, L. A. Thigpen brings error. Affirmed.

Saffold & Larsen and Williams & Bradley, for plaintiff in error. Smith & Kirkland, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(136 Ga. 516)

HILLYER v. ROBINSON.

(Supreme Court of Georgia. June 23, 1911.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§ 87*)—RESCISSION—RETURN OF BENEFITS.

Where, in a controversy between the representative of the estate of a decedent and another, the latter admits that he is indebted to the estate, and the representative of the estate contends for a larger sum, and both parties, by way of compromise and settlement of their conflicting contentions, enter into an agreement for its effectuation, authority from the court of ordinary is sought and obtained, and the amount agreed upon is paid over to the representative of the said estate, the latter cannot subsequently, without paying back at least such an amount as was in excess of the admitted indebtedness, maintain a suit to recover from a party indebted to the estate another amount, which she insists represents the true amount of the indebtedness to the estate of her intestate, although such representative was induced to execute the

compromise agreement by the fraudulent representations of the debtor as to the true amount of his indebtedness to the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 384-392; Dec. Dig. § 87.*]

Error from Superior Court, Fulton County; Geo. Bell, Judge.

Action by Pauline E. Robinson against S. L. Hillyer. Judgment for plaintiff, and defendant brings error. Reversed.

Mrs. W. E. Robinson, administratrix of the estate of her deceased husband, W. E. Robinson, brought an equitable petition against Shaler L. Hillyer to recover a certain sum which she claimed as due by the defendant. Petitioner alleged that at the time of the death of her husband there were outstanding two policies of insurance on his life, aggregating the sum of \$5,000; that prior to his death he had assigned these policies to the defendant in terms which authorized him to collect from the insurance company the full amount which might become due on the policies upon the death of Robinson, and out of the money so received to retain for his (defendant's) own use the amount of any indebtedness of Robinson to the defendant, and to pay over the balance to the beneficiary named in the policies, which was the estate of the deceased; that Robinson died in August, 1908, and shortly thereafter the insurance company paid over the sums due on the policies to the defendant; that it was not until after the death of her husband that petitioner learned that these policies had been assigned to the defendant to secure an indebtedness of the deceased, and on offering to adjust this indebtedness she was informed by the defendant that her husband owed him \$3,696, represented by 14 promissory notes; and that, believing the representations of the defendant to be true, petitioner agreed to settle this indebtedness for the sum of \$2,460, thereby, as she believed, saving for the estate the sum of \$2,000. Petitioner charges that the representations of the defendant as to her husband's indebtedness to him were false and fraudulent, and made for the purpose of defrauding her and her children out of a large sum of money. She charges that at the time of signing said notes her husband was induced to sign the same without any consideration other than certain small sums of money advanced to him, and that the entire indebtedness to the defendant, both for money advanced and premiums paid on the policies, did not in fact exceed the sum of \$500, and that the taking of the notes for the several amounts, one being for the sum of \$3,000, "was a scheme and effort to enforce fraudulently a usurious contract, * * * and defendant was thus enabled to collect and did collect from the estate usury to the amount of \$1,850." Petitioner charges that, "to further cloak his deceit and

fraud, said Hillyer caused your petitioner to file in the court of ordinary of said state and county a petition to authorize said settlement, a copy of which is hereto attached," and that the ordinary, upon these false representations (innocently made by petitioner), approved said settlement. Petitioner prays that this judgment of the court of ordinary confirming the settlement be set aside, and that she have judgment against the defendant for the sum of \$1,850. The defendant filed a general and a special demurrer, which were overruled, and he excepted.

Kontz & Austin and Candler & Alexander, for plaintiff in error. Jackson & Orme, for defendant in error.

BECK, J. We are of the opinion that the court below erred in not sustaining the general demurrer to the petition in this case. There are no facts alleged in the declaration which take the case without the ruling made in case of *East Tennessee, Virginia & Georgia Ry. Co. v. Hayes*, 83 Ga. 558, 10 S. E. 350. Upon the showing made by Mrs. Robinson in her petition, a large part of the sum which she received from Hillyer, the defendant in error, was paid over to her to effectuate a compromise agreement between her and Hillyer; and while, under the allegations in the petition, she was induced to enter into the agreement referred to by fraud upon the part of the other party, and under such circumstances and representations as render the agreement voidable, and one which she would have the right to rescind, before she can exercise her right to have that agreement rescinded and set aside, something must be done by her; that is, she must restore the status quo as it existed previously to the making of the agreement under which she received the sum of \$2,460. In her petition to the court of ordinary for authority to make the settlement between herself and Hillyer, she represented to that court that she was saving for the estate some \$2,000. In other words, a controversy existed between her and Hillyer as to the amount which Hillyer was due the estate of her deceased husband. She believed the amount so due to be larger than the amount admitted by Hillyer. Her contentions and those of Hillyer were in conflict. They agreed upon a settlement. Authority to make that settlement was granted by the court of ordinary. Before that settlement and compromise can be rescinded and set aside, under the ruling in the case above referred to, at least the amount in excess of what Hillyer admitted to be due the estate of Robinson, deceased, would have to be restored. The case which we have cited above, and other decisions of this court which might be cited, in addition to those cited in the *Hayes Case*, are conclusive against the

defendant in error upon the question involved in this case.

The discussion in the case last referred to and the reasons stated, together with the authorities cited in that decision, render further discussion of the question here unnecessary.

Judgment reversed. All the Justices concur.

(136 Ga. 484)

WESTERN & A. R. CO. v. HAIG & PURYEAR.

(Supreme Court of Georgia. June 22, 1911.)

(Syllabus by the Court.)

CARRIERS (§ 44*)—SWITCHING CARS—REFUSAL—RIGHT OF ACTION.

The mere fact that one railroad company had been accustomed in behalf of a firm of merchants to switch to its side track, to be unloaded for the consignees, cars of ice brought to destination by another railroad company, did not make the former liable in damages to the firm merely because of a refusal to continue the practice of switching cars in this way for the firm, with or without notice to it that the practice would be discontinued, where it does not appear that because of the practice, and a belief that it would be continued, the firm did something by reason of which it suffered injury or loss upon a discontinuance of the practice without reasonable notice, and that no such notice was given.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120-122; Dec. Dig. § 44.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by Haig & Puryear against the Western & Atlantic Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

The defendants in error (hereinafter called the plaintiffs) sued the plaintiff in error (hereinafter called the defendant) for actual and punitive damages, making, among other allegations, substantially the following: The plaintiffs have been in the "meat market business" in Dalton since March, 1908, and have shipped to Dalton every week four or five cars of ice to be used in this business. It had been the practice and custom of the defendant (a railroad corporation under the laws of this state) since the plaintiffs began business in March, 1908, up to July 20, 1909, when cars of ice consigned to the plaintiffs reached Dalton over the Southern Railway, to take the cars and place them on a side or spur track of the defendant, "in place for unloading at" the warehouse and place of business of the plaintiffs, receiving the sum of \$2 for each car thus handled. On July 20, 1909, the defendant, "without notice, failed and refused to receive any car or cars from the said Southern Railway, consigned to your petitioners. That defendant failed to give notice a reasonable time before failure to receive said cars, even if it had the right to refuse at all to receive

said cars." On July 20, 1909, the defendant received from the Southern Railway a car of ice consigned to the plaintiffs, kept it 16 hours, and refused to deliver it to the plaintiffs, and after the expiration of the 16 hours returned the car to the Southern, "saying that they did not intend to deliver any more freight to petitioners, coming over any other road. This was done through G. W. Orr, defendant's authorized agent at Dalton, Ga. Petitioners allege that by reason of holding this car, and failure to deliver same, 3600 pounds of ice melted before petitioners could haul the same out, to petitioners' damage \$20. Petitioners were forced to haul said ice to warehouse to save said shipment, which cost them \$5. The \$2 were tendered, as usual, to said defendant." The remaining allegations of the petition, beginning with paragraph 5, are as follows:

"Petitioners further show that on the 22d, 24th, 28th, and 31st days of July, 1909, and the 4th, 9th, 10th, 14th, 17th, 18th, 21st, 23d, 26th, and 28th days of August, 1909, and on each of said days, a car of ice was tendered to said defendant, together with the usual and customary freight charges, which said ice was consigned to petitioners and shipped to Dalton from Southern Railway. Petitioners' loss on said cars was: Hauling said [ice] from Southern depot \$5, and loss in weights of ice, occasioned by exposing the same to weather in hauling same, \$2.50 on each and every car, to damage of petitioners \$105.

"(6) Petitioners further show that the said defendant, by its authorized agent aforesaid, maliciously refuses to receive and deliver any freight consigned to petitioners, although the usual and customary freight charges are tendered to said defendant, and although the said defendant receives from other railroads freight consigned to others in said city of Dalton, and to competitors of petitioners, to wit, Bowen Bros. and others; and by reason of said wrong and malicious conduct of said defendant, done for the purpose of annoying and harassing petitioners and damaging them in their said business, said defendant has injured and damaged petitioner \$3,000, said acts being attended with aggravating circumstances, both in the acts and the intention, said defendant is liable to punitive damages, and they ask judgment for the same.

"(7) Petitioners further show that their said warehouse was built by petitioners on the line of defendant, with consent of defendant, and said defendant is in duty bound to deliver freight to petitioners, and would have done so but for the malice toward petitioners, actual on the part of said agent, trying to vent his malice and personal spleen on petitioners, but pretending to try, by colluding with the competitors of petitioners, to force petitioners to purchase exclusively

in Chattanooga, so as to get all the freight for shipment, all of which is fully and well known to the defendant. Wherefore petitioners pray that process may issue," etc.

An amendment was made to the petition, wherein it was alleged that the warehouse referred to "is the brick just in the rear of plaintiffs' meat market, and the one just in rear and between the brick warehouse and W. & A. R. R., or close to track of defendant, and just north of freight depot of defendant. Amends paragraph 5 of petition, and alleges the cars mentioned in said paragraph were tendered by the plaintiffs and freight agent of Southern Railway Company, R. C. Craig, by direction of plaintiff, and also by these plaintiffs; said cars were tendered on the arrival of each car, on dates named in said paragraph, and at the place said defendant is accustomed to receive such cars, and had been doing so for years, in the railroad yards in Dalton, Ga.; said tender of cars and charges were made to the agent, G. W. Orr, at Dalton, Ga., and said agent being authorized to receive the same; said usual amount so paid and tendered was \$2 per car."

The defendant filed a demurrer to the petition, as follows:

"Defendant, the Western & Atlantic Railroad Company, demurs to the petition served upon it in this case, and moves the court to dismiss the same: (1) Defendant demurs to that portion of paragraph 3, alleging that plaintiffs' place of business and warehouse situated on the side or spur track of this defendant, and that defendant had been accustomed to place cars of ice for unloading at said warehouse and place of business, and moves the court to strike the same, because the same does not sufficiently identify what warehouse and place of business is therein referred to, nor does it describe the same so that this defendant can identify the locality in question. (2) Defendant demurs to paragraph 5, and moves the court to strike the same, because no actionable breach of duty is therein alleged, and no facts giving a right of action are therein set out. It is not alleged who tendered the cars referred to to this defendant, nor where, nor when, nor how the tender was made, nor who tendered the usual and customary freight charges, nor to whom, nor when, nor where such tender was made, nor what amount was so tendered. (3) Defendant demurs to paragraph 6, and moves the court to strike the same, because no facts are therein alleged giving plaintiffs any right against this defendant, or aggravating the damages, or any right which it may otherwise have, and because the same is immaterial and irrelevant."

The demurrer was overruled, and upon the trial of the case a verdict was rendered "in favor of the plaintiff for \$125 actual damages, \$625 punitive damages." In the bill of exceptions filed by the defendant, the order

the order overruling its demurrers are assigned as error.

Tye, Peeples & Jordan and Maddox, McCamy & Shumate, for plaintiff in error. W. E. Mann and W. C. Martin, for defendants in error.

HOLDEN, J. (after stating the facts as above). Haig & Puryear sued the Western & Atlantic Railroad Company for actual and punitive damages for a failure to deliver, for unloading by the plaintiff, cars of ice shipped to Dalton, Ga., to the plaintiffs, over the Southern Railway, on a side track or spur track of the defendant near the warehouse and place of business of the plaintiffs. It was alleged that it had been the practice and custom of the defendant, since March, 1908, down to July 20, 1909, to receive and deliver such cars of ice for \$2 per car, but that on July 20, 1909, the defendant received from the Southern Railway a car of ice and refused to deliver it on the side track, but kept it 16 hours, after which time it returned the car to the Southern Railway, saying that it would not thus deliver any more cars of ice consigned to the plaintiffs not brought to Dalton on the road of the defendant. Plaintiffs were damaged by reason of the ice melting and expense incurred in hauling it. It was further alleged, in paragraph 5 of the petition (which paragraph is copied in the statement of facts), that on named dates in July and August, 1909, a car of ice consigned to the plaintiffs and brought to Dalton by the Southern Railway was tendered to the defendant, with the customary freight charges, and plaintiffs were damaged because of the ice melting and expense incurred in hauling the same from the Southern depot. The other allegations of the original petition mainly deal with the liability of the defendant for punitive damages. The receipt of the car by the defendant on July 20, 1909, in accordance with its custom, for delivery on its side track for unloading by the plaintiffs, and its detention, refusal to deliver, and return of the car to the Southern, thereby causing the ice to melt, would give the plaintiff a right of action for damages. However, proof of the allegations with reference to the actual damages sustained, and punitive damages because of a failure to receive from the Southern the cars referred to in the fifth paragraph of the petition and deliver them for unloading at the side track of the defendant, would not authorize a recovery of either actual or punitive damages.

Besides being a suit to recover damages with respect to the car of ice received by the defendant on July 20, 1909, the suit was one to recover damages because it had been the practice and custom of the defendant from March, 1908, to July 20, 1909, to receive cars of ice consigned to the plaintiffs and brought to Dalton by the Southern Railway, and deliver them for unloading on the side track near the place of business and warehouse of

the plaintiffs, and because on named dates in July and August, 1909, the defendant refused to thus receive and deliver cars consigned to the plaintiffs and brought to Dalton by the Southern on these days, especially in view of the fact that the defendant did not give the plaintiffs reasonable notice before these dates of its intention to discontinue the practice and custom of thus receiving and delivering such cars. When cars of ice consigned to the plaintiffs were brought to Dalton by the Southern, they had reached their destination, and, independently of any rule of the Railroad Commission of this state, there was no duty on the Western & Atlantic Railroad Company to take these cars and place them on its side track for unloading by the consignees, where this company was under no duty to do so because of a contract, or on account of being a common carrier with respect to such work, or some other special reason. The defendant did not bring the cars to their destination, and there was no statutory or common-law duty on it to place on its side track for unloading cars of ice brought to their destination by another railroad. Outside of the rules of the Railroad Commission, no duty rests on one railroad to take cars brought to their destination by another railroad and switch them at the same point to a side track of the former, where it is more convenient for the consignee to unload; and if it was in the habit of doing so for one person, it could discontinue the practice, with or without giving notice of an intention to cease service of this kind for such person, where it does not appear that because of the practice, and a belief that it would be continued, such person did something by reason of which he suffered injury or loss upon a discontinuance of the practice without reasonable notice to him that it would be discontinued, and that no such notice was given.

The petition alleges that the defendant gave the plaintiffs notice of an intention to discontinue the practice on July 20 or 21, 1909, but it did not give the plaintiffs reasonable notice of such intention. Without alleging that they sustained loss because of a discontinuance of the practice, on account of having done something in reliance on the practice and belief that it would be continued, the discontinuance of the practice without any notice whatever would give no right of action for damages. There is no allegation that the plaintiffs incurred any expense or did anything because of any reliance on the practice and custom referred to and a belief that such practice and custom would be continued. The plaintiffs do allege that they built a warehouse "on the line of the defendant, with the consent of defendant"; but it is nowhere alleged when or for what reason they built the warehouse, or that there was any contract with the defendant with reference to the erection of the warehouse. There is no statutory or common-law duty

on the defendant to receive cars brought to their destination at Dalton by the Southern and place them on the former's side track for unloading by the consignee, and it was not alleged that the plaintiffs had any contract with the defendant by virtue of which it was bound to receive and deliver on its side track cars of ice brought to Dalton by the Southern Railway, nor are there any allegations that the defendant was a common carrier with respect thereto. A practice or custom of the defendant in doing this for the plaintiffs would not make it a common carrier with respect to this service, and the allegations in paragraph 6 of the petition that "defendant receives from other railroads freight consigned to others in said city of Dalton and to competitors of petitioners, to wit, Bowen Bros. and others," were made only to show the plaintiffs' right to punitive damages, because defendant "maliciously refuses to receive and deliver" cars of ice consigned to plaintiffs; the right to recover actual damages being based solely on the contention that the defendant discontinued a practice and custom with the plaintiffs without giving the plaintiffs reasonable notice of its intention to do so. There can be no recovery of punitive damages where there is no right to recover actual or nominal damages. This was not a suit based on discrimination or conspiracy, though there were some general charges of malice in connection with the claim to recover punitive damages. It was not to recover under any rule of the Railroad Commission. Nor did the allegations show that as to switching in its yard the defendant held itself out as a common carrier, so as to come under Civil Code 1910, §§ 2711, 2712.

It is therefore unnecessary to discuss any such matters. The case is decided where the pleader put it, on the practice which had previously existed between the plaintiffs and the railroad. The allegations as to the car load of ice actually received were not demurred to. The demurrer to the fifth paragraph of the petition, on the ground that "no actionable breach of duty is therein alleged, and no facts giving a right of action are therein set out," should have been sustained. After the petition was amended, this paragraph was not subject to the other grounds of the demurrer thereto, nor was the third paragraph subject to the grounds of demurrer urged against it. The demurrer to the sixth paragraph should have been sustained. There were introduced in evidence certain rules of the Railroad Commission, making it the duty of one railroad to accept cars from any connecting road tendered it within a specified time and place them at an accessible point on any side track on its line designated by the "shipper, or consignee at interest." Even if damages other than the penalty provided by these rules for a failure to comply therewith could be recovered in a suit based on a violation of the rules, no recovery could

be had in this case because of a violation of these rules by the defendant, as the suit was based on a supposed liability of the defendant independent of any duty imposed on it by the rules of the Railroad Commission. *Western & Atlantic Railroad Co. v. Exposition Cotton Mills*, 81 Ga. 522, 7 S. E. 918, 2 L. R. A. 102. We deem it unnecessary to deal with the assignments of error relating to the charges of the court and the failure of the court to charge, of which complaint is made. Certain demurrers should have been sustained, as hereinbefore indicated; and the verdict should be set aside.

Judgment reversed. All the Justices concur.

(136 Ga. 376)

WRIGHT v. GAMBLE.

(Supreme Court of Georgia. June 18, 1911.)

(Syllabus by the Court.)

OFFICERS (§§ 50, 72*)—REMOVAL FROM OFFICE—POWER.

Where the tenure of an office is not prescribed by law, the power to remove is an incident to the power to appoint. In such case the appointee holds at the pleasure of the appointing power, although it attempts to fix a definite term; and no formalities, such as the preferring of charges or the granting of a hearing to the incumbent, are necessary to the lawful exercise of the authority of removal. The provision of Civil Code 1910, § 264, par. 3, is not applicable to such a case.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 69, 102; Dec. Dig. §§ 50, 72.*]

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Quo warranto by J. B. Gamble against Tate Wright. Judgment for relator, and defendant brings error. Reversed.

An act of the General Assembly, approved December 15, 1897 (Acts 1897, p. 387), created a board of commissioners of roads and revenue for the county of Clarke. Under the provisions of the act the grand jury, at the next regular term of the superior court of Clarke county after the passage of the act, were to elect three citizens and resident freeholders who should constitute a board, one of whom should be elected for one year, one for two years, and one for three years. Each succeeding grand jury at the spring term of such court should elect one commissioner, who should hold office for three years, unless removed as provided by the act. The act declared "that the board of commissioners shall elect their own clerk, with such pay as the board may allow"; his duties being prescribed by the act. The clerk, before entering upon the discharge of his duties, was required by the act to take the same oath prescribed for the commissioners, and to enter into a bond with good security to faithfully perform the duties of the office of clerk. The act fixed no term of office for the clerk. In November, 1909,

the board passed a resolution fixing the term of the clerk of the board at two years, beginning with the first Tuesday in January, 1910, and providing that a clerk should be elected under this resolution at that time for the ensuing two years, and subsequently on the same date every two years, unless a vacancy should occur. In accordance with this resolution John B. Gamble, who had been clerk for some years, was on the first Tuesday in January, 1910, elected clerk of the board, and thereafter assumed the discharge of the duties of the position, taking possession of the office and all books, papers, etc., connected therewith. At a regular meeting held on the first Tuesday in May, 1910, being the 3d day of the month, the board passed the following resolution: "Resolved, by the board of commissioners of roads and revenue for Clarke county, in regular monthly session assembled: (1) That the position of clerk of said board is hereby declared vacant. (2) That the action of said board taken at the January meeting of 1910, in electing John B. Gamble clerk of said board, be and the same is hereby revoked from this day. (3) That the board proceed to elect a clerk, who shall begin the discharge of his duties at once."

Subsequently, on May 9, 1910, the commissioners in regularly called session elected Tate Wright as clerk. Gamble refused to recognize the authority of the board to pass the resolution vacating the office of clerk and revoking the action of the board in electing him to that office. The books and papers of the office of clerk having been turned over to the commissioners by Gamble, in obedience to an order of the judge of the superior court, passed in a proceeding brought by the commissioners against Gamble, were by the commissioners delivered to Wright after his election. Thereafter Gamble presented to the judge of the superior court an application for leave to file an information in the nature of a writ of quo warranto to try the question of title to the office of clerk of the board of commissioners. Such leave was granted, and the information duly filed. Respondent, Wright, filed both a demurrer and an answer to the information. The applicant, Gamble, filed a demurrer to portions of the answer of the respondent. After a hearing, the judge passed an order overruling the demurrer to the information, and sustained the demurrer to certain portions of the answer, holding that the pleadings, after these rulings, raised no issue of fact. Judgment was entered, declaring that Gamble was the lawful clerk of the board of commissioners, and was entitled to the possession of the office and the books and papers thereof, and that Wright was not the lawful clerk of the board, and was not entitled to the possession of the of-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

office or the books and papers thereof. It was further adjudged that the respondent, Wright, deliver possession of the office and all books, papers, etc., connected therewith, to the applicant, Gamble, and that the respondent pay the costs of the proceedings. To these rulings the respondent excepted.

Jno. J. Strickland, for plaintiff in error.
W. M. Smith and Cobb & Erwin, for defendant in error.

FISH, C. J. (after stating the facts as above). The controlling question presented by the record is whether the board of commissioners of roads and revenue of Clarke county, created by an act of the General Assembly approved December 15, 1897 (Acts 1897, p. 389), the act providing that commissioners "shall elect their own clerk with such pay as the board may allow," had the power, in the absence of any law fixing the term of office of the clerk, to prescribe, by resolution duly passed, the tenure of the office of the clerk at two years, and having subsequently elected a clerk for that time, could remove the incumbent before the expiration of that term, without preferring charges against him and giving him an opportunity to be heard, and to elect another clerk in his stead? We deem it unnecessary to pass upon any other question presented by the record. It seems now to be the universally accepted rule that, where the tenure of the office is not prescribed by law, the power to remove is an incident to the power to appoint. 29 Cyc. 371; 23 A. & E. Enc. Law, 405; Mechem, Pub. Off. § 445; Throop, Pub. Off. § 304 et seq. In such a case no formalities, such as the preferring of charges against, or the granting of a hearing to, the incumbent, are necessary to the lawful exercise of the discretionary power of removal. 29 Cyc. 1408, and numerous cases there cited. See *Coleman v. Glenn*, 103 Ga. 458, 30 S. E. 297, 68 Am. St. Rep. 108, and *Gray v. McLendon*, 134 Ga. 224, 67 S. E. 859. Counsel for the defendant in error in the case now before us concede in their brief that, if the board of commissioners of roads and revenue of Clarke county had not fixed the tenure of office of their clerk, then the power to remove the defendant in error as clerk would have existed as an incident to the power of appointment in the board; but they contend that as the board had, as authorized by law, divested itself of such arbitrary power of removal, it could not revert itself with this power during the time for which the defendant in error was elected clerk under the resolution fixing the term of such office. The pivotal point of the case is whether the board had the power to fix the tenure of its clerk. If it had such authority, then Gamble, the defendant in error, who had been elected by the board for the term of two years, was not removable

by it before the expiration of this term, without charges, notice, and a hearing. On the other hand, if the board was without power to prescribe a fixed term for its clerk, then Gamble, notwithstanding he had been elected for a purported fixed term, held the office at the pleasure of the board, and was removable at its discretion, without the preferring of charges, notice, or the benefit of a hearing.

The question under consideration has been passed on by several courts of last resort. In *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234, it was held: "The grant of power to appoint to public office, where no term of office is fixed by law, carries with it as an incident the absolute power of removal at any time, without notice or charges or a hearing, and without the cause for removal being inquired into by any court. Such power vested in a board cannot be limited by any action taken by such board, whether by appointing the officer for a fixed term, or by by-laws restricting the power of removal to cases where cause for removal exists." In that case Moore applied for a mandamus to compel Archibald to turn over to the applicant the possession of the office of Superintendent of the State Hospital for the Insane, to which office Archibald, the defendant, had been appointed by the trustees of that institution for the term of one year, and from which he had been arbitrarily removed before the expiration of his term by the board of trustees, at a meeting called for that purpose, and at which Moore was appointed in Archibald's place (facts similar to those in the instant case). Prior to the appointment of Archibald, the board had passed by-laws making the superintendent and other named subofficials "subject to removal for good and sufficient cause, at the pleasure of the board of trustees," and that "charges against officers of the institution must be submitted in writing, and that a copy thereof should be furnished the officer against whom the charge is made at least one month before it is acted upon." Corliss, J., in pronouncing the opinion for the court, cogently said: "The by-laws which they [the trustees] are authorized to pass must not be repugnant to the laws of the state. The statute by necessary implication confers upon the board unlimited power of removal. This manifests the legislative policy with respect to this particular office. That statute cannot be annulled, neither can such policy be overthrown, by a by-law passed by a mere creature of the Legislature. The people, under such legislation, have a right to demand that, whenever the board shall deem it for the public interests to remove the superintendent, its power of removal shall be the absolute power vested in it by the Legislature, and shall not be fettered by any restriction whatever. This power is delegated to the board for the public good,

and the people cannot be prejudiced by limitations of that power to which they have not consented, and which they have not authorized the board to impose. If the board may lawfully fix the term at one year, it may likewise give the incumbent a life tenure. If it can, with legal effect, declare that the superintendent can be removed for good and sufficient cause, it may narrow the ground of removal to a particular case, and thus place this portion of the discretion vested in the board for the public welfare beyond the possibility of exercise by succeeding boards for years to come. Thenceforth the board of trustees would, for a season, be shorn of the specified power of appointment, of the incidental power of removal, and to this extent of the power of general control and management granted to it by the statute. Even if the by-laws in question were explicit in their limitation of the power of the board, we would be compelled, for the reasons set forth, to treat them as without effect."

In support of this view the following authorities were cited: *State v. Lane*, 53 N. J. Law, 275, 21 Atl. 302; *City of Newark v. Stout*, 52 N. J. Law, 35, 18 Atl. 943; *Williams v. City of Gloucester*, 148 Mass. 256, 19 N. E. 348; *Higgins v. Cole*, 100 Cal. 260, 34 Pac. 678; *Carter v. City of Durango*, 16 Colo. 534, 27 Pac. 1058, 25 Am. St. Rep. 294; *State v. Johnson*, 123 Mo. 43, 27 S. W. 399; *Weidman v. Board of Education*, 54 Hun, 634, 7 N. Y. Supp. 309. Upon examination we find that the cases cited either decide the point in accordance with the view of Judge Corliss or expressly recognize its soundness. It was held in *Parsons v. Breed*, 126 Ky. 759, 104 S. W. 766, that "where neither the Constitution nor statute fixes the term of office, the appointee holds at the pleasure of the appointing power, although it was attempted by the appointing power to fix a definite term," citing *Johnson v. Cavanah*, 54 S. W. 853, 21 Ky. Law Rep. 1246. See, also, *Abrams v. Horton*, 18 App. Div. 208, 45 N. Y. Supp. 887. So in *Mathis v. Rose*, 64 N. J. Law, 45, 44 Atl. 875, it was held that, as the charter of Atlantic City authorized the city council to elect a street supervisor, the council had power to remove an incumbent and appoint its successor at their pleasure, notwithstanding an ordinance had been passed making the term of such officer one year. The ordinance being inconsistent with the charter provision, it was held to be void, citing *Trowbridge v. Newark*, 46 N. J. Law, 140. The case of *Bradshaw v. City Council*, 39 N. J. Law, 418, was distinguished. Our conclusion is that the board of commissioners of roads and revenue of Clarke county, being invested, by the act of the General Assembly creating it, with the power of appointment of a clerk,

which carried with it the authority to remove such officer at its pleasure, as the statute fixed no term for such officer, could not legally by resolution fix a tenure of such office, and thus divest the board of the power of removal at pleasure conferred upon it by statute. It follows that Civil Code 1910, § 264 (3), providing that one of the methods for vacating an office is "by decision of a competent tribunal declaring the office vacant," did not apply to this case, so as to require charges, notice, and a hearing before the board could legally remove its clerk.

Counsel for the defendant in error cite, as sustaining a contrary view, the following cases: *Robertson v. Coughlin*, 196 Mass. 539, 82 N. E. 678, and *State v. Williford*, 104 Tenn. 694, 58 S. W. 295. In each of these cases it appeared that the board therein referred to elected a clerk or secretary to fill a vacancy created by the expiration of the term of office fixed by the board for its clerk or secretary, and it was held in effect that the board had the power to do this. The question whether the board could have removed the incumbent prior to the expiration of his term fixed by it was not involved. In our opinion the judgment in each of the cases was correct; but we cannot agree to the soundness of the proposition announced in these cases that the board had authority to fix the term of its clerk or secretary, no term being fixed by law, and no authority being given to the board to prescribe it. Other authorities cited by the defendant in error are not sufficiently relevant, in our opinion, to require discussion.

It follows, from our views as above set forth, that the judgment of the court below must be reversed. All the Justices concur.

(136 Ga. 332)

CLARKE COUNTY v. GAMBLE.

(Supreme Court of Georgia. June 13, 1911.)

(Syllabus by the Court.)

1. OFFICERS (§ 82*)—INJUNCTION—NATURE OF REMEDY—EXISTENCE OF OTHER REMEDY.

Clarke county brought its petition against Gamble, the substance of which, now material, was: Defendant had recently been removed by the board of commissioners of roads and revenue of that county from the office of clerk of such board. Up to the time of his removal, the defendant and the board "occupied offices together," the board paying one-half of the rent for the same, wherein were kept all the records, books, and other property of the county pertaining to the official business of the board. The possession of these records, books, etc., by the board was necessary for the discharge of its public duties. At the time of his removal the defendant notified the board that, on account of the invalidity (as contended by him, for certain reasons) of the order discharging him, "he would not permit any books, papers, or other documents belonging to the county to be removed from the offices where they [were then] located, * * * claiming that the offices were

rented in his name and he would control them." The board procured another office, but the defendant refused to allow the board to remove such records, books, etc., from the offices occupied by them. One of the prayers of the petition was that the defendant be enjoined from interfering with the county or the board of commissioners or their agents in the removal of such records, books, etc., from the place where they were. *Held*: (1) The injunction sought was not purely mandatory, but its essential feature was to restrain the defendant. See *MacKenzie v. Minis*, 132 Ga. 323, 63 S. E. 900, 23 L. R. A. (N. S.) 1003. (2) Civil Code 1910, § 304 et seq., providing how a successor to an office may obtain the books, papers, etc., appertaining thereto from his predecessor, who refused on demand to turn over the same, did not furnish to the county an adequate remedy, if any at all, under the facts of this case. See, in this connection, *Albee v. Watts*, 114 Ga. 149, 39 S. E. 940.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 114; Dec. Dig. § 82.*]

2. PREVIOUS DECISION CONTROLLING.

This case on its facts is controlled by the decision, this day rendered, in the case of *Wright v. Gamble*, 71 S. E. 795, and accordingly the judge erred in refusing an interlocutory injunction.

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action by Clarke County against J. B. Gamble. From a judgment refusing an interlocutory injunction, plaintiff brings error. Reversed.

Jno. J. Strickland, for plaintiff in error. W. M. Smith and Cobb & Erwin, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(136 Ga. 473)

CURRIE v. COLLINS et al.

(Supreme Court of Georgia. June 21, 1911.)

(*Syllabus by the Court.*)

1. VENDOR AND PURCHASER (§ 176*)—PERFORMANCE OF CONTRACT—DEFICIENCY OF QUANTITY.

In an action by a vendee against his vendor of land sold by the tract, where the number of acres is stated as "more or less" and only as a part of its description, there can be no recovery on account of the deficiency in the number of acres so stated, where it does not appear that the vendor was guilty of actual fraud in misrepresenting the quantity. *Montgomery v. Robertson*, 134 Ga. 66, 67 S. E. 431.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 333-340; Dec. Dig. § 176.*]

2. VENDOR AND PURCHASER (§ 44*)—DEFICIENCY OF ACREAGE—FRAUDULENT MISREPRESENTATIONS—EVIDENCE.

If the offered portion of the testimony of the plaintiff, which was excluded by the court, had been admitted, it would not have been sufficient, considered in connection with the testimony before the jury, to authorize a finding that the defendants, who were the vendors of the land, were guilty of any actual fraud in misrepresenting the number of acres contained in the tract. The alleged misrepresentations of the vendors were merely to the effect that they believed that the tract of land, which was describ-

ed as "containing 30 acres more or less," contained as much as 35 acres, and that they were sure that it contained as much as 30 acres. Moreover, it appeared from the testimony of the vendee, the plaintiff, that one of the vendors prior to the sale pointed out to the vendee the boundaries of the tract, that the vendee in company with such vendor inspected the land, that the vendee at the time he purchased did not believe that the tract contained 30 acres, and that he would not have purchased, but for the guaranty of such vendor that it contained that quantity.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 76; Dec. Dig. § 44.*]

3. REFUSAL OF NEW TRIAL—PROPRIETY.

As the verdict found for the defendants was demanded, the court, of course, did not err in refusing to grant a new trial.

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Action by D. M. Currie against S. E. Collins and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. B. Geiger and P. W. Meldrim, for plaintiff in error. A. C. Saffold, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(136 Ga. 488)

MOREHEAD et al. v. AYERS et al.

(Supreme Court of Georgia. June 22, 1911.)

(*Syllabus by the Court.*)

1. ASSIGNMENTS (§ 24*)—RIGHTS ASSIGNABLE—RIGHT OF ACTION FOR FRAUD.

A right of action for injuries arising from fraud cannot be assigned. Civil Code 1910, § 3655.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 42-46; Dec. Dig. § 24.*]

2. VENDOR AND PURCHASER (§ 176*)—ASSIGNMENTS (§ 24*)—APPORTIONMENT OF PRICE—ASSIGNABILITY OF RIGHT.

The right given by Civil Code 1910, § 4122, to a vendee of land sold by the tract or entire body, where the quantity is specified as "more or less," to have an apportionment of the price for a deficiency in the quantity specified so gross as to justify the suspicion of willful deception, or mistake amounting to fraud, arises only by reason of actual fraud and deception on the part of the vendor (*Montgomery v. Robertson*, 134 Ga. 66, 67 S. E. 431; *Currie v. Collins*, 136 Ga. —, *supra*), which tends to injure or damage the vendee, and therefore, under Civil Code 1910, § 3655, is not assignable by such vendee transferring to the purchaser of the land from him the bond for title given him by his vendor, so as to entitle the transferee of the bond to have the note of his immediate vendor held by the vendor from whom the latter purchased, and given as a part of the purchase price of the land, credited with the value of the deficiency of land according to the price at which the payee of the note sold it.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 333-340; Dec. Dig. § 176.* *Assignments*, Cent. Dig. §§ 42-46; Dec. Dig. § 24.*]

3. DEMURRER TO PLEADING—RULING OF COURT.

Under the rulings announced in the preceding headnotes, if for no other reason, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

court did not err in sustaining a general demurrer to the petition.

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action by A. B. Morehead and others against J. W. Ayers and others, administrators. From a judgment in favor of defendants, plaintiffs bring error. Affirmed.

A. G. & Julian McCurry and W. L. Hodges, for plaintiffs in error. Jas. H. Skelton, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(136 Ga. 555)

ALABAMA GREAT SOUTHERN R. CO. v. DAFFRON.

(Supreme Court of Georgia. July 12, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1069*)—HARMLESS ERROR—VERDICT—REMARKS OF COURT.

The court should not unduly press a jury to agree upon a verdict; and in the use of any remarks designed to impress the desirability of reaching a verdict, he should be careful to refrain from any expression of a coercive nature, or which possibly may mislead them into an erroneous method of reaching a verdict. Upon being informed by the jury of their inability to agree upon the amount of recovery, the judge's instruction that verdicts are mostly compromises, and his illustration of that statement, was prejudicial to the defendant. Its tendency was to suggest that the jurors might arbitrarily compromise, divide, and yield for the mere sake of agreement.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1069.*]

2. REVIEW ON APPEAL.

Other than as indicated, no error was committed which would require a new trial.

Error from Superior Court, Dade County; A. W. Flite, Judge.

Action by Jessie Daffron, as administratrix, against the Alabama Great Southern Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. E. Goodhue and Foust, Payne & Tatum, for plaintiff in error. Reuben R. Arnold, for defendant in error.

EVANS, P. J. Mrs. Jessie Daffron, administratrix of Joseph Daffron, sued the Alabama Great Southern Railroad Company to recover damages for the alleged wrongful death of her husband, who was a fireman in the employment of the defendant at the time of his death. After the case had been submitted to the jury, and they had been deliberating upon the same for about 24 hours, they were called into the courtroom, and inquiry was made by the judge whether they had agreed upon a verdict, or were likely to agree; and, upon being informed that they had not agreed, the court said, "I regret exceedingly, gentlemen, for you to fail to make a verdict in this case, and trust that you will come to-

gether on the facts," and, after instructing them that they were the sole judges of the facts, and that the court could not render any assistance in solving the facts of the case, the court said: "You will first determine, as I have before stated, whether or not there should be a recovery; and, if you determine there should be, you will settle the amount, if you possibly can. If you determine there should not, then you will find for the defendant company. Now, gentlemen, see if you cannot get together." The jury returned to their room, and about 24 hours thereafter they were again called into the courtroom, when the following colloquy occurred between the court and the jury: Judge: "Gentlemen of the jury, have you agreed upon the question as to the right to recover?" Jurors: "We have, but differ as to the amount." Court: "It does look like you might agree upon that. You ought to agree upon the amount. I might be going a little too far, but verdicts are mostly all compromises. No man gets all he wants in things of that kind; and, having agreed upon the essential point, the question of whether or not there should be a recovery, it does look like you all might get together on some amount—that is, you might make a conjunction, as defined by an old rural school-teacher, who, when asked what a conjunction was, said, 'A conjunction is the coming together of two or more persons or things, as John and James met.' You may now retire, and see if you can come together." A verdict for the plaintiff was rendered within a few hours after this recharge. The defendant moved for a new trial, which was refused.

[1] 1. This court has indulged judicial urging of a verdict to a considerable extent. Unless the remarks of the judge amounted to coercion, or a direction to arbitrarily compromise individual conflicting views solely for the sake of agreement, the court has declined to set aside the verdict. It has been ruled that a new trial will not be granted, where the court, upon a failure of the jury to agree, addressed to them certain remarks tending to impress upon them the importance of the case, the desirability of rendering a verdict, and the expense of a retrial, and sent them back for further deliberation. *Allen v. Woodson*, 50 Ga. 53; *Parker v. Georgia Pacific Ry. Co.*, 83 Ga. 539, 10 S. E. 233; *Golatt v. State*, 130 Ga. 18, 60 S. E. 107. In each of these cases the court recognized the impropriety of unduly pressing a jury to arrive at a verdict, and in one of them stated that the trial judge went to the allowable limit. When informed that the jury is unable to agree upon a verdict, the court in his remarks upon the desirability of reaching a verdict should be very careful not to employ any expression of a coercive nature, nor should he say anything which might mislead them as an instruction that some of them should

yield their conscientious opinions and convictions upon a material feature of the case, solely for the sake of making a verdict.

• *Georgia Railroad Co. v. Cole*, 77 Ga. 77. In the case just cited, which was one closely contested on the facts, after the jury had been charged and retired, the court had them brought into the courtroom, and, after stating to them that he was informed that they were not likely to agree, asked if it were true. The jury replied that it was. The court inquired whether the trouble was upon a matter of law or fact, to which the jury responded that it was upon a question of amount—that they differed about the amount. The court said: "Gentlemen, I cannot aid you in that, as I know of, in any way, further than to say that, upon that matter, the jury ought to make a very earnest effort to agree—to reconcile conflicting opinions as to amounts. I merely give you that as advice of the court. You must make an effort to agree upon the amount. Of course, a juror ought not to give up his convictions, if they are so strong; but there ought to be an effort to come to an agreement. You can retire, and see if you cannot agree upon the amount." This court held that these remarks might have induced some of the jurors to give up opinions entertained in favor of the defendant, simply to make a verdict, and a new trial was granted on this ground.

In the present case the court instructed the jury that "verdicts are mostly all compromises," and his illustration was calculated to induce them to arrive at a common sum by a compromise, without reference to the individual convictions of the jurors as to the amount the plaintiff was entitled to recover. In *Goodsell v. Seely*, 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183, which was a personal injury case, the jury informed the court that they "had not agreed, but stood eleven to one, and divided on \$200." The judge in reply told them: "If that is the only difference, it would be better for the county and the parties on both sides that one or both sides yield, so as to come together. It would be unfortunate for all to have a disagreement, when the difference is so small"—and he asked them to get together if possible. A new trial was granted upon this ground, and in the opinion Judge Cooley said: "It is no doubt true that juries often compromise in the way here suggested, and that by 'splitting difference' they sometimes return verdicts with which the judgment of no one of them is satisfied. But it is an abuse. The law contemplates that they shall, by their discussions, harmonize their views, if possible, but not that they shall compromise, divide, and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring jury trial into discredit and to convert it into a lottery. It was no doubt very desirable to the public and to the parties

that the jurors should agree, if they could do so without sacrificing what any one of them believed were the just rights of the parties, but not otherwise." Moreover, the court characterized the jury's agreement that the plaintiff should have a recovery as the essential point in the case, thus minimizing the importance of the amount of the recovery. In the petition the damages were laid at \$20,000. The verdict was for \$7,500. We have no means of knowing the views of the individual jurors as to the amount which each thought the plaintiff was entitled to recover. The tendency of the court's remarks was to create an impression that, having agreed upon the right of the plaintiff to recover, the jurors need not be so careful in fixing the amount, which might be arrived at as a result of an arbitrary compromise of the individual views of the jurors.

[2] 2. The various charges complained of were without substantial error, and the general charge covered the essential features in the requests to charge. Other than as indicated in the first division of the opinion, no error requiring a new trial is made to appear. Judgment reversed. All the Justices concur.

(136 Ga. 596)

ALABAMA GREAT SOUTHERN R. CO. v. ALLISON.

(Supreme Court of Georgia. July 13, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 351*)—ACCIDENTS AT CROSSINGS—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

The court erred in charging the jury as follows: "To run a train at high rate of speed, and without signals of approach, when the trainmen have reason to believe there are persons in exposed positions on the track, as over an ungarded crossing in a populous district of a city, or where the public are wont to pass on the track with such frequency and in such numbers, and the facts are known to those in charge of the train, as that they will be held to a knowledge of the probable consequence of maintaining greater speed without warning, so as to impute to them reckless knowledge in respect thereto, would render the employer liable for injuries resulting therefrom, notwithstanding there was negligence on the part of those injured, and no fault on the servants after seeing the danger." This charge was not authorized by the pleadings or the evidence in the case.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1195; Dec. Dig. § 351.*]

2. APPEAL AND ERROR (§ 274*)—OBJECTIONS IN TRIAL COURT—NEW TRIAL—QUESTIONS REVIEWABLE.

Grounds of a motion for a new trial, complaining that the verdict is contrary to certain portions of the charge, raise no question for decision by this court not raised by the general ground in the motion for a new trial that the verdict is contrary to law.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 274.*]

3. GRANT OF NONSUIT.

The court below did not err in refusing to grant a nonsuit.

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by A. B. Allison, administrator, against the Alabama Great Southern Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. E. Goodhue and Foust, Payne & Tatum, for plaintiff in error. Ben. T. Brock, for defendant in error.

BECK, J. A. B. Allison, administrator of the estate of W. M. Allison, deceased, brought suit against the Alabama Great Southern Railroad Company to recover damages for the homicide of his intestate in the state of Alabama, alleging that the killing was wrongful and tortious, being the result of the negligent operation of a locomotive and train of the defendant company by its employees. Petitioner pleaded the Alabama statutes authorizing suits by the personal representative of a decedent to recover damages for the death of his intestate in cases of the character set forth in the petition. On the trial a verdict was rendered in favor of the plaintiff. Upon the refusal of the court below to grant a new trial, upon a motion duly made, the defendant excepted.

[1] 1. Error is assigned upon the following charge of the court: "To run a train at high rate of speed, and without signals of approach, when the trainmen have reason to believe there are persons in exposed positions on the track, as over an unguarded crossing in a populous district of a city, or where the public are wont to pass on the track with such frequency and in such numbers, and the facts are known to those in charge of the train, as that they will be held to a knowledge of the probable consequences of maintaining greater speed without warning, so as to impute to them reckless knowledge in respect thereto, would render the employer liable for injuries resulting therefrom, notwithstanding there was negligence on the part of those injured, and no fault of the servants after seeing the danger." This charge was unauthorized by the evidence in the case. It was properly challenged on that ground. In fact, neither the pleadings nor the facts as developed on the witness stand afforded any basis for the instructions quoted. While it was alleged that the train approached the crossing in question at a high rate of speed, it was not alleged, nor was there evidence to show, that the train was run or the crossing approached "without signals of approach" or without "warning." Judging from the context, the portion of the charge criticised was in the language of a decision rendered by the Supreme Court of Alabama; but the case from which it is taken is not cited in the charge itself nor in the brief of counsel. But, as was said in the case of Savannah Railway Co. v. Evans, 115 Ga. 318, 41 S. E. 632, 90 Am. St. Rep. 116: "Some of the charges which were complained

of in the present case seem to be literal copies of headnotes made by the Supreme Court of Florida in a case decided by that court. It is claimed that it was not error to use the language of the Florida court, for the reason that the case was to be tried according to the law of Florida, and anything which was declared to be the law of that state by its court of last resort was a proper subject of instruction to the jury. This position is not sound. There are many things said by this court, both in headnotes and opinions, that are sound law, but which nevertheless would be improper instructions to a jury. This court as well as the Supreme Court of Florida may use language which would be appropriate in a headnote or opinion, but which would be grossly improper when embodied in a charge to a jury. *Merritt v. State*, 107 Ga. 676 (4) [84 S. E. 361]; *F. C. & P. Railroad Co. v. Lucas*, 110 Ga. 127, 128 [35 S. E. 283]." See, also, in this connection, the case of *Lay v. N. C. & St. L. Ry. Co.*, 181 Ga. 345, 62 S. E. 189. The admonitions contained in the extract from the decision of this court above quoted should be observed by judges of the trial courts when instructing the jury.

We base the judgment of reversal of this case upon the error contained in that portion of the charge set forth above. But attention should also be called to the following charge of the court, complained of in the first ground of the amended motion for a new trial: "When a railroad runs its track through a district of a city, town, or village, densely populated, and the demands of trade and public intercourse necessitate the frequent crossing of the track, it is the duty of those operating the engine over the track in such places to keep a lookout. This duty is not specially imposed by statute, but arises from the likelihood that in such places there are persons on the track, and the bounden duty to guard against inflicting death or injury in places and under circumstances where and when it is likely to result, unless due care is observed. This duty arises when the circumstances exist which call for its exercise." This language seems also to have been taken from a decision rendered by the Supreme Court of Alabama, and it might well have been criticised upon the ground that it contains an expression of an opinion on the facts of the case by the judge in his charge to the jury. This specific exception, however, was not made. The exceptions which were urged are themselves somewhat vague and uncertain, and of such a character that we do not feel authorized to declare the charge error upon the specific objections stated in the motion. But inasmuch as a new trial is granted upon another ground, we thought it proper to point out the obvious error in the excerpt last quoted.

[2] 2. Grounds of a motion for a new trial, complaining that the verdict is contrary to certain portions of the charge, raise no question for decision by this court not raised by

the general grounds in the motion for a new trial, that the verdict is contrary to law.

[3] 8. The court below did not err in refusing to grant a nonsuit.

Judgment reversed. All the Justices concur.

(136 Ga. 483)

STONER v. PATTEN et al.

(Supreme Court of Georgia. June 21, 1911.)

(*Syllabus by the Court.*)

WATERS AND WATER COURSES (§ 87*) — INJUNCTION — DIVERSION OF WATER — EVIDENCE.

The petition in this case having been brought by a lower riparian owner for injunction to restrain the taking of water from a stream which the petitioner alleged was accustomed to flow through his land from the point at which it is alleged the water was being taken, it was not error upon the trial to grant a nonsuit after the conclusion of the evidence introduced by the plaintiff, there being no evidence to show to what extent the flow of water had been diminished, nor that it had been diminished to a substantial extent, nor that the complainant had been or would be damaged by the acts complained of.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 87.*]

Error from Superior Court, Walker County; J. W. Maddox, Judge.

Action by W. B. Stoner against J. C. Patten and others. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Foust & Payne, for plaintiff in error. F. W. Copeland, R. M. W. Glenn, and Williams & Lancaster, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(136 Ga. 584)

BROWN v. RAPE.

(Supreme Court of Georgia. July 13, 1911.)

(*Syllabus by the Court.*)

1. EVIDENCE (§ 434*) — PAROL EVIDENCE — FRAUD — ACTION ON NOTE.

On the trial of an action brought on a promissory note, parol evidence was admissible in support of a plea that the defendant was induced to sign the notes by certain alleged fraud practiced upon him by the plaintiff. *McBride v. Macon Telegraph Co.*, 102 Ga. 422 (2), 30 S. E. 999.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

2. EVIDENCE (§ 370*) — DOCUMENTARY EVIDENCE.

The execution of the application for a policy of insurance not being proved, the court properly refused to admit it in evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1559-1579; Dec. Dig. § 370.*]

3. REVIEW ON APPEAL.

The evidence authorized the verdict, and the refusal of a new trial was not error.

Error from Superior Court, Houston County; W. H. Felton, Judge.

Action between N. B. Brown and G. E.

Rape. From the judgment, Brown brings error. Affirmed.

Napier & Maynard and O. C. Hancock, for plaintiff in error. M. Kunz, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(136 Ga. 591)

SOUTHERN RY. CO. v. HUTCHESON.

(Supreme Court of Georgia. July 13, 1911.)

(*Syllabus by the Court.*)

1. DAMAGES (§ 32*) — PHYSICAL INJURIES — PAIN AND SUFFERING — CAPACITY TO LABOR.

A physical injury, which impairs the capacity of a married woman to labor, is classified by the law with pain and suffering. *Metropolitan R. Co. v. Johnson*, 90 Ga. 500, 18 S. E. 49. In a suit by a married woman for a personal injury, an allegation of impaired capacity to labor resulting from the injury is not irrelevant as an element of damage.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 32.*]

2. EVIDENCE (§ 473*) — OPINION EVIDENCE — CONCLUSIONS FROM FACTS.

Where the question under consideration is one of opinion, a nonexpert witness may state the facts and circumstances and his opinion predicated thereon.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2220-2223; Dec. Dig. § 473.*]

3. RAILROADS (§ 397*) — FRIGHTENING HORSES — EVIDENCE.

In a suit against a railroad company for a personal injury caused by a horse, alleged to have been frightened by unusual and unnecessary noises made by the defendant's locomotive, it is competent to show that the horse was road-worthy, and was not subject to fright by the ordinary and usual noises incident to the operation of locomotives and cars.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1344-1355; Dec. Dig. § 397.*]

4. INSTRUCTIONS.

The charges on the subject of a railroad company's liability for an injury to a traveler on a public thoroughfare alongside the railroad, alleged to have been caused by the traveler's horse becoming frightened by the unusual and unnecessary noises made by the locomotive of the company in approaching the station, were in substantial accord with the rule of liability as defined in *Georgia Railroad v. Carr*, 73 Ga. 557.

5. REVIEW OF EVIDENCE.

The evidence authorized the verdict, and, in view of the general charge, the specific exceptions are without merit.

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action by Minnie Hutcheson against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. H. McLarty and Maddox, McCamy & Shumate, for plaintiff in error. J. S. James and Roberts & Hutcheson, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(136 Ga. 549)

HALL, County Treasurer, v. MARTIN.
(Supreme Court of Georgia. July 12, 1911.)

(Syllabus by the Court.)

1. MANDAMUS (§ 3*)—WHEN LIES—OTHER LEGAL REMEDY.

Mandamus will not lie to compel the performance of an official duty, when there exists another specific legal remedy. Civ. Code 1910, § 5440.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 8, 10-34; Dec. Dig. § 3.*]

2. MANDAMUS (§ 3*)—PAYMENT OF FUNDS BY CITY SOLICITOR—ANOTHER ADEQUATE REMEDY.

Where the treasurer of a county sought by mandamus to compel the solicitor of a city court therein to pay into the treasury of the county certain funds arising from fines, forfeitures, etc., in such court, and which the applicant for the writ alleged the solicitor was not legally entitled to, but which, under the provisions of the act of the General Assembly creating such court and the office of its solicitor, it was his official duty to pay into the treasury of the county; and where in response to the nisi it was urged, as one of the reasons why a mandamus absolute should not be granted, that another specific legal remedy existed, to wit, a rule in such city court which could be brought by the treasurer against the solicitor, an officer of that court, to require him to pay to the treasurer the funds alleged to be legally withheld by the solicitor from the treasury, which rule, if made absolute, could be enforced by an attachment for contempt—*Held*, that the judge of the superior court, upon the hearing of the rule nisi, did not err in refusing to grant a mandamus absolute. See *Johnson v. Gilmer*, 113 Ga. 1146, 39 S. E. 469.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 3.*]

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Application by D. D. Hall, Treasurer, for writ of mandamus to Ware G. Martin, Solicitor. From an order denying the writ, petitioner brings error. Affirmed.

D. J. Ragan and Hollis Fort, for plaintiff in error. Ware G. Martin, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(136 Ga. 559)

VALDOSTA, M. & W. RY. CO. v. ADEL LUMBER CO.

(Supreme Court of Georgia. July 12, 1911.)

(Syllabus by the Court.)

EMINENT DOMAIN (§ 47*)—CONDEMNATION OF RIGHT OF WAY FOR TRAMWAY.

Civil Code 1910, § 804, which provides that "any person, or corporation, desiring to build or construct any tramways to connect with any waterway or railway, in this state, for the purpose of transporting lumber, naval stores, and timber by means of the same," may condemn a right of way for such tramway, "setting out the length of such way, together with the place of starting and the terminus of the same," only applies to instances where such tramways are necessary to connect with a rail-

way, or waterway, for the purpose of transporting the articles mentioned by means thereof, and does not authorize a person who owns a sawmill located on the line of one railway to condemn a right of way for a tramroad to cross the line of another railway and extend to a lot of timber belonging to such sawmill owner. *Garbutt Lumber Co. v. Georgia & Alabama Ry. Co.*, 111 Ga. 714, 36 S. E. 942; *Normandale Lumber Co. v. Knight*, 89 Ga. 111, 14 S. E. 882; *Chattanooga, etc., R. Co. v. Philpot*, 112 Ga. 153, 37 S. E. 181.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by the Valdosta, Moultrie & Western Railway Company against the Adel Lumber Company. Judgment for defendant, and plaintiff brings error. Reversed.

The Adel Lumber Company, being a private corporation, was engaged in operating a sawmill at Adel, Ga., on the line of the Georgia Southern & Florida Railway Company. The lumber which it manufactured was for shipment over the railroad of the Georgia Southern & Florida Railway Company, for distribution to the general lumber trade. In order to conduct its business, it had acquired large timber holdings extending to a remote distance from the mill, and in order to bring the timber from the forests to the mill it was necessary to employ a "tramroad." For the purpose of carrying on a sawmill business, it had so constructed its tramroad that it extended from the mill for a number of miles into the timber lands, but contemplated further extension in the future from time to time as the work of cutting the timber progressed and such extension should become necessary in order to reach the more remote timber lands. Under such conditions the Valdosta, Moultrie & Western Railroad Company, being a chartered commercial railway, constructed its line of road across the proposed extension of the tramroad of the Adel Lumber Company, so that, in order for the tramroad to reach a large part of the timber lands of that company, it was necessary to cross the railroad track. In order to reach such timber with its tramroad, the Adel Lumber Company sought permission from the Valdosta, Moultrie & Western Railroad Company to cross its track with a tramroad at a point in the country on lot No. 487 in the Ninth land district of Colquitt county, which lot was among the timber lands of the Adel Lumber Company; but permission was not granted, and, being unable otherwise to get permission to cross, the lumber company sought to acquire a crossing by the exercise of the power of eminent domain, under sections 658, 659, and 660 of volume 1 of the Code of 1895.

The Valdosta, Moultrie & Western Railroad Company instituted suit to enjoin the Adel Lumber Company from so proceeding to condemn a crossing for its tramroad, on the ground that the proposed condemnation was

contrary to law, for the following reasons: (a) The operation of defendant's tramroad for the purpose of hauling to and furnishing its sawmill with crude logs to be manufactured into lumber and other timber products is purely a private enterprise, in which the public has no interest. (b) There is no provision of law authorizing a person or corporation, engaged in a purely private enterprise, to take, injure, or damage the property of a duly chartered railroad company, necessary for and in actual use in the operation of its trains as a part of its right of way and tracks. (c) Sections 658, 659, and 660 of volume 1 of the Code of 1895, under which defendant is undertaking to condemn, do not afford a person or corporation, desiring to construct a tramway for transportation of lumber, naval stores, or timber by means thereof, the right to condemn the right of way or track of a duly chartered railway for the purpose of crossing the same, or for any other purpose. (d) It appears upon the face of said application and notice that it is not necessary for the defendant to build or construct its tramroads across the right of way and track of the plaintiff in order to connect it with the waterway or railway, for which provision is made by sections 658, 659, and 660 of volume 1 of the Code of 1895, for the reason that it has ample means of transportation without the privilege of making said crossing. The judge at an interlocutory hearing found that the way sought was a way of necessity, and declined to grant an ad interim injunction. The Valdosta, Moultrie & Western Railroad Company excepted.

El. K. Wilcox and J. G. Cranford, for plaintiff in error. J. Z. Jackson and Fulwood & Murray, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(136 Ga. 534)

JENKINS v. SOUTHERN RY. CO.
(Supreme Court of Georgia. July 11, 1911.)

(Syllabus by the Court.)

RAILROADS (§ 344*) — CROSSING ACCIDENT — DEFECT IN CROSSING — PETITION — SUFFICIENCY.

The petition as amended did not set forth a cause of action.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 344.*]

Error from Superior Court, Harris County; S. P. Gilbert, Judge.

Action by W. W. Jenkins against the Southern Railway Company. Judgment for defendant, on sustaining a demurrer to the amended petition, and plaintiff brings error. Affirmed.

Jenkins sued the Southern Railway Company for damages, and his petition, after amendment, was dismissed on general demur-

rer, to which ruling he excepted. So much of the original petition as is now material was as follows: While plaintiff's servant, about 9 o'clock in the morning, was driving a two-mule team hitched to a wagon belonging to the plaintiff onto the defendant's track, where a public road crossed the same, one of the mules was struck by the defendant's engine and killed. Just as the mules got on the track, upon the unexpected approach of the train, plaintiff's servant attempted to back the team from the track in order to keep the train from striking it, and by reason of the narrowness of a bridge over which he attempted to back the team, constituting a part of the approach to the crossing, and over a drain cut by the defendant company, the bridge being only 10 feet wide, one of the wagon wheels ran off the bridge, so that it was impossible for him to get one of the mules off the track, and it was struck by the engine and killed. The public road ran parallel with the track for 100 feet, and then curved just before crossing the track. There were trees and shrubbery growing between the road and the track where they paralleled each other. The bridge was maintained by the railway company. The acts of negligence charged were: (1) "Said * * * train was at said time * * * running at a very rapid rate of speed in approaching said public road crossing." (2) "Defendant's servants and agents failed and neglected to signal the approach of the train to this public road crossing, and to check and keep checking the speed thereof in approaching the crossing, as by statute required." (3) Defendant, "in maintaining the drain along its track and roadbed, * * * failed to maintain a bridge of sufficient length over said drain; the bridge being only 10 feet long, when it should have been not less than 15 or 18 feet long, especially where the dirt road enters and crosses the track at a curve, and as the usual and customary length of bridges over drains at public road crossings and where bridges more than 10 feet wide are necessary to prevent injuries." And (4) the defendant was negligent "in carelessly and negligently running over and against plaintiff's mule and killing it, and in not checking or stopping said train in time to save said mule." An amendment to the petition was filed, subject to demurrer. By the amendment the word "public," referring to the road, appearing in three different paragraphs of the petition, was stricken. Such word, however, was not stricken where it occurred in the paragraph of the petition charging the acts of negligence complained of. The alleged negligence of the defendant's servants in failing to observe the blow post law as to public crossings was also stricken. The amendment alleged, in substance, that the road which crossed the defendant's track was a private way, which had been used for

some 50 years; that the bridge over the drain, and constituting a part of the approach to the crossing, had been constructed by the defendant company and maintained by it for a great number of years, and, being only about 10 feet long, was too short to enable a person to safely back a team from the track across the bridge in order to avoid a train approaching the crossing, and unseen by reason of a cut through which it was passing.

Hatcher & Hatcher, for plaintiff in error.
C. E. Battle and Howell Hollis, for defendant in error.

FISH, C. J. (after stating the facts as above). The original petition sought a recovery for the alleged negligence of the defendant company in two particulars, namely: (a) In approaching a public crossing at a high rate of speed, without giving proper signals or checking the speed as required by the statute commonly known as the "blow post law," and thus negligently running against the plaintiff's mule and killing him; and (b) in constructing and maintaining, as a part of the approach to such crossing, a bridge which was too narrow. While certain vague and general expressions in reference to negligence in running upon the plaintiff's mule were not expressly eliminated by the amendment, the sole ground wherein was alleged the negligence in approaching a public crossing both as to speed, signaling, and checking, was withdrawn. As amended, the petition in effect alleged the crossing to be a private one maintained by the defendant company, over which the public was impliedly invited to cross; and the case was left to stand upon the allegation of negligence that the bridge, though 10 feet in width, was too narrow, and that by reason of this, when the plaintiff's servant sought to back the team upon it as the train approached, one wheel of the wagon ran off the side of the bridge, thus preventing one of the mules from being backed off the track, thus causing it to be struck by the train and killed. Treating, therefore, the question of negligence in the operation of the train as eliminated, and the sole act of negligence upon which the plaintiff based his claim for recovery as being the contention that the bridge constructed by the railway company at a private crossing, not shown to be one established by law, was too narrow, the petition was subject to general demurrer. There was no allegation that the bridge was too narrow, or otherwise unsuitable, for passage in the ordinary and usual methods, or for the purpose for which it was constructed and maintained. It was 10 feet in width, which was not alleged for any reason to have been too narrow for a team to safely approach and pass over the track. Not to provide a bridge broad enough for persons to turn teams upon or to back their teams across cannot be said

to be negligence. The injury occurred in the daytime, and there was no question as to concealed danger in the bridge by reason of its defective construction or the want of repair, as appeared in the cases of *Central R., etc., Co. v. Robertson*, 95 Ga. 430, 22 S. E. 551, and *Southern Ry. Co. v. Hooper*, 110 Ga. 779, 38 S. E. 232. If one were to construct a lane leading to his residence, which the public were impliedly invited to use, and it was sufficient for all ordinary methods of passage, he would not be held to be negligent merely because the lane was not sufficiently wide to turn wagons in, or for teams to back out of, where there was no concealed danger, nor any emergency brought about by the negligence of the one constructing the lane. In the present case, as we have already indicated, the allegations of negligence in respect to the operation of its train by the defendant were substantially eliminated by the amendment, and the case left to stand alone upon the charge of negligence of the defendant in not providing a broader bridge; and as there was no allegation of concealed danger arising from darkness, lack of repair, or other causes, the amended declaration failed to show a breach of duty on the part of the defendant company in not constructing and maintaining a wider bridge, and was therefore properly dismissed on general demurrer.

Judgment affirmed. All the Justices concur.

(130 Ga. 448)

LOUISVILLE & N. R. CO. et al. v.
PEEPLES.

(Supreme Court of Georgia. June 17, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 439*)—INJURY TO PROPERTY OF THIRD PERSONS—PETITION.

In a suit against a railroad company and an individual, alleged to be the section boss of the company, for recovery of damages alleged to have been sustained by reason of injury to the plaintiff's horse through the acts of the section boss, who was alleged to be the agent and servant of the railroad company and acting within the scope of his employment, in negligently driving the horse over a stock gap, which he knew to be a dangerous place for such purpose, thereby causing the injury complained of, the petition which contained such allegations was not subject to general demurrer.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1566; Dec. Dig. § 439.*]

2. RAILROADS (§ 439*)—INJURY TO PROPERTY OF THIRD PERSON—PETITION.

The petition, alleging specially that the section boss so alleged to be the agent of the railroad company carelessly ran the horse upon and into the stock gap on the line of railway of the defendant while in the discharge and performance of his duty as such agent, and, further, that the defendant was negligent in employing "such a reckless and careless servant, * * * and in having the said stock gap in a damaged condition, the defect being that it was not such as is built to keep stock from going on the same, but was flat and loose," was not subject to special demurrer on the ground that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

it failed to allege how the agent negligently and carelessly ran the horse upon the stock gap, or how he was then in the discharge and performance of his duty, nor upon the ground that it did not appear how the railroad company was negligent in employing such a reckless and careless servant, or how or wherein the servant was reckless and careless, nor upon the ground that it did not appear specifically how or where-in the stock gap was defective.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1566; Dec. Dig. § 439.*]

3. INSTRUCTIONS—PROVINCE OF JURY—INVASION.

The instructions of the court upon the credibility of witnesses, though inaccurate, were not subject to the criticism that the judge invaded the province of the jury.

4. RAILROADS (§ 447*)—INJURY TO PROPERTY OF THIRD PERSONS—SCOPE OF EMPLOYMENT—EVIDENCE.

There was no evidence tending to show the duties of the section boss, further than that he was a section boss, and that he was then engaged in walking the track. This evidence was insufficient to authorize a finding that the section boss was acting within the scope of his authority when he drove the horse over the stock gap, and accordingly it was erroneous to charge that "the defendant company had the right to drive the horse out of the inclosure for its own protection, if it was on the line of the track or inclosure, * * * and if the defendant Higgins, acting as an agent and employé of the defendant company, drove the horse across the stock gap, and it was apparently dangerous, and he knew it was so, when he might have reasonably put it out in another way, then I leave you to say whether or not he was exercising all ordinary and reasonable care and diligence, and, if so, then neither the company nor he would be liable; but, if he was not exercising all ordinary and reasonable care and diligence, then they would be liable."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1642-1650; Dec. Dig. § 447.*]

5. RAILROADS (§ 443*)—INJURY TO PROPERTY OF THIRD PERSONS—SCOPE OF EMPLOYMENT—INSTRUCTIONS—SUPPORT IN EVIDENCE.

There being no evidence, other than as above indicated, that the section boss in driving the horse across the stock gap was acting within the scope of his employment, there was not sufficient evidence to authorize a verdict against the railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.*]

6. RAILROADS (§ 267*)—INJURY TO PROPERTY OF THIRD PERSON—LIABILITY OF SERVANT.

The testimony of defendant Higgins (the section boss) was to the effect that he knew that it was dangerous to drive a horse across the stock gap, and with such knowledge did it, and the horse was injured thereby. There was also evidence to authorize a finding that the horse died from the injury sustained. Under this and other evidence as to the value of the horse, the evidence authorized the verdict against this defendant; and as the court did not err in overruling his demurrer to the petition, and the instructions of the court complained of were not erroneous, relatively to him, for any reason assigned, the court did not abuse its discretion in refusing to grant a new trial as to him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 859, 860; Dec. Dig. § 267.*]

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by W. J. Peeples against the Louisville & Nashville Railroad Company and an-

other. Judgment for plaintiff, and defendants bring error. Reversed as to the railroad company, and affirmed as to other defendant.

C. N. King and D. W. Blair, for plaintiffs in error. J. J. Bates and W. E. Mann, for defendant in error.

ATKINSON, J. Judgment reversed as to the railroad company, and affirmed as to Higgins. All the Justices concur.

(9 Ga. App. 484)

ELDER v. WOODRUFF HARDWARE & MFG. CO. (No. 3,268.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. SALES (§ 480*)—INFANTS (§ 58*)—CONDITIONAL SALES—REMEDIES OF SELLER—DEFENSES.

Where personal property is sold under a contract by which the seller retains the title by duly recorded written instrument, and the purchaser resells the property to another, who in turn sells or otherwise disposes of it, the original seller may maintain trover against the person to whom the original purchaser sold; and in such a case it is no defense that the original purchaser was a person under the age of 21 years.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1448; Dec. Dig. § 480.* Infants, Cent. Dig. § 150; Dec. Dig. § 58.*]

2. SALES (§ 480*)—TROVER AND CONVERSION (§ 40*)—CONDITIONAL SALES—MEASURE OF DAMAGES.

Where the title of a plaintiff in a trover suit is held by him as security for purchase money or other debt, and he elects to take a money verdict, he is entitled to recover, either the highest value of the property between the date of the conversion and the date of the trial, or the value of the property at the date of the conversion with interest thereon, subject, however, to the condition that under neither choice can he recover more than the amount of the debt for which the property stands as security.

(a) The phrase "the highest proved value between the conversion and the trial" does not mean the highest estimate given by any witness as to the value during the period stated, but means the highest value which the jury, from consideration of all the proof, finds that the property was worth at any time during that period, if during the period there was a change in its value.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1448; Dec. Dig. § 480.* Trover and Conversion, Cent. Dig. § 242; Dec. Dig. § 40.*]

3. TROVER AND CONVERSION (§ 66*)—PROCEEDINGS—QUESTION FOR JURY.

There being a conflict in the testimony as to the value of the property, the court erred in directing the verdict.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 288-294; Dec. Dig. § 66.*]

Error from City Court of Jefferson; W. W. Stark, Judge.

Action by the Woodruff Hardware & Manufacturing Company against Paul Elder. From a judgment for plaintiff, defendant brings error. Reversed.

Ray & Ray, for plaintiff in error. G. A. Johns, for defendant in error.

POWELL, J. [1] The Woodruff Hardware & Manufacturing Company sold a buggy and harness to one Maddox, who in turn sold it to Elder, who in turn resold it to another. The original seller had taken from Maddox a note for the purchase money, in which title was vested in the seller until the amount of the note was paid. This note was duly witnessed and recorded. It appears that Maddox was a minor at the time when he gave the note. The Woodruff Company brought trover against Elder. There was a conflict in the evidence as to the value of the property at the time Elder bought it, but the court directed a verdict in the plaintiff's favor for the full amount of the purchase price, as represented by the note given by Maddox to the plaintiff. The plaintiff had such title as to authorize him to maintain trover against Elder. *Ezzard v. Frick*, 76 Ga. 512. The fact that the maker of the note by which the plaintiff reserved title was a minor makes no difference. "The exemption of the infant is a personal privilege, * * * nor can third persons avail themselves of it as a defense." Civil Code 1910, § 4234. Even if the infant had been the defendant in the present case, he could not have pleaded his infancy as against the recovery of the property, for the action of trover sounds in tort, and infancy is usually no defense to an action in tort, where the infant has arrived at the age of discretion. Civil Code 1910, § 4501; *Malone v. Robinson*, 77 Ga. 719. So that, under the particular facts of the case, the court ought to have instructed the jury that they should find in favor of the plaintiff.

[2] 2. The error into which the court fell was that he directed the jury to return a verdict in favor of the plaintiff for the full amount of the purchase price of the buggy as fixed in the contract between the plaintiff and Maddox, the original purchaser, although there was evidence that at the time of the defendant's conversion of the property it was worth much less than that sum. It is well settled by a number of cases that where a seller has retained title as security for his purchase money, or where one otherwise holds title to personal property as security, and he brings trover, the amount of the indebtedness remaining due at the time of the trial fixes the maximum of his recovery. *Clark v. Bell*, 61 Ga. 147; *Bell v. Ober*, 96 Ga. 214, 23 S. E. 7; *Bradley v. Burkett*, 82 Ga. 255, 11 S. E. 492. However, where the seller, who has retained title as security for his purchase money, brings trover, even against the original purchaser, his act in bringing the suit operates as a rescission of the sale; and if he elects to take a money verdict, he cannot recover more than the value of the property at the time of the conversion, with interest or hire, or the highest proven value between the conversion and the trial, accord-

ingly as he may elect, notwithstanding the balance due on his debt may be a larger amount. *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143; *Hodges v. Cummings*, 115 Ga. 1000, 42 S. E. 394. As between the original seller and the original purchaser, the agreed price as stated in the contract of sale is *prima facie*, but not conclusive, evidence of the actual value of the property. But as between the seller and third persons the amount stated in the contract of purchase is of no such evidentiary value. In this case the proof as to the value of the property at the time of the defendant's conversion and subsequently was in decided conflict, and therefore presented a jury question.

Counsel for the defendant in error ingeniously argue that the amount of the sale price, evidenced by the title-retaining note, and the highest proven value of the property are in this case identical, and that there cannot be hurt to the plaintiff in error because the judge took the amount of the sale price to fix the sum for which he directed the verdict. He bases this contention on the fact that the highest estimate of value given by any witness tallied in amount with the sale price stated in the note. There is often a very great difference between the highest estimate of value and the highest proved value of an article. Witnesses may vary in their estimates as to what the highest value of the property was between certain dates. Of course, the measure of damages which allows the plaintiff to take advantage of the highest proved value has reference to property which has changed in value between the dates in question, and allows the plaintiff to take the advantage of recovering for the value of the property at that point during the period at which the property was worth the most, whether it be at the beginning of the period, at the end of the period, or at some intermediate time, but does not give him the right to recover the highest amount that any witness is willing to swear the property was worth, unless the jury believe that that witness has correctly estimated the value.

[3] 3. The judgment is reversed, because the court did not submit to the jury the question as to the amount of the plaintiff's recovery.

Judgment reversed.

(9 Ga. App. 496)

O'NEAL v. FIRST NAT. BANK. (No. 8,314.)
(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. EXECUTION (§ 51*)—PROPERTY SUBJECT—LAND PURCHASED IN PART BY WIFE.

Where a husband, having in his possession certain money belonging to his wife, purchased a parcel of land, paying therefor partly with this money of his wife and partly with money which he borrowed in his own name, and with

his wife's consent took the title to the land in himself, with the understanding, evidenced in parol only, that when the sum so borrowed by him was repaid by her to him he would convey the land to her, the legal title to the land was in the husband, and the wife acquired neither legal title nor a perfect equity thereto, even upon payment to the husband of the sum so borrowed, until the husband executed the deed. Likewise the title to crops severed from the land before the deed from the husband to the wife was executed was in the husband, and was subject to a common-law judgment rendered against him in behalf of one of his creditors.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 119; Dec. Dig. § 51.*]

2. EXECUTION (§ 194*)—CLAIM BY THIRD PERSON—BURDEN OF PROOF.

Where a levy is made upon property found in the possession of the defendant in *fi. fa.* and a claim is filed thereto, the burden of proof rests upon the claimant. Where property levied upon and found in the possession of the defendant in *fi. fa.* was a bale of cotton, and there was evidence from which the jury could find that the title to a part of the cotton in the bale was in the defendant in *fi. fa.* and a part in the claimant, but the bale of cotton at the time of the levy was in the possession of the defendant in *fi. fa.*, it was not error for the court to charge the jury that the burden was upon the claimant to show what part was subject and what part was not subject, and that upon his failure to do so it would be the duty of the jury to find all of the cotton subject.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 572; Dec. Dig. § 194.*]

Error from City Court of Moultrie; Robt. L. Shipp, Judge pro hac.

Action by the First National Bank against R. L. O'Neal. Judgment for plaintiff, and defendant brings error. Affirmed.

Edwin L. Bryan, for plaintiff in error.
J. D. McKenzie, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 496)

MOORE v. GAINESVILLE MIDLAND RY. CO. (No. 3,311.)

(Court of Appeals of Georgia. June 29, 1911.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

2. NEGLIGENCE (§ 97*)—COMPARATIVE NEGLIGENCE—APPLICATION OF DOCTRINE.

There was no error in the court's instructing the jury substantially to the effect that, though the plaintiff would be *prima facie* entitled to recover if the runaway in which he was injured was occasioned by the alleged acts of negligence on the part of the defendant, yet that if, after the acts of the defendant's negligence were in progress, the plaintiff could have avoided the consequences by ordinary care and diligence, he could not recover. The charge was not subject to the exception on the ground that it deprived the jury of the right to diminish the damages in accordance with the comparative negligence of the respective parties. The doctrine of comparative negligence is not applicable to cases where the plaintiff failed to observe ordinary care and diligence to avoid the injury, after the negligence of the opposite party was existing and apparent. Atlanta, Knoxville

& Northern v. Gardner, 122 Ga. 82, 49 S. E. 818.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 93, 162; Dec. Dig. § 97.*]

3. APPEAL AND ERROR (§ 1052*)—DISPOSITION OF CAUSE—REVERSAL—TRIVIAL ERROR.

There was some slight error in the admission of testimony; but slight error in the admission of testimony is not alone sufficient ground for reversal, especially where the verdict is well supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4177; Dec. Dig. § 1052.*]

Error from City Court of Jefferson; W. W. Stark, Judge.

Action by W. R. Moore against the Gainesville Midland Railway Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

M. C. Few, for plaintiff in error. H. H. Dean, for defendant in error.

POWELL, J. Judgment affirmed.

(89 S. C. 140)

STATE v. PARRIS.

(Supreme Court of South Carolina. July 3, 1911.)

1. INDICTMENT AND INFORMATION (§ 114*)—ALLEGATION OF CONVICTION OF PRIOR OFFENSE—NECESSITY.

An indictment need not allege that the offense charged is a subsequent offense for the purpose of increasing the punishment on a conviction and an allegation of a prior conviction should be stricken out on motion of accused.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 301-307; Dec. Dig. § 114.*]

2. CRIMINAL LAW (§ 1202*)—PUNISHMENT—PRIOR OFFENSES—STATUTES—CONSTRUCTION.

To justify the imposition of the increased punishment authorized by Acts 1909 (26 St. at Large, p. 60), prohibiting the sale of intoxicating liquor, and declaring, in section 11, that the punishment for the second or any subsequent offense shall be by imprisonment, there must be a prior conviction of a violation of the act, and a former conviction of a violation of a municipal ordinance relative to intoxicating liquors is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3280-3285; Dec. Dig. § 1202.*]

3. CRIMINAL LAW (§ 762*)—EVIDENCE—INSTRUCTIONS—CHARGE ON THE FACTS.

Where, on a trial for keeping intoxicating liquors for unlawful sale, there was evidence that accused had concealed on his person intoxicating liquor, and that intoxicating liquor had been found in his house partially concealed, a charge that the jury must determine from the circumstances whether accused had liquor in his possession for an unlawful purpose, and that if a practicing physician had liquor in his possession, the jury would naturally infer that he was going to use the same for medicine, while if a notorious blind tiger traveled around with liquor they would naturally suppose he was plying the trade, was objectionable as a charge on the facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1753; Dec. Dig. § 762.*]

Appeal from General Sessions Circuit Court/ of Spartanburg County; Robt Aldrich, Judge.
"To be officially reported."

J. B. Parris was convicted of crime, and he appeals. Reversed.

J. B. Atkinson, for appellant. J. C. Otts, Sol., for the State.

HYDRICK, A. J. Appellant was convicted on an indictment which contained two counts. The first count charged him with "keeping a place where alcoholic liquors are kept for unlawful use, and where people are permitted to come and traffic in liquors"; and the second count charged him with "having in his possession alcoholic liquors for unlawful use, and storing and keeping the same." After the formal parts, the indictment contained the following charge: "And the jurors aforesaid, upon their oaths, do further present that J. R. Parris has been heretofore duly convicted for violating statutes relating to the sale of liquors and beverages containing alcohol, by a court of competent jurisdiction."

[1] Upon the call of the case for trial, defendant's attorneys moved to strike from the indictment the allegation, above quoted, of a previous conviction, on the ground that it was evidentiary matter or surplusage. The motion was refused, the court holding that, as the statute increased the punishment for a second or any subsequent offense, the allegation that the offense charged in the indictment was of that character was necessary. This view of the law is in harmony with the greater number of decided cases in other jurisdictions. See 22 Cyc. 356, and cases cited. But the contrary rule was established in this state in Smith's Case, 8 Rich. 460, where the court held that the indictment need not state whether it is for the first or second offense, though the second offense, in that case, was punishable with death, while the first offense was punishable only with whipping. To the same effect is the case of State v. Allen, 8 Rich. 448. We think, therefore, the motion should have been granted.

[2] Section 11 of the act of 1909 reads: "Any person who violates any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, be fined in a sum not less than one hundred dollars nor more than five hundred dollars, or imprisoned at hard labor for a period of not less than three months, nor for more than one year; and for the second or any subsequent offense, upon conviction thereof, shall be imprisoned at hard labor for not less than one year nor more than five years." Under the allegation in the indictment of a former conviction, evidence was admitted that appellant had been convicted and sentenced for violating some ordinance of the city of Spartanburg relative to intoxicating liquors. The record is very indefinite, and

falls to disclose the exact charge upon which he was convicted in the city court, but whatever it may have been, his conviction in that court was not sufficient to warrant an increase of punishment under the section above quoted upon his subsequent conviction in the circuit court for a violation of the act of 1909; for "the second or any subsequent offense" referred to in section 11 above quoted means a second or any subsequent offense committed in violation of any of the provisions of that act. Therefore, the increased punishment can be imposed only upon proof of a former conviction for violation of the provisions of the act of 1909, and the conviction in the city court could not have been such, for that court has no jurisdiction of violations of that act. The imposition of any increased punishment in this case, as for a second offense, was therefore erroneous.

[3] There was testimony that on one occasion defendant was arrested by a police officer of the city of Spartanburg, and that he had concealed on his person—in his pockets—seven pint bottles full of whisky and one pint bottle about half full. On another occasion, he was arrested and two bottles of whisky were found on his person which he had been seen to get from under a house back of a hotel. On still another occasion, his house was searched and a keg, containing 4½ gallons, was found under the table in his dining room, partially concealed by the table cloth; and in the drawers of a dresser and in a trunk in his house were found eight pints and a quart bottle about half full. This indictment was based upon the finding of liquors in his house. The court charged the jury in part as follows: "Now, how are you going to determine whether a man has liquor in his possession for a lawful purpose or for an unlawful purpose? Just as you determine any other practical question; from the circumstances. If you see a practising physician going along in his buggy with a bottle of liquor in his possession, you would naturally infer that he is going to see a sick man, and that he is going to use that liquor for medicine; if you saw a notorious blind tiger traveling around with numbers of bottles of liquor stored about all over his person, you would naturally suppose that he was plying his trade—you judge of those things from the circumstances." Appellant alleges that this was a charge upon the facts. The exceptions raising this point are sustained. When used in connection with the testimony in this case, the language above quoted from the charge gave the jury a very clear intimation of the opinion of the judge as to the weight which should be given to the circumstances mentioned and the inference which should be drawn from them. State v. Johnson, 85 S. C. 265, 67 S. E. 453, and cases cited.

There was some testimony tending to sup-

port the verdict. There was therefore no error in refusing the motion for a new trial on the ground of an entire absence of evidence to sustain the verdict.

Reversed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(39 S. C. 244)

JEFFERS v. JEFFERS et al.

(Supreme Court of South Carolina. July 8, 1911.)

1. COURTS (§ 202*)—PROBATE COURTS—JURISDICTION—WAIVER OF OBJECTIONS—REVIEW.

Where a party on appeal from the probate court to the circuit court contests the case upon the merits in a matter of which the circuit court has jurisdiction, that court, even if it had no jurisdiction of the person in the first instance, acquired such jurisdiction by submission of the party.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 480-486; Dec. Dig. § 202.*]

2. JUDGES (§ 45*)—DISQUALIFICATION TO ACT—RELATION TO PARTY INTERESTED.

At common law a judge was not disqualified by relationship to a party, but might decline to sit in such case.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 208-212; Dec. Dig. § 45.*]

3. JUDGES (§ 56*)—DISQUALIFICATION TO ACT—EFFECT ON ACTS OF JUDGE.

In the absence of statute changing the common law, a judgment rendered by a disqualified judge is merely voidable, and not void.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 235-245; Dec. Dig. § 56.*]

4. JUDGES (§ 53*)—DISQUALIFICATION TO ACT—WAIVER.

In proceedings under the common law, a party might waive objection to the disqualification of the judge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 232; Dec. Dig. § 53.*]

5. JUDGMENT (§ 9*)—DISQUALIFICATION TO ACT—EFFECT ON ACTS OF JUDGE—STATUTORY PROVISIONS.

Under Const. art. 5, § 6, which provides that no judge shall preside at the trial of any cause when he is related to any of the parties by affinity or consanguinity within such degrees as may be prescribed by law, and Civ. Code 1902, § 2820, which declares that no judge shall preside on the trial of any cause where he is related to any of the parties within the sixth degree, a judgment rendered by a disqualified judge is merely voidable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 235-245; Dec. Dig. § 9.* Judges, Cent. Dig. §§ 237, 239.]

6. APPEAL AND ERROR (§ 911*)—REVIEW—PRESUMPTION—JURISDICTION OF LOWER COURT.

In the absence of facts showing that the judge of the probate court knew of his disqualification to act by reason of his relationship to a party, it will be presumed that the judge was not aware of the relationship, as otherwise he would have been guilty of a willful violation of law.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 911.*]

7. APPEAL AND ERROR (§ 1027*)—HARMLESS ERROR—DISQUALIFICATION OF JUDGE.

Where the judge during a proceeding and at the time of rendering a decree did not know

that he was related to one of the parties, his disqualification was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1027.*]

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Berkeley County; R. W. Memminger, Judge.

"To be officially reported."

Proceeding by William A. Jeffers, executor of William Jeffers, against Mary E. Jeffers and others to probate the will of plaintiff's decedent. From an order of the circuit court, pending an appeal from the probate court, refusing a motion for a new trial in probate court, plaintiff appeals. Appeal dismissed.

Mitchell & Smith, John A. Hiers, E. J. Dennis, and Octavus Cohen, for appellant. Legaré & Holman, Mordecai & Gadsden, and Rutledge & Hagood, for respondents.

GARY, A. J. This is an appeal from an order of the circuit court refusing a motion for a new trial in the probate court on the ground that the probate judge at the time of filing the decree herein rendered by him was related to one of the parties to the action within the sixth degree. The proceedings were instituted in the probate court on the 8th of February, 1909, at which time an order was made requiring William A. Jeffers, executor of the will of William Jeffers, deceased, to take such steps as were necessary to have said will probated in solemn form of law. On the 3d of August, 1910, the probate judge, before whom the case was tried, filed a decree in which he ruled that the will propounded for probate was not the last will and testament of William Jeffers, deceased. The executor appealed from said decree, and while the appeal was pending made the motion for a new trial hereinbefore mentioned in the circuit court, which was refused. The motion for a new trial was based upon the following facts alleged in the affidavit made by the executor: "That he was not informed before or at the time the above-entitled cause was tried before the probate judge, nor did he have any notice whatsoever, nor could he have discovered prior to said trial by the exercise of any reasonable diligence that the probate judge who tried the cause was related within the sixth degree, or was second cousin to one of the parties to the cause, to wit, Mrs. Mary E. Singletary, formerly Mrs. Mary E. Jeffers, the widow of the testator, the late William Jeffers; that it is only since the trial and the decision of the probate court in this case that this matter accidentally came to the knowledge of this proponent and his attorneys, who have only now been able to verify and obtain satisfactory proof of the facts above set forth, and the motion for a new trial could not have been made sooner." The reasons assigned by his honor, the circuit

judge, for refusing said motion, are thus stated in the following order made by him on the 8th of March, 1911: "This cause having come on, on a motion to remit the case to the probate court for a new trial, on the ground that the probate judge who heard the cause was within the prohibited degree of relationship; now, on hearing the motion and affidavits on both sides, and counsel on both sides being heard, it is ordered that, although it appears from the weight of the testimony that the probate judge of Berkeley county, who heard the case below, was related to Mary E. Jeffers, one of the defendants herein, within the sixth degree, yet it does not sufficiently appear that the petitioner could not by due diligence have ascertained that fact before or during the trial or before the decision in the probate court; and therefore, in the opinion of the court, the motion for a new trial should be and is hereby refused." When this case was called for hearing in the Supreme Court, the respondents' attorneys raised the following preliminary question of jurisdiction, upon which they gave notice they would rely, as an additional reason, for sustaining the judgment of the circuit court: That the court of common pleas has no jurisdiction to entertain a motion for a new trial in the probate court on notice and affidavit, but that such motion should have been made before the judge of probate in the court of original jurisdiction."

[1] In the first place, we do not regard the question as jurisdictional in its nature. The case of *Jenkins v. Railway*, 84 S. C. 343, 66 S. E. 409, shows conclusively that the court of common pleas has jurisdiction of the subject-matter of the action, and that, even if that court did not have jurisdiction of the person in the first instance, it acquired such jurisdiction, when the party now interposing the objection contested the case upon the merits. See, also, *Ex parte Hilton*, 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800. We proceed to the consideration of the question whether there was error on the part of his honor, the circuit judge, in ruling that the motion for a new trial could not be sustained, as it did not sufficiently appear that the petitioner could not by due diligence have ascertained the relationship before the rendition of the decision in the probate court.

[2] At common law a judge was not disqualified from presiding by reason of his relationship to a party to the action, but had the privilege of declining to sit in such cases. It is now, however, generally provided by constitutional or statutory law that relationship by affinity or consanguinity between him and a party litigant within certain degrees will disqualify him. 23 Cyc. 583.

[3] In the absence of statute changing the common law, a judgment rendered by a disqualified judge was held to be merely voidable, and not void. The judge's action was regarded as an error or irregularity, and,

as such, a ground to set aside the judgment on error or appeal, except in inferior courts or proceedings, where no writ of error or appeal would lie.

[4] In proceedings under the common law objection to a disqualified judge might be waived by a party so as to preclude him from afterwards taking advantage of it. 17 Enc. of Law, 742. See, also, note to the case of *Carr v. Duhme*, 10 Am. & Eng. Ann. Cas. 987. Section 6, art. 5, of the Constitution, provides that "no judge shall preside, at the trial of any cause, in the event of which he may be interested, or when either of the parties shall be connected with him, by affinity or consanguinity, within such degrees as may be prescribed by law." Section 2820 of the Code of Laws is as follows: "No judge or other judicial officer, shall preside on the trial of any cause, where he may be connected with either of the parties by consanguinity or affinity, within the sixth degree."

[5] A judgment rendered by a disqualified judge in this state is merely voidable. *Ex parte Hilton*, 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800. In the note on page 995, 24 Enc. of Law (1st Ed.), the principle is thus stated: "After a trial has been commenced, no attempt to recuse a judge will be listened to, unless it be shown affirmatively that the party was not aware of the objection, *and was in no fault, for not knowing it.*" (Italics ours.) This language is quoted with approval in *Ex parte Hilton*, 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800. In the case of *Town of Clinton v. Leake*, 71 S. C. 22, 50 S. E. 541, it was held that the objection that members of the town council were related to the defendant would not be considered, where the record failed to show that such objection was urged at the trial. In the note to *Johnson v. State* (Ark.) 15 Am. & Eng. Ann. Cas. 531, appears the following quotation from *Roberts v. Roberts*, 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108: "The reasons at the foundation of the rule which forbid a juror from sitting in a case, where he is related to some one pecuniarily interested in the result of the suit, would also apply in the case of a judge who was in a similar situation."

Turning to the case of *State v. Robertson*, 54 S. C. 147, 31 S. E. 868, we find that the rule is thus stated, in regard to the disqualification of a juror: "While it is true that in the cases of *Kennedy v. Williams* [2 Nott & McC. 79] and *Garrett v. Weinberg* [54 S. C. 127, 31 S. E. 341, 34 S. E. 70] supra, some stress is laid, and in a proper case properly laid, on the fact that the disqualification of the juror was not known to the party or his counsel, until after the trial, yet we think this should be qualified by the proviso that such ignorance is not due to the want of diligence; for, where the disqualification relied on might have been discovered by the exercise of ordinary diligence, it affords no

excuse for failing to make the objection in due season; for, as was said in *State v. Fisher* [2 Nott & McC. 261], supra, a party 'should not be permitted to take advantage of his own negligence.' This language is quoted with approval in *State v. Rafe*, 56 S. E. 379, 34 S. E. 660, in which the court also says: "It was necessary for the appellant to show, not only that he did not know of the juror's disqualification until after the trial, but that by the use of due diligence he could not have discovered the same." (Italics ours.)

[6] If the appellant in addition to showing the disqualification of the probate judge, and that he (the appellant) did not have knowledge of such fact, before the decree was rendered, had also shown that the probate judge knew at that time of his relationship to one of the parties to the action, then it might with good reason be contended that there should be a new trial.

[7] But no such fact appears in the record, and the presumption is that the probate judge was not aware of the relationship, as otherwise he would have been guilty of a willful violation of the law, which is never presumed. In the absence of testimony, showing that the probate judge had knowledge of said relationship, it has not been made to appear that there was prejudicial error in refusing the motion for a new trial.

Appeal dismissed.

JONES, C. J., concurs. HYDRICK, J., did not sit in this case.

WOODS, J. (dissenting). I dissent because I am unable to accept the doctrine that the provision of the Constitution prohibiting a judge related within the sixth degree to either party from hearing a cause is waived by the failure to inquire into the relationship before trial.

All the requirements of the Constitution of this state are mandatory, and it is therein provided by article 5, § 6, that "no judge shall preside at the trial of any cause in the event of which he may be interested, or when either of the parties shall be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law." The statute law has fixed the sixth degree of relationship, and the probate judge in this case was a second cousin. In some of the states the courts have held that such a mandatory provision cannot be waived. *Oakley v. Aspinwall*, 3 N. Y. 547; *Gulf, etc., Ry. Co. v. Looney*, 42 Tex. Civ. App. 234, 95 S. W. 691. Other courts, including the Supreme Court of this state, have held that a party will be held to have waived the objection if he knew of the relationship before the trial. *Ex parte Hilton*, 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800. Other authorities on the subject are collated in 23 Cyc. 596, and

the note to *Moses v. Julian*, 84 Am. Dec. 130. In several of the states the decisions will be found to depend on the special terms of the Constitution or statute law.

It concerns not only the parties to the suit, but all the people, that there should be confidence in the impartiality of judges. The prohibition of the Constitution is directed to the judges themselves, forbidding them to preside at a trial when related to a party within the degree fixed by law. The law is intended, not only to give security to the parties and to promote confidence in the courts, but to safeguard judicial officers against criticism. There may be, it is true, special circumstances requiring a party to make inquiry as to the relationship or interests of the judge. But the judge himself may well be presumed to know his own relationship within the sixth degree, and as a general rule the parties may well rely on this presumption, and on the further presumption that the judge will be mindful of the law on the subject and will obey it.

It would be unseemly that parties should have placed upon them the burden of inquiring at their peril into disqualifying interests and relationships of judicial officers. Jurors and judges in this respect stand on a very different footing. Jurors are drawn from the body of the people for a temporary public service. Judicial officers are set apart because of their supposed special fitness for continuous public service. The presumption that judges know the law bearing upon their own qualifications and official duties is very strong. Such presumption as to jurors is comparatively weak. Hence the law allows to parties the opportunity to examine jurors upon their voir dire, and places upon parties the burden of making reasonable efforts before trial to ascertain and make known facts tending to disqualify them. In view of this distinction, it seems clear that the case of *State v. Robertson*, 54 S. C. 147, 31 S. E. 868, and other similar cases relating to jurors, do not control this case. The facts in the case of *Clinton v. Leake*, 71 S. C. 22, 50 S. E. 541, cited in the opinion of Mr. Justice GARY, were so different that it seems to me that case is obviously inapplicable.

The point was made in this court for the first time that the circuit court had no jurisdiction to hear the motion to remand the case to the court of probate for a new trial by a duly qualified judge of that court. I am unable to find any mode of procedure in such case laid down by statute, or by rule of court, or by judicial decision in this state. but it seems to me evident that when any appellate court finds on its docket a case in which the fact is made clearly to appear that the judgment appealed from was not rendered by a court constituted according to the Constitution and laws of the state, and the parties have not waived their right to such a tribunal, it should refuse to hear the appeal

and remand the case to be tried by a properly constituted court.

For these reasons, I think the judgment of the circuit court should be reversed.

TRAYNHAM v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. July 8, 1911.)

1. COMMERCE (§ 33*)—INTERSTATE COMMERCE—WHAT IS.

A shipment from one point in the state to another point in the same state is nevertheless interstate commerce where the route of the railroad between those two points lies partly within the boundaries of another state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.*]

2. COMMERCE (§ 61*)—INTERSTATE COMMERCE—STATE REGULATION—DELAYS WITHIN THE STATE.

The statute subjecting railroads to penalties for delay in shipment of freight within the state is not a burden on interstate commerce, though railroads are liable for those delays in interstate shipments which occur wholly within the state, as the statute instead of creating a burden, aids such commerce by seeking to compel performance by the carrier of its duty to deliver freight with reasonable diligence.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81-84, 89; Dec. Dig. § 61.*]

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Laurens County.

Action by Z. R. Traynham against the Charleston & Western Carolina Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Simpson, Cooper & Babb, for appellant. Richey & Richey, for respondent.

JONES, C. J. We do not think the statute as applied to a delay wholly within the state is obnoxious to the interstate commerce clause of the federal Constitution. In *Hunter v. Railway*, 81 S. C. 173, 62 S. E. 13, construing this statute the court said: "The statute cannot have operation beyond the territory of the state and should not be so construed as to interfere substantially with transportation in its interstate features. Possibly in case of a transportation beginning and ending in this state, but the necessary route going partly in another state, it would not materially interfere with interstate transportation or commerce to penalize for delay occurring wholly within this state, but such is not the case at bar and we reserve opinion on that point." The present case squarely presents the point reserved in that case.

[1, 2] It is conceded that the transportation in this case is interstate because partly in another state, under the authority of *Hanley v. Kansas City Ry.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, and that state

legislation cannot be allowed to operate so as to materially affect or burden such transportation. The real question then is whether the legislation in question construed with reference to a delay wholly within the state is any substantial burden on interstate commerce. The *Hanley Case*, supra, related to the right of a railroad commission to fix a rate of transportation on a shipment between two points in a state where a large part of the route was outside the state. The crux of the case was the fixing of a rate of transportation which of necessity directly operated upon such portion of the transportation as was outside of the state, and this distinguished the case from *Lehigh Valley Ry. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, where a state tax upon gross receipts for the proportion of transportation within the state was held not to interfere with interstate commerce as applied to a railroad doing interstate business.

That the statute is within the valid exercise of the police power of the state and not a burden on interstate commerce as applied to the penalizing of a delay occurring wholly within this state is shown by the principle declared in *Western Union Tel. Co. v. James*, 162 U. S. 850, 16 Sup. Ct. 934, 40 L. Ed. 1105; *Western Union Tel. Co. v. Commercial Mill Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088; *Atlantic Coast Line Railroad Co. v. Mazursky*, 216 U. S. 122, 30 Sup. Ct. 378, 54 L. Ed. 411; *Western Union Tel. Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 400, 55 L. Ed. —. The last-mentioned case, which was decided in April, 1911, held that a statute of Virginia which imposed a penalty upon telegraph companies for failure to transmit within the state as promptly as practicable a message received in the state for transmission to a person in another state is a valid exercise of police power, in the absence of legislation by Congress on the subject.

The statute in question operates wholly within the state, makes no attempt to interfere with interstate commerce, creates no burden upon such commerce, but aids it, in seeking to compel performance by the carrier within this state of its duty to the public to deliver freight with reasonable diligence.

The judgment of the circuit court is affirmed.

WOODS and HYDRICK, JJ., concur.

GARY, A. J. (dissenting). This is an action for the recovery of a statutory penalty, and for damages alleged to have been sustained by the plaintiff, in consequence of an unreasonable delay on the part of the defendant, in transporting certain articles of merchandise. The allegations of the complaint, material to

the consideration of the questions involved, are as follows:

"That heretofore, to wit, on the 4th day of March, 1907, the Ashpoo Fertilizer Company, delivered to the Atlantic Coast Line Railroad Company, at Charleston, S. C., 10 tons of guano, consigned to Z. R. Traynham, at Barksdale in Laurens county, and state aforesaid. That at Yemassee in the state aforesaid, on March 5, 1907, the Atlantic Coast Line Railroad Company, delivered the car containing said guano, to the defendant the Charleston & Western Carolina Railway Company, for transportation to the plaintiff at Barksdale, S. C. That the distance between Yemassee and Barksdale, both of which are in the state of South Carolina, is not over 200 miles, by the nearest railroad route. That although the said car of guano was received by the defendant on March 5, 1907, and the defendant was requested to make prompt shipment thereof, the said car of guano was not delivered to the plaintiff until the 6th day of April, 1907. That by and under the statute law of South Carolina all common carriers doing business in this state are required to transport to its destination all freight received by them for transportation, not exceeding the following limit, * * * and for failure to comply with the said statute, such common carrier so failing, shall be subject to a penalty of five dollars per day, for every day of delay, in excess of the time hereinabove limited."

The defendant denied that the delivery of the guano at its destination was unreasonably delayed, and alleged that the delay was caused by an unusually heavy movement of freight, at that time, over the line of the defendant, which caused its yards and tracks to be blocked at the transfer points, and made it impossible to reach the car and move it at an earlier day. The defendant also alleged that the shipment was subject to the laws relating to interstate commerce, and not to state legislation, by reason of the fact, that the defendant's line of railway, over which the guano was being transported, lies partly in the state of South Carolina, and partly in the state of Georgia. The jury rendered a verdict in favor of the plaintiff for \$60, and the defendant appealed.

The testimony shows that the shipment began and terminated at its destination in this state; that a part of defendant's line, over which it was necessary for it to transport the goods, lies within the state of Georgia.

The first question that will be considered is whether it was an interstate or an intrastate shipment. The cases of *Sternberger v. Railway*, 29 S. C. 510, 7 S. E. 836, 2 L. R. A. 105, *State v. Holleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567, *Frasier & Co. v. Ry.*, 81 S. C. 162, 62 S. E. 14, *Hunter v. Ry.*, 81 S. C. 169, 62 S. E. 13, and *Hanley v. Kansas City Ry.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 323, deter-

mine, beyond question, that it was an interstate shipment. In the case of *Hunter v. Ry.*, 81 S. C. 169, 62 S. E. 13, the same railroad company was involved and the facts, in every respect, were similar to those now under consideration, except in that case, the delay occurred in the state of Georgia.

The title of the act (24 St. at Large, p. 671) then and now before us for interpretation is: "An act to prevent delays, in the transportation of freight, by railroads in this state." The first section provides: "That from and after May 1, 1904, all railroad companies, doing business in this state, shall transport to its destination, all freight received by them for transportation, within the state. * * *" In that case the court used this language: "Construing the words 'transportation within the state,' according to their exact and natural meaning, they do not embrace interstate transportation. (Citing authorities.) The statute, therefore, cannot have operation beyond the territory of the state and should not be so construed, as to interfere substantially with transportation in its interstate feature. * * * Transportation is a part of commerce, and it must be held that the transportation in this instance was not wholly within the state, but was in part within the state of Georgia, and was, therefore, interstate transportation." If no other language had been used by the court in that case, it would be unnecessary to cite authorities to show that the statute of this state is inapplicable. But the court left open the question, whether a case is embraced within the terms of the statute, when the delay takes place wholly in this state. In *Hanley v. Kansas City Ry.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, the court quotes with approval the following language from *Pacific Coast S. S. Co. v. R. R. Commissioners (C. C.)* 9 Sawy. 253, 18 Fed. 10: "To bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state."

An interstate transportation is continuous in its nature, and if a state statute could have the effect of breaking the continuity of transportation, it would necessarily interfere with interstate commerce. *State v. Holleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567. As an interstate transportation must be regarded as an entirety, it is difficult to conceive how a delay may take place within a state, without being affected by causes operating at some other place on the line of railroad, even in another state. It would certainly be an onerous burden on interstate commerce, to hold that a shipment during its actual transportation, could be subjected to state legislation at any point on the line whatever before it reached its destination.

It is the judgment of this court that the judgment of the circuit court be reversed.

(96 S. C. 398)

HARMON v. HARMON et al.

(Supreme Court of South Carolina. July 7, 1911.)

1. WITNESSES (§ 150*)—COMPETENCY—TESTIMONY OF PERSONS INTERESTED AGAINST REPRESENTATIVE OF PERSON DECEASED.

Under Code Civ. Proc. 1902, § 400, which provides that parties may be witnesses in their own behalf, except as to transactions with decedents, in actions by heirs, etc., the testimony of a defendant in partition as to an agreement between himself and his deceased father is competent, where the plaintiffs claim as heirs of defendant's deceased brother.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 150.*]

2. TRUSTS (§ 110*)—CONSTRUCTIVE TRUSTS—EVIDENCE TO ESTABLISH—SUFFICIENCY.

Evidence in a partition suit held sufficient to establish a constructive trust in favor of a party defendant.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 110.*]

3. TRUSTS (§ 95*)—"CONSTRUCTIVE TRUSTS."

A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form, as if one person having money belonging to another wrongfully uses it for the purchase of land, and takes the title in his own name, in which case equity impresses a constructive trust upon the land not only while in the hands of the original wrongdoer, but as long as it can be followed and identified, except in the hands of a bona fide purchaser for value and without notice.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145-147; Dec. Dig. § 95.*]

4. ESTOPPEL (§ 58*)—GROUNDS—INCONSISTENCY OF CONDUCT—CLAIM.

Estoppel by conduct rests upon the principle that the conduct of the party estopped has misled another to his prejudice, and, where the money of a party defendant in a partition suit had been used by his father in the purchase of land, the title to which was put in a brother's name, defendant's acceptance of a deed of the dower rights of his brother's widow does not estop him from claiming against his brother's heirs, since their rights were not adversely affected by his acceptance of the deed.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 144, 145; Dec. Dig. § 58.*]

5. TRUSTS (§ 108*)—CONSTRUCTIVE TRUSTS—EVIDENCE—ADMISSIBILITY.

Where defendant in a partition suit claimed as constructive trustee land to which his brother had held record title, the fact that he accepted a deed of dower rights in his brother's estate is competent as evidence of an implied admission that the beneficial title was in the brother.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 168; Dec. Dig. § 108.*]

6. ESTOPPEL (§ 90*)—GROUNDS—ACQUISITION—PREJUDICE.

Where money of defendant was used by his father in the purchase of land, title to which was put in the name of defendant's minor brother with an intent to delay the father's creditors, and to prevent defendant's interference with the possession of the land, defendant was not estopped from asserting a constructive trust by acquiescence in the transfer, since such creditors would not have been entitled to subject the land to the payment of their claims in any event.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 242-256; Dec. Dig. § 90.*]

Appeal from Common Pleas Circuit Court of Berkeley County; G. W. Gage, Judge.

Action for partition by D'Orrielle Harmon against Duncan Harmon and others. Complaint dismissed, and plaintiff and defendants, except Duncan Harmon, appeal. Affirmed.

Octavus Cohen, for appellants. Lewis G. Fultz, for respondent.

HYDRICK, J. This is an action for partition. The complaint alleges that William H. Harmon died intestate seised in fee of the land therein described, the same having been conveyed to him by James W. Brownlee by deeds dated June 14, 1855, and May 25, 1861; that his widow, Margaret, and his children, the plaintiff and the defendants Angel and Marie, are his only heirs; that his widow conveyed her dower in said land to the defendant Duncan A. Harmon, who is therefore made a party. The defendant Duncan admits the allegations of the complaint, except that William was seised of the land in his own right, and claims to be the sole owner thereof, alleging that Enoch, the father of himself and William, purchased the land from Brownlee and paid for it with funds belonging to him, but had the titles made in the name of William, then an infant about 11 years old; that thereby a trust arose in his favor; that he has paid the taxes thereon and all expenses connected therewith, and has been in exclusive possession thereof for more than 20 years, claiming the same as owner thereof; that during the life of William the land was forfeited to the state for nonpayment of taxes, and it had not been redeemed up to the time of his death, but, after the death of William, desiring to redeem the land, he was required by the commissioners of the sinking fund to produce some written evidence of being the owner of an interest therein, and for that reason he obtained a conveyance from Margaret of her dower therein; and thereupon he was allowed to and did redeem it.

The master found the facts to be substantially as alleged by Duncan, and, further, that, when Duncan redeemed the land in 1889, he returned it for taxes in his own name, and has ever since paid taxes on it; that he has been in possession of it for about 50 years, ever since it was purchased from Brownlee. It appears from the testimony that Enoch and his two sons lived on the land until the death of Enoch, and that after the death of Enoch the two sons lived on the land until a few years after William's marriage, when he moved off to educate his children, leaving Duncan in possession. The master held that, by accepting the deed from Margaret conveying to him her dower therein, Duncan thereby acknowledged that the land belonged to William in his own right,

and he was therefore estopped from claiming that William held the title merely as trustee for him; for, in that case, his widow would have had no dower in the land. The master further found that Enoch had the title put in the name of William, then an infant 11 years of age, to shield the land from his creditors, and to prevent Duncan from interfering with his possession thereof; and held that Duncan, having acquiesced in the fraud perpetrated on his father's creditors for more than 50 years, is now estopped from setting up any claim to the land. Upon exceptions to the master's report, the circuit court sustained all his findings of fact, but reversed his conclusion that Duncan was estopped from claiming the land by his acceptance of the deed of Margaret to her dower therein and by acquiescing in the alleged fraud upon his father's creditors, and dismissed the complaint, holding that, the trust having been established, Duncan was the sole owner of the land.

The exceptions assign error (1) in not holding that the testimony of Duncan Harmon as to transactions and communications between himself and his father, Enoch Harmon, then deceased, was obnoxious to section 400 of the Code of Procedure, and should, therefore, have been excluded; (2) in holding that the evidence established a trust in favor of Duncan; (3) in not holding that Duncan was estopped from claiming the land by accepting the deed of William's widow to her dower right therein, thereby admitting the beneficial title to have been in William and also by his long acquiescence in the alleged fraud on his father's creditors.

[1] The testimony of Duncan as to the transactions between himself and his father was not obnoxious to section 400 of the Code, because it was not against a party prosecuting or defending the action in any character mentioned in that section. The plaintiff and other children of William claimed the land as his heirs, and not as heirs of Enoch. If they had been prosecuting the action as heirs of Enoch, then the testimony of Duncan as to any transactions between himself and Enoch would have been obnoxious to that section. *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797.

[2, 3] We agree with the circuit judge in holding that the evidence was sufficient to establish a constructive trust in favor of Duncan. "A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form. If one person, having money or any kind of property belonging to another in his hands, wrongfully uses it for the purchase of lands, taking the title in his own name; or if a trustee or other fiduciary person wrongfully converts the trust fund into a different species of property, taking to himself the title; or if an agent or bailee wrong-

fully disposes of his principal's securities, and with the proceeds purchases other securities in his own name, in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosoever hands it may come, except into those of a bona fide purchaser for value and without notice, and the court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust who has thus been defrauded. * * * It is not essential for the application of this doctrine that an actual trust or fiduciary relation should exist between the original wrongdoer and the beneficial owner. Wherever one person has wrongfully taken the property of another, and converted it into a new form, or transferred it, the trust arises and follows the property or its proceeds." 8 Pom. Eq. Jur. (3d Ed.) § 1051. See, also, section 1049, where it is said the doctrine applies to the cases of persons "purchasing property with money belonging to the separate estate of their wives, parents, and children, and all persons who stand in fiduciary relations towards each other."

[4, 5] The doctrine of estoppel has no application to this case, as it does not appear that the rights of William or of those claiming under him have been adversely affected by the conduct of Duncan in accepting the deed from Margaret for her dower in the land. Estoppel by conduct rests upon the principle that the conduct of the party estopped has misled another to his prejudice. The fact that he accepted the deed was competent as evidence of an implied admission on his part that the beneficial title was in William, but he satisfactorily explained his reasons for accepting the deed, and thereby removed the force of the admission.

[6] As to his acquiescence in the alleged fraud perpetrated by his father upon his creditors, we agree with the circuit judge. In the first place, there was no fraud upon Enoch's creditors. They had no right to nor interest in money in Enoch's hands which belonged to Duncan, who owed them no legal duty. They could not have reached the land, if the title had been put in Enoch's instead of William's name, because it was impressed, in equity, with a trust in favor of Duncan, whose money paid for it, and whose equity, so far as the evidence shows, was superior to theirs. The acquiescence of Duncan in allowing the title to remain in William after his father had had it so made was natural under the circumstances, and is explained by the relations of the parties.

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(39 S. C. 189)

NEW YORK LIFE INS. CO. v. MOBLEY.
(Supreme Court of South Carolina. July 7, 1911.)

1. EXECUTION (§ 158*)—STAY OF EXECUTION—ORDER—NOTICE.

An order to stay execution cannot be made without notice to the adverse party or attorney, as prescribed by Code Civ. Proc. 1902, § 242a.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 442-465; Dec. Dig. § 158.*]

2. INJUNCTION (§ 148*)—UNDEBTAKING—NECESSITY.

The court, on issuing an injunction, cannot dispense with an undertaking with or without sureties, as required by Code Civ. Proc. 1902, § 243.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 323-334; Dec. Dig. § 148.*]

Appeal from Common Pleas Circuit Court of Lancaster County; J. W. De Vore, Judge. "To be officially reported."

Action by the New York Life Insurance Company against Nanny B. Mobley. From a judgment for plaintiff, defendant appeals. Reversed.

J. Harry Foster, for appellant. James H. McIntosh and R. B. Allison, for respondent.

HYDRICK, J. [1] It is error to grant an order staying execution without notice to the adverse party, or his attorney. Code Civ. Proc. 1902, § 242a.

[2] On issuing an injunction, the court has no power to dispense with an undertaking, with or without sureties, as required by section 243 of the Code. *Smith v. Smith*, 51 S. C. 379, 29 S. E. 227; *Water Co. v. Nunamaker*, 73 S. C. 550, 53 S. E. 996.

No point is made and no opinion expressed as to whether this action will lie. But see *Crocker v. Allen*, 34 S. C. 452, 18 S. E. 650, 27 Am. St. Rep. 831.

Reversed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(39 S. C. 241)

BRUCE v. CITY COUNCIL OF GREENVILLE.

(Supreme Court of South Carolina. July 8, 1911.)

MUNICIPAL CORPORATIONS (§ 911*)—BONDS—"IMPROVEMENT"—BRIDGES.

Under an amendment to the Constitution ratified by Act Feb. 20, 1905 (24 St. at Large, p. 955), providing that a city might increase its bonded indebtedness for the improvement of streets, the construction of a bridge in place of a previous bridge, which spanned a river, dividing a city street, is an "improvement" of the street, and bonded indebtedness may be incurred to pay for such improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1899, 1901; Dec. Dig. § 911.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3452-3460; vol. 8, pp. 7682, 7683.]

Original petition by J. B. Bruce against the City Council of Greenville to enjoin the issuance of certain municipal bonds. Petition dismissed.

Haynsworth & Haynsworth, for petitioner. Oscar Hodges, for respondent.

WOODS, J. In this proceeding instituted to enjoin the city council of Greenville from issuing certain municipal bonds, the following are the admitted facts:

The city of Greenville is incorporated under the General Statutes of this state (Code 1902, vol. 1, § 1972), having surrendered its old charter and received a new one February 14, 1911. By an amendment to the Constitution proposed by joint resolution February 19, 1904 (24 St. at Large, p. 676), and ratified by an act of February 20, 1905 (24 St. at Large, p. 955), it was provided that the city of Greenville might increase its bonded indebtedness to an amount not exceeding 15 per cent. of the value of its taxable property, where the proceeds of the bonds are applied to the payment "of past indebtedness, to expenses and any liabilities incurred or to be incurred in the improvement of streets and sidewalks, and for providing sewerage for said city, or any part thereof, for purchasing, owning or operating waterworks or electric light plants." In the early part of the year 1910, a petition from the freeholders of the city of Greenville was presented to the city council, asking for an election upon the question as to whether the city of Greenville should issue bonds in the sum of \$200,000, "to be used solely for the improvement or paving of its streets and sidewalks and building Main Street bridge." In this petition it was stated that \$20,000 should be used for building a bridge, and \$180,000 for street improvements. The election was duly held, and a large majority voted in favor of the issue of the bonds. Street improvement bonds to the amount of \$100,000 have already been issued and sold, and out of the proceeds \$20,000, provided for in the petition, has been expended on Main Street bridge. The city has now negotiated the sale of the remaining \$100,000 worth of bonds, the proceeds of this second sale to be used in paying for street paving, a large part of which work has already been done. The sale of these bonds has, however, been held up, because the objection was raised that, if the city had no authority to issue bonds for the building of Main Street bridge, this would enter into and affect the validity of the entire issue, and not merely the validity of the \$20,000 worth of bonds, the proceeds of which were actually used in paying for this bridge.

The only question concerning the validity of the bond issue is whether "the building" of Main Street bridge is "an improvement of

streets and sidewalks," within the meaning of the amendment to the Constitution above referred to. The bridge in question spans Reedy river where it is crossed by Main street. For many years there has been a bridge at this point, and before the first bridge was built there was a ford. The new bridge is at the same place, but slightly larger than the old bridge. The walls and arches are of reinforced concrete, filled in with dirt. On the bridge will be laid asphalt sidewalks and vitrified brick paving, corresponding in all particulars with the other portions of Main street. Unless the bridge can be said to be a part of the street, so that the building of it would come within the provision for paving streets and sidewalks, the city has no authority to issue bonds for that purpose. If the proceeds of the bond issue had been used or were to be used for the construction of a river bridge costing \$20,000, where there had been no bridge before, the question might be a serious one. In a very large sense, the construction of such a bridge might be considered improvement of a street; but it might be argued that such construction should be regarded a distinct municipal enterprise, not intended by the Constitution to fall under the head of a mere street improvement. *Schneider v. Detroit*, 72 Mich. 240, 40 N. W. 329, 2 L. R. A. 54. On this question we express no opinion. But where, as in this case, there is already a bridge over the river constituting a part of the street, it seems to be clear that the improvement of the river crossing by repair or reconstruction of the bridge must be held to be an improvement of the street. 2 Dillon on Mun. Corp. § 729; *Berlin Iron Bridge Co. v. San Antonio* (Tex. Civ. App.) 50 S. W. 408; *Huggans v. Riley*, 125 N. Y. 88, 25 N. E. 993; *Sandpoint v. Doyle*, 14 Idaho, 749, 95 Pac. 945, 17 L. R. A. (N. S.) 497; *Erie v. Schwingle*, 22 Pa. 384, 60 Am. Dec. 87; *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418; *Cascade County v. City of Great Falls*, 18 Mont. 537, 46 Pac. 437.

It is the judgment of this court that the petition be dismissed.

(89 S. C. 420)

WARREN et al. v. WILSON.

(Supreme Court of South Carolina. July 5, 1911.)

1. TRESPASS TO TRY TITLE (§ 1*)—NATURE OF REMEDY—"TRESPASS QUARE CLAUSUM FREGIT."

The purpose of the action of trespass to try title being to establish the plaintiff's title to land, the plaintiff must show title in himself and recover upon the strength of his own, and not the weakness of his adversary's title, while in an action of trespass quare clausum fregit the object is to recover damages for the trespass, and mere possession will support the action; and hence a complaint which seeks to recover damages for trespass upon stating title in plaintiff and ouster by defendant, and praying damages for the ouster and the possession of

the land alleged to be wrongfully withheld, states a cause of action of trespass to try title.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7093, 7094.]

2. EVIDENCE (§ 215*)—ADMISSIBILITY.

Plaintiffs in trespass to try title claimed as devisees of a testator who died in 1906, in possession of the land by defendant as tenant. Defendant denied all the allegations of the complaint except his possession, and alleged that he had been in possession for over 25 years as exclusive owner. *Held*, that it was error to exclude an unexecuted deed in the handwriting of defendant, dated in 1904, purporting to be made by testator, as grantor, to the plaintiff of the lands involved; it being in the nature of an admission by defendant against his claim of ownership.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 754-759; Dec. Dig. § 215.*]

3. TRESPASS TO TRY TITLE (§ 45*)—TRIAL—INSTRUCTIONS—APPLICABILITY TO ISSUES.

In trespass to try title, the complaint alleged that plaintiffs were entitled to the land as devisees of a decedent, and that defendant had entered upon the land as tenant of the decedent, and that testatrix being so seised during her lifetime by defendant as her tenant, defendant, after her death, took and held possession in his own right and ousted plaintiff. The court charged the jury that they must find for the defendant, unless they "find that defendant's possession is that of a tenant of the decedent." *Held*, that this charge was erroneous, being too restrictive of the issues, and authorizing a verdict for defendant if he were not a tenant of the decedent, regardless of the superiority of plaintiff's title.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 45.*]

4. TRIAL (§ 243*)—CONFLICTING INSTRUCTIONS.

It is error to give contradictory instructions on a material issue.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 564-565; Dec. Dig. § 243.*]

Appeal from Common Pleas Circuit Court of Colleton County; R. C. Watts, Judge.

"To be officially reported."

Action by G. L. Warren and others against P. J. Wilson. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

See, also, 71 S. E. 513.

Warren & Warren and Perurifoy Bros., for appellants. Padgett, Lemacks & Mooror and Howell & Gruber, for respondent.

GARY, A. J. This is an action to recover the possession of certain lands and damages. As there is a question as to the nature of the action, we reproduce the complaint, which is as follows: "That heretofore, to wit, on the ——— day of December, 1906, one Georglaetta H. Warren departed this life leaving a last will and testament, whereby she devised to the plaintiffs above named all of her property, both real and personal. That during her lifetime, and at the time of her death, she was seised and possessed of all that tract of land situate, lying, and being in the county

of Colleton, state of South Carolina. * * * That, being so seised and possessed of the aforesaid tract of land during her lifetime by her tenant, the defendant aforesaid, the defendant upon her death took and held possession in his own right, and ousted the plaintiffs herein, and now holds and occupies the same unlawfully, to plaintiffs' damage \$300. Wherefore plaintiffs demand judgment against defendant: (1) For the possession of the above-described tract of land. (2) For \$300 damages sustained by them, by the unlawful ouster of them by said defendant." The defendant denied each and every allegation of the complaint, except "that he is in possession of the said premises, and has been in actual possession thereof for more than 25 years last as the exclusive owner thereof." The jury rendered a verdict in favor of the defendant, and the plaintiffs appealed.

[1] The first question that will be considered is whether the complaint sets forth what would formerly have been denominated an action *quare clausum fregit*. Mr. Chief Justice McIver in the case of *Connor v. Johnson*, 59 S. C. 115, 37 S. E. 240, thus points out the difference between an action *quare clausum fregit* and an action of trespass to try title: "There is this fundamental difference between these two actions, viz.: That in the former, the object being to recover damages for trespass, upon the possession of the land, it is not necessary for the plaintiff to show title himself, but possession merely; while in the latter the plaintiff, in order to recover, must show title in himself, and must recover upon the strength of his own title, and not upon the weakness of his adversary's title. Accordingly, in an action of trespass *quare clausum fregit*, when the plaintiff proves that he is in possession of a given tract of land, and that defendant has trespassed upon it, he is entitled to recover, unless the defendant shows that he has title to the land himself—not that the title is in some third person, as would be sufficient to protect him, if the action were an action of trespass to try titles, or that he entered upon the land and did the acts complained of as trespasses, by the permission or under a license, from the true owner of the land." The present action does not merely seek to recover damages for alleged trespasses on the land, but also possession of the land. It cannot therefore be properly denominated an action *quare clausum fregit*.

[2] The next assignment of error, which will be considered, is as follows: "Because his honor, the presiding judge, erred in not allowing the plaintiffs to introduce in evidence a written title deed, not signed, to the premises, the subject of the action from G. H. Warren to G. L. Warren, dated the 22d day of November, 1904, alleged to have been written by the defendant and proved to have been written by him by the undisputed testimony in the case." The following statement appears in the record: "That during the prog-

ress of the said trial, and during the cross-examination of the defendant in the case, plaintiffs' attorney offered in evidence a deed written by P. J. Wilson in his own handwriting from G. H. Warren to G. L. Warren which deed was never executed fully or delivered, purporting to convey from said G. H. Warren to G. L. Warren the lands which are the subject-matter of this action, and that the presiding judge refused to allow the introduction of said deed in evidence." It thus appears that the defendant P. J. Wilson actively participated in a transaction which was inconsistent with the theory that he was the owner of the land, and which, if it had been consummated, would have estopped him from asserting title to the land as against G. L. Warren and G. H. Warren. *Chambers v. Bookman*, 67 S. C. 432, 46 S. E. 39. It was in the nature of an admission against his interest, while he was in the possession of the land, and his honor, the presiding judge, erred in refusing to allow it to be introduced in evidence.

[3,4] The next question for consideration is raised by the following exception: "His honor, the presiding judge, was in error in charging the defendant's second request to charge, as follows: 'That the jury must find for the defendant, unless they find that the defendant's possession is that of tenant of Miss Warren'—the error being that the jury were thus limited to the consideration of only one question, that of tenancy, whereas the issue of title should have been submitted to them, as to whether the plaintiffs or the defendant had the better title, this request being, in effect, a direction of a verdict for the defendant on all issues in the case except, that of tenancy." By reference to the complaint, it will be seen that it does not allege that the defendant is now in possession of the land as a tenant, but it does allege, in effect, that having entered as such during the lifetime of Miss G. H. Warren he forfeited his rights as a tenant, when "upon her death he took and held possession in his own right, and ousted the plaintiffs herein, and now holds and occupies the same unlawfully." As the complaint did not allege that the defendant was at this time in possession as a tenant, it will readily be seen that the charge was prejudicial to the rights of the appellants.

Furthermore, his honor, the circuit judge, charged the jury, as follows: "The case, according to my views, resolves itself as to whether or not Wilson went in as a tenant. If he went in as a tenant of Miss Warren, and paid her rent and acknowledged her as his landlord, either put in there by herself or any one acting for her, and he continued in possession of that land, exercising supervision over it until she died, then plaintiffs are entitled to recover, if he went in, not as her tenant, and occupied the land for 20 years or more openly, notoriously, continuously, and adversely, then your verdict would be for him. If he went in not as a tenant of

Miss Warren, and occupied the land for 10 years openly, notoriously, continuously, and adversely, then your verdict would be for him. If he went in as her tenant and subsequently vacated the land, and terminated his tenancy and moved off somewhere else, and then went in under a paper title from some one else, didn't go in as her tenant, and occupied the land for 10 years openly, notoriously, adversely, and continuously claiming it as his own against her and all the world, then your verdict would be for him." The charge "that the jury must find for the defendant, unless they find that the defendant's possession is that of tenant of Miss Warren," rendered unnecessary that the jury should pass upon these facts, which the presiding judge instructed them would defeat the plaintiff's right to recover possession of the land in case they found that the defendant was not in possession of the land as tenant. The charge was erroneous, as it was too restrictive of the issues.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded for a new trial.

JONES, C. J., and WOODS, J., concur.
HYDRICK, J., did not sit.

(89 S. C. 143)

ATLANTIC COAST LUMBER CORPORATION v. E. P. BURTON LUMBER CO.

(Supreme Court of South Carolina. July 5, 1911.)

1. INJUNCTION (§ 132*) — PRELIMINARY INJUNCTIONS—SCOPE OF REMEDY.

Where plaintiff was not in possession, a preliminary injunction restraining defendant from cutting or removing timber should not have prohibited defendant from entering the land, and it was proper to modify the injunction, so as to allow defendant to saw timber already cut, thereby preventing its loss, as an interlocutory injunction is to preserve the existing status during the litigation, and will not be allowed to have the effect to transfer property from one in possession to another who claims it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 132.*]

2. INJUNCTION (§ 136*) — PRELIMINARY INJUNCTION—GROUNDS.

Where plaintiff, a lumber company, seeking an injunction against another company which it alleges is trespassing on its property, does not allege that plaintiff is in possession, or that defendant is insolvent, or that the injury to plaintiff is irreparable, the court may refuse a preliminary injunction and leave plaintiff to its remedy at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

Appeal from Common Pleas Circuit Court of Berkeley County; John S. Wilson, Judge.

Action by the Atlantic Coast Lumber Corporation against the E. P. Burton Lumber Company. From an order modifying a preliminary injunction, plaintiff appeals. Affirmed.

Willcox & Willcox and Octavus Cohen, for appellant. Nathans & Sinkler, for respondent.

HYDRICK, J. Plaintiff brought this action for damages and injunction, alleging that it is the owner in fee of the land described in the complaint, and that defendant had trespassed thereon, and had threatened to continue trespassing thereon, by cutting and removing the timber therefrom. Upon the verified complaint, Judge Wilson granted an order restraining defendant from cutting or removing timber from the land in dispute, or from entering thereon. Plaintiff was required to give an injunction bond, as provided by statute, in the sum of \$5,000. The defendant answered, admitting that it had been and was cutting and removing the timber, but denied plaintiff's title to the land.

Upon the answer, which was verified, and the affidavit of E. H. Burton, president of the defendant company, from which it appeared that defendant was and had been in actual possession of the land in dispute, and that before the restraining order was issued a large quantity of timber had been cut, which was then lying on the ground and would be ruined, unless it was sawed into lumber before the litigation could be ended, and that defendant alone had the necessary logging equipment to handle it, the circuit judge, on motion of defendant, modified his preliminary order, so as to allow defendant to remove the timber which had already been cut, upon its giving bond for plaintiff's protection in the sum of \$5,000, the amount of damages alleged in the complaint. From this order plaintiff appealed, contending that, in effect, it operates to compel the sale of its property to defendant, and is, therefore, a taking of private property for private use without consent of the owner, in violation of the inhibition of the Constitution.

[1] It is clear that such contention is unsound. Ordinarily the purpose of an interlocutory injunction is merely to preserve the existing status during the litigation, and as a general rule, subject to some exceptions, which need not be mentioned here, it will not be allowed to have the effect of transferring the possession of property from a litigant in possession to another who claims the right to possession. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781; *Northwestern R. Co. v. Colclough*, 84 S. C. 37, 65 S. E. 950. In this case the plaintiff does not even allege that it was in the actual possession of the land or the timber which had been cut. On the other hand, it appeared that defendant was in possession thereof, and it did not appear that its possession was tortiously obtained. Therefore the preliminary restraining order should have been modified, so that it would not have the effect of depriving de-

fendant of its possession of the land, though it was proper, on the showing made, to enjoin any further cutting of timber during the litigation.

[2] But as to the timber which had already been cut the order appealed from was more favorable to plaintiff than it was entitled to as a matter of right, because that timber, having been cut before the order was issued, had become personal property, and as there was no allegation of insolvency of defendant, or of irreparable injury to plaintiff growing out of the use thereof by defendant, the court might well have set aside the preliminary restraining order and left the plaintiff to its remedy at law, which, for aught that appears, was plain and adequate.

1 High on Inj. (4th Ed.) §§ 723, 728.

Affirmed.

JONES, C. J., and WOODS, J., concur.
GARY, A. J., did not sit.

(39 S. C. 228)

STATE v. BRIGHT.

(Supreme Court of South Carolina. July 7, 1911.)

1. HOMICIDE (§ 187*)—SELF-DEFENSE—EVIDENCE—ADMISSIBILITY.

Acts of decedent done immediately before the homicide to show his mental attitude are admissible on the issue of self-defense.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 187.*]

2. HOMICIDE (§ 336*)—HARMLESS ERROR—ERRONEOUS REMARKS OF TRIAL JUDGE.

Where sufficient evidence was admitted of the acts of decedent immediately before the homicide to give the jury information on the subject of the mental attitude of decedent toward accused, who relied on self-defense, the expression of opinion by the circuit judge against the admission of evidence of overt acts of decedent to show his vicious humor was not prejudicial.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 336.*]

3. CRIMINAL LAW (§ 656*)—MISCONDUCT OF TRIAL JUDGE—COMMENT ON MATTERS OF FACT.

Where accused, charged with the murder of his father, relied on self-defense, and the evidence showed that decedent had struck his wife and accused, that on the day of the homicide decedent's wife because of his conduct fled from him, and went to accused's house, the remarks of the trial judge expressing a positive opinion that the evidence offered in support of the plea of self-defense tended to prove that the killing was committed with malice were in violation of the Constitution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.*]

4. HOMICIDE (§ 336*)—HARMLESS ERROR—ERRONEOUS REMARKS OF TRIAL JUDGE.

The error of the court in expressing its opinion on the evidence that it proved the malice of accused was not available to accused where he was found guilty only of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 707; Dec. Dig. § 336.*]

5. CRIMINAL LAW (§ 762*)—INSTRUCTIONS—MATTERS OF FACT.

A charge in a homicide case that the blood of a fellow citizen cries out from the ground, and that civilized society is demanding protection at the hands of the jury, and that the jury should not forget that there are other lives which may be taken and which will probably be taken, or spared according as the jury discharge its duties, is objectionable, as leading the jury to believe that a verdict of conviction is essential to protect society, and is violative of the Constitution prohibiting the trial court from charging as to matters of fact.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 762.*]

6. HOMICIDE (§ 300*)—SELF-DEFENSE—INSTRUCTIONS.

A charge on self-defense which correctly declares that where one takes the life of another to save his own life, or to save himself from serious bodily injury, and he is without fault in bringing on the difficulty, and he has no other reasonable means to escape but to kill his assailant, he acts in self-defense, and that self-defense is based on necessity, is defective for failing to state, as requested, that one who kills another makes out his plea of self-defense where he proves by a preponderance of the evidence that when the fatal shot was fired accused believed that he was in danger of death or serious bodily harm, and that it was necessary to shoot to save himself, and that the circumstances induced that belief in the mind of a person of ordinary reason.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Appeal from General Sessions Circuit Court of Cherokee County; Robt. Aldrich, Judge.

"To be officially reported."

Travis Bright was convicted of manslaughter, and he appeals. Reversed and remanded for new trial.

Butler & Hall, H. K. Osborne, and R. A. Dobson, for appellant. Solicitor J. C. Otts, for the State.

WOODS, J. In March, 1910, the defendant, Travis Bright, shot and killed his father, Hose Bright. On his trial in the court of general sessions for Cherokee county he set up the plea of self-defense, and was convicted of manslaughter.

The case is singular, in that there is little, if any, material difference in the testimony of the witnesses for the state and for the defense. Hose Bright was a quiet and amiable man when sober, but aggressive and violent when drinking. For a day or two before his death he had been on a spree, and had threatened and struck his wife and the defendant. On the day of the homicide his wife, after being struck by him, fled from him, and in her flight went to the house of N. P. Smart, where the defendant was lying in bed somewhat unwell. Mrs. Bright did not stop in the room where defendant was, but as she passed through cried out: "O Lordy, don't let him get to me. He is going to kill me." The defendant testified that he then got out of bed, took a pistol from a bureau drawer, and sat down in a chair, holding the pistol in his lap. The following ac-

count by the defendant of the killing is in agreement with that of the other witnesses: "Q. Did you hear any noise from your father out there? A. No, sir. I didn't know he was out there, and he says—when he came in he commenced cursing me, and he says to me, 'I want what you owe me.' I says, 'All right, Pa, I will give it to you this morning,' and I says, 'Pa, I want what you owe me.' He says, 'Owe you—you God—I don't owe you anything.' And he struck at me and I threw up my hand and knocked the lick off, and the next time he struck at me right along there [indicating] and knocked me over in the chair. And, as I rose, I shot him and he threw his hands so, and says, he staggered and says, 'Lordy, Trate, you have killed me'; and I says to him, 'Pa, I had it to do.'" The defendant further testified that his father threatened to kill him, but struck with his hand only, and he saw no weapon at that time, though he had seen a knife in his father's hand on the same evening at defendant's own house. We think consideration of the exceptions in detail not necessary to the decision of the appeal.

[1] The exceptions assigning error in the exclusion of testimony as to the hostile attitude and unreasonable and general threats of the deceased are not well founded. Such testimony as to acts done immediately before the homicide tending to show the mental attitude of the deceased is clearly admissible where the plea is self-defense. *State v. Smith*, 12 Rich. 430; *State v. Thrallkill*, 71 S. C. 140, 50 S. E. 551; *State v. Miller*, 73 S. C. 279, 53 S. E. 426, 114 Am. St. Rep. 82; *State v. Springfield*, 86 S. C. 318, 68 S. E. 563.

[2] It is true the circuit judge did express his opinion against the admission of testimony as to overt acts of the deceased tending to show his vicious humor, but the record shows that enough evidence on this subject was admitted to give the jury ample information on the question.

[3] In expressing his opinion as to the competency of evidence of threats and violence of the deceased towards his wife before the homicide, the circuit judge said with respect to an objection by the solicitor: "I don't see why you object to that, because he is going straight on proving malice on the part of that boy." Again, on the same subject, he said to defendant's counsel at different times: "There is no use in your asking me that question. You are perfectly familiar with the rules. You know you are getting on unfortunate ground when you try to set up what took place between the deceased and his wife, out of the presence of the defendant, because, if you are allowed to show that, you would show malice on his part. * * * I want counsel to understand the trend that this examination has been taking all along will make it necessary for me to charge that jury, when I come to charge them, that, if the defendant in shooting his

father that night was influenced by any ill treatment of his mother previous to the time of the shooting, that that is malice. So far from being any cause of justification, it goes to make out the crime of murder. * * * It can serve no possible good purpose whatever under the charge I am going to make to that jury. I mean just what I am telling you. His duty was to have gone to a peace officer and have him bound over if he was going to injure his mother, not to kill him for it; and I hate to see a man prejudiced in the way he is being done in the view of the law that I entertain and shall present to that jury." Taken together, these remarks expressed a positive opinion of the circuit judge that the evidence which was offered by the defendant in support of his plea of self-defense and much of which was admitted tended to prove that the homicide was committed with malice. The question whether the killing was malicious being a vital one in the case, the remarks of the judge were in violation of the Constitution under the rule laid down in *Willis v. Telegraph Co.*, 73 S. C. 379, 53 S. E. 639, *State v. Arnold*, 80 S. C. 383, 61 S. E. 891, and *Latimer v. General Electric Co.*, 81 S. C. 374, 62 S. E. 438.

[4] It is to be observed, however, that the expression of the opinion of the judge related to the element of malice, and the jury by the verdict of manslaughter found for the defendant on the issue of malice. For this reason, the error is not available to the defendant as a ground of reversal. *State v. Robertson*, 54 S. C. 147, 31 S. E. 888.

There are numerous exceptions to the charge, but we think all of them except two have been eliminated by the verdict for manslaughter, instead of murder, or are based on too great refinement of criticism. The conclusion is unavoidable, however, that there must be a new trial for two errors committed in the charge.

[5] The following instruction was given to the jury: "There is nothing in the whole range of human experience that is more solemn, more sacred, or more important than the trial upon which we are now engaged. The issue involved in this proceeding is the life or the death of a fellow man, a power, except in the single instance of a case like this, which should reside only in the hands of God. *On the other hand, the blood of a fellow man cries out from the ground. A civilized society is demanding protection at our hands to-day.* Every consideration should be extended to the accused, but at the same time it should not be forgotten that *there are other lives which may be taken and which probably will be taken or spared, according as we discharge our duties here to-day*, and we can only perform the sacred responsibilities resting upon us by approaching the performance of our duties soberly, discreetly, and in the fear of God." The portion of this instruction which we have italicized could not fail to convey to the jury the

impression that the presiding judge was of the opinion that the duty of the jury required them to find such a verdict as would prevent other lives being taken, that a verdict in favor of defendant would probably result in the taking of other lives, and that civilized society demanded protection against such an act as the defendant had committed. The right of the defendant was to have the jury determine primarily whether he killed his father feloniously or in self-defense, without respect to the effect of their determination in producing or preventing other crimes, or the effect of their verdict on society in any other respect. It is perfectly proper for a circuit judge to state to a jury their duty to society to bring in a verdict of guilty if they are convinced of the guilt of the accused, but an exhortation to protect society should always be predicated on the jury's conviction of guilt. We are unable to escape the conclusion that the charge on this point was in violation of the section of the Constitution which prohibits a circuit judge from charging in respect to matters of fact.

[§] The court correctly charged: "Where one takes the life of another to save his own life or to save himself from serious bodily harm, he being without fault in bringing on the difficulty, and having no other reasonable means of escape but to take the life of his assailant, that is justifiable self-defense." The jury were also correctly charged that self-defense is based on necessity. But the fatal defect in the charge on this point was the failure to instruct the jury in the general charge or in response to the request of defendant's counsel that one who kills another makes out the plea of self-defense if he proves by the preponderance of the evidence that, when the fatal shot was fired, the defendant believed that he was in danger of death or serious bodily harm from his assailant, and that it was necessary for him to shoot as he did to save himself from death or serious bodily harm, and that the circumstances were such as to induce that belief and lead to that action by a person of ordinary reason and firmness.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause be remanded to that court for a new trial.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(89 S. C. 136)

STATE v. HUNTER.

(Supreme Court of South Carolina. July 8, 1911.)

1. INTOXICATING LIQUORS (§ 236*)—OFFENSES—EVIDENCE.

Where separate indictments charged accused with selling intoxicating liquors on designated dates to persons named in violation of

the dispensary law, and the evidence showed a sale between designated dates, but the sales were not confined to the date specified in either indictment, a conviction on the two indictments could not be sustained, but a conviction on either was justified.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 236.*]

2. CRIMINAL LAW (§ 1167*)—HARMLESS ERROR—ERRONEOUS RULING ON INDICTMENTS.

Where the court, in sentencing accused found guilty of selling intoxicating liquor in violation of the dispensary law, sustained accused's contention that the evidence showed only one offense, and that a conviction on the two separate indictments charging separate offenses could not be sustained, the ruling that the indictments charged separate offenses and that he could be convicted on both was immaterial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3101; Dec. Dig. § 1167.*]

3. CRIMINAL LAW (§ 739*)—SEPARATE OFFENSES—QUESTION FOR JURY.

Whether the offense charged in each of several indictments is the same offense is for the jury, unless a jury trial is waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1710; Dec. Dig. § 739.*]

4. INTOXICATING LIQUORS (§ 228*)—VIOLATION OF DISPENSARY LAW—EVIDENCE—ADMISSIBILITY.

Where, on a trial for violating the dispensary law, there was evidence that a third person was accused's agent, or that he acted in concert with accused and sold liquor from accused's house with his knowledge, the testimony of witnesses that they bought liquor from the third person at or near accused's house was admissible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 228; Dec. Dig. § 228.*]

5. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where witnesses testified that they obtained whisky at accused's house, the error in permitting a witness to give hearsay testimony to the same effect was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

6. INTOXICATING LIQUORS (§ 239*)—TRIAL—INSTRUCTIONS.

A charge that if accused or any other person sold liquor it was a violation of the dispensary law, and the jury could find accused guilty, was not misleading, as permitting the jury to convict accused on proof that a third person with whom he had no connection had violated the law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 239.*]

7. INTOXICATING LIQUORS (§ 242*)—OFFENSES—PUNISHMENT.

Where one was convicted of violating two provisions of a statute imposing a fine of not more than \$500 for each offense, a fine of \$600 was not excessive, but was within the discretionary power of the court.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 356-361; Dec. Dig. § 242.*]

Appeal from General Sessions Circuit Court of Laurens County; J. H. Marion, Special Judge.

"To be officially reported."

Green Hunter was convicted of violating the dispensary law, and he appeals. Affirmed.

Richey & Richey, for appellant. R. A. Cooper, Sol., for the State.

HYDRICK, J. At the September, 1910, term of court of general sessions for Laurens county two indictments for violation of the dispensary law were found against the defendant Green F. Hunter, in each of which there were three counts—one for selling, one for storing and keeping in possession, and one for handling and delivering in the nighttime. One charged the defendant with selling to B. B. Hill, C. E. Roland, Sam Sloan, and Nat Wallace on December 11, 1909. The other charged him with selling to the same persons on December 15, 1909. The defendant took the position that he was charged in both indictments with the same offense. The presiding judge ruled that the offenses alleged on several days were separate and distinct, and that the defendant could be convicted on both indictments. At the close of the testimony for the state, the solicitor entered a nolle prosequi on the count in each indictment charging the defendant with handling liquor in the nighttime. Counsel for the defendant then moved the court to direct a verdict of not guilty, upon the ground that there was no testimony that the defendant had sold any liquor, or that he had stored and kept any liquor. The motion was overruled. The jury convicted defendant on both indictments, whereupon he moved for a new trial upon the same ground upon which he had moved for the direction of the verdict, which motion was overruled. When the defendant was called for sentence, his counsel took the position that he could not be sentenced on both indictments, as he had been convicted twice for the same offense. The presiding judge sentenced him to six months' imprisonment at hard labor or pay a fine of \$600, \$100 being suspended during good behavior. This sentence was written on the indictment which charged the violation of the dispensary law on December 15, 1909. The defendant was not sentenced on the other indictment.

The record does not disclose any distinct ruling of the court in response to defendant's objection to being sentenced on both indictments on the ground that he had been convicted twice for the same offense. But, as the court ruled at the beginning of the trial that the indictments charged separate and distinct offenses, and, after hearing the evidence, in response to defendant's objection and contention above stated, imposed sentence only on one of the indictments, we construe the action of the court as sustaining the defendant's contention that the evidence showed only one offense and that both convictions could not be sustained.

[1] In this there was no error, because the testimony was sufficient to sustain a conviction on either indictment, but not on both. The evidence as to the sales was not con-

fined to the date specified in either indictment. In fact, there was no evidence of a sale on either date, but there was evidence of sales between the 1st and 15th of December, 1909, which was sufficient to sustain a conviction on either indictment; for sales on other days than that alleged in the indictment may be proved. *State v. Anderson*, 3 Rich. 172; *State v. Prater*, 59 S. C. 271, 37 S. E. 933; *State v. Green*, 61 S. C. 12, 39 S. E. 185. But upon such evidence the conviction on both indictments could not have been sustained. *State v. Van Buren*, 86 S. C. 297, 68 S. E. 568.

[2] Therefore the exception which questions the first ruling of the court becomes immaterial, and it will not be necessary to discuss the question involved in that ruling. But see *State v. Cassety*, 1 Rich. 90; *State v. Anderson*, 3 Rich. 172; *State v. Steedman*, 8 Rich. 312; *State v. Van Buren*, 86 S. C. 297, 68 S. E. 568.

[3] The question whether the offense charged in each of several indictments is the same is one of fact to be tried by a jury, unless that mode of trial is waived. *State v. Dewees*, 76 S. C. 72, 56 S. E. 674.

[4] There was no error in admitting the testimony of witnesses that they had bought whisky from Fate Blakely at or near defendant's house, and that they had seen others buy from him, because there was testimony from which it was reasonably inferable that Blakely was defendant's agent, or that he was acting in concert with him and selling liquor from his house with his knowledge and sanction. *State v. Prater*, 59 S. C. 271, 37 S. E. 933; *State v. Marchbanks*, 61 S. C. 17, 39 S. E. 187.

The third exception charges error in the refusal to strike out the testimony of the witness Hill that Eugene Roland and Sam Sloan got whisky at defendant's house, when it appeared from cross-examination of the witness that he did not know the fact, but was testifying from what they had told him. This exception must have been taken through inadvertence, because the record plainly shows that, on motion of defendant's attorney, so much of Hill's testimony as involved what Roland and Sloan had told him was stricken out.

[5] Moreover, it would have been harmless error, if the ruling had been as alleged, because the record shows that Roland and Sloan both testified that they got whisky at defendant's house.

There was abundant testimony to sustain a conviction on one of the indictments, and there was therefore no error in refusing defendant's motion to direct a verdict of not guilty on both indictments.

[6] There is no merit in the exception which imputes error to the trial judge in charging the jury, "if the defendant or any person sells liquor, * * * it is a violation of the law, and you would be entitled to find this defendant guilty." We are sub-

ified that there was no one of the jury so lacking in intelligence as to suppose for a moment that the court meant to instruct the jury that defendant could be convicted upon proof that another person, with whom he had no connection, had violated the law.

[7] The last exception charges error in imposing a greater fine than the maximum amount prescribed in the statute. Each count in the indictment charges a substantive offense, the violation of a separate and distinct provision of the statute, which provides (26 Stat. 60, § 11) that for the violation of any of its provisions a fine of not more than \$500 may be imposed. As defendant was convicted of violating two of its provisions, the court may have imposed an aggregate fine of \$1,000. Within the limits of the statute the amount of fine imposed is discretionary with the trial court. *State v. Sheppard*, 54 S. C. 178, 32 S. E. 146.

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 277)

PENNINGTON et al. v. PENNINGTON.
(Supreme Court of South Carolina. July 11, 1911.)

1. REFERENCE (§ 85*)—FINDINGS—NECESSITY.

Where a suit to specifically perform a contract to convey involved a statement of accounts between the parties, the master to whom the cause was referred should have reported his findings and conclusions.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 181; Dec. Dig. § 85.*]

2. FRAUDS, STATUTE OF (§ 129*)—CONTRACTS TO CONVEY—AVOIDANCE OF STATUTE.

An oral contract to convey is taken out of the statute of frauds by the purchaser being placed in possession and making valuable improvements.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 289; Dec. Dig. § 129.*]

3. SPECIFIC PERFORMANCE (§ 119*)—CONTRACTS TO CONVEY—BURDEN OF PROOF.

One suing to specifically perform a contract to convey has the burden to prove payment of the purchase money.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 382, 383; Dec. Dig. § 119.*]

4. APPEAL AND ERROR (§ 848*)—REVIEW—ACCOUNTS.

The Supreme Court will not undertake to state accounts.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 848.*]

Appeal from Common Pleas Circuit Court of Aiken County; Robt. Aldrich, Judge.

"To be officially reported."

Action by Allie Pennington and others against J. A. Pennington. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Davis, Gunter & Gyles, for appellant, J. B. Salley, for respondents.

HYDRICK, J. [1] This action was brought by plaintiffs, as heirs at law of A. M. Pennington, to compel the specific performance of a parol contract between their intestate and the defendant for the conveyance of land. It was referred to the master to take and report the testimony to the court. He was not required to and did not report his findings and conclusions, which should have been done in a case like this, where the issues involved the statement of accounts between the parties.

[2] The circuit court found that the contract was made, as alleged, and that plaintiffs' intestate had been put in possession of the land, and had made valuable improvements thereon, under the contract, which took the case out of the statute of frauds. The evidence was such that it could not have been satisfactorily determined whether the purchase money for the land had been fully paid, without a statement of the accounts between the parties. There was evidence tending to show that some payments were made on the contract by A. M. Pennington during his lifetime. As to some of them, the evidence was not only vague and indefinite, but conflicting. After his death, his widow and children, the plaintiffs herein, remained upon the land, and the crops of cotton raised by them, including that of the year 1903, but not that of 1907, were turned over to the defendant, who furnished the necessities for the support of the family and making the crops. The circuit judge made no attempt to state the accounts, but said at the foot of his decree: "I have made no attempt to state the accounts between the parties. They have been so irregularly kept, and in some instances not kept at all, and the evidence is so vague and uncertain that I could reach no satisfactory solution of them. The parties themselves for a considerable time seemed to regard the mutual indebtedness in the light of a stand-off, and I think equity will be done by leaving them in that condition." There is nothing in the record to sustain the finding that the parties regarded their mutual indebtedness in the light of a stand-off. The only thing that appears as to that is that they did not have a settlement; but the plaintiff, Allie Pennington, testified that she asked defendant several times how much she still owed him, which would seem to indicate that she thought there might be something due him.

[3] The burden was upon plaintiffs to prove payment of the purchase money in full, before they could ask that defendant be required to convey. When they proved that the crops of the several years mentioned had been turned over to defendant, the burden was then upon him to discharge himself, according to the rules of evidence, for the value thereof.

[4] This court is satisfied with and con-

firm the findings and conclusions of the circuit court, except in the particulars herein indicated. But this court will not undertake to state the accounts. The correct procedure in such matters is stated in *Talbert v. Hamlin*, 86 S. C. 526, 68 S. E. 765, where the court said: "Many of the exceptions to the report of the master and the circuit decree assign error in the accounting without specifying the particular item or items debited or credited to which objection is made, so that, to determine whether there was error in respect to the matters complained of, a detailed examination of the whole account would be necessary. The purpose of referring matters of account to the master is to save the court the time and labor that would be necessary to do the work of an accountant. When the account has been stated, according to correct methods, the exceptions must specify the item or items of debit or credit to which objection is made. The court will not, in response to a general exception alleging error in an account, enter upon a detailed examination of the whole account."

The judgment of the circuit court is reversed, and the case remanded for such further proceedings as may be necessary to carry out the views herein expressed.

Reversed.

JONES, C. J., GARY, A. J., and WOODS, J., concur

(89 S. C. 224)

STATE v. EDWARDS et al.

(Supreme Court of South Carolina. July 7, 1911.)

1. COUNTIES (§ 97*)—COUNTY TREASURER—ACTION ON BOND—ACCOUNTING.

The failure of public officials to make annual settlements with the county treasurer as required by Civ. Code 1902, § 431 et seq., is no defense to sureties on the treasurer's official bond; the duty to make such settlements being one which the officers owe to the public, and not to the sureties.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 140; Dec. Dig. § 97.*]

2. COUNTIES (§ 101*)—COUNTY TREASURER—BOND—DEFAULT—PRESUMPTIONS.

Where a county treasurer had held office for two or more successive terms, and suit was brought on the last bond, it would be presumed that the default occurred during his last term, unless the sureties proved that the defalcation in fact occurred prior to the giving of the bond sued on.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 158; Dec. Dig. § 101.*]

3. TAXATION (§ 570*)—COUNTY TREASURER—ACTION ON BOND—EVIDENCE.

Civ. Code 1902, § 451, provides that, after the county treasurer has receipted to the auditor for his duplicate, he shall be charged with the taxes, penalties, and assessments charged thereon except such as may be put on the delinquent list, and that he shall be credited for taxes not collected only on a sheriff's return of nulla bona, or that property was found, but for want of bidders was sold and conveyed to

the sinking fund commission by the sheriff, that execution issued and is in the hands of the sheriff, or that taxes, assessments, and penalties had been enjoined by a competent court. *Held*, that in an action on the county treasurer's bond, he having signed a receipt to the auditor for his tax duplicate reciting that he had compared the treasurer's duplicate with the auditor's duplicate, page by page, that the two books were properly added and proved, and that the tax and assessment were entered on both books, evidence of alleged errors, discrepancies, and mistakes therein was inadmissible.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1128; Dec. Dig. § 570.*]

Appeal from Common Pleas Circuit Court of Berkeley County; Geo. W. Gage, Judge.

"To be officially reported."

Action by the State against John O. Edwards and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Legare & Holman, Mordecai & Gadsden, and Rutledge & Hagood, for appellants.

HYDRICK, J. The complaint alleges that John O. Edwards was appointed treasurer of Berkeley county, and on February 27, 1907, gave bond, as required by law, with the other defendants as sureties, and was thereafter commissioned and assumed the duties of the office; that he was removed from office in January, 1908, and failed to turn over to his successor \$5,596.23 of the funds in his hands as treasurer. Judgment was demanded, as for a breach of the bond, for the penalty thereof. The allegations of the complaint were admitted, except those as to the breach of the condition of the bond, which were denied. The sureties set up the further defense that Edwards had been treasurer for several terms, before that upon which he entered when the bond sued on was given, and had given other bonds for the faithful performance of the duties of the office during said terms; that they were discharged from liability on the bond sued on, because the plaintiff, through its officers, failed to discharge the duty imposed by law of making annual settlements with Edwards as treasurer, and of having the same witnessed and his accounts checked and verified by the Comptroller General, the county auditor, and the foreman of the grand jury, as required by statute, which, if it had been done, would have prevented any breach of the bond sued on, or of any of those previously given. The court sustained a demurrer to this defense on the ground that the duty of making annual settlements with the county treasurer and of having same witnessed and his accounts checked and verified by the officers named was imposed by law for the protection of the public, and was therefore a duty to the public, and not to the sureties on his official bond, who could take no advantage of the failure to perform it. The grounds of appeal—four—

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

teen in number—allege only three errors, to wit: (1) In sustaining the demurrer to the special defense interposed by the sureties; (2) in refusing to charge that the state was bound to prove that the shortage occurred during Edwards' last term of office—that is, the term upon which he was entering when the bond sued on was given; (3) in refusing to allow Edwards to examine the abstracts of the tax duplicates furnished him by the county auditor and point out alleged errors, discrepancies, and mistakes therein, notwithstanding he had signed a receipt to the auditor for them in which he stated that he had "compared the treasurer's duplicate with the county auditor's duplicate, page by page, that the two books are properly added and proved, and that the tax and assessment are entered on both books."

[1] The failure of the public officials to make the annual settlements in the manner prescribed by the statute (1 Code 1902, § 431 et seq.) cannot avail the defendant sureties. The principle is clearly and tersely stated in *Board of Supervisors v. Otis*, 62 N. Y. 95, where the court said: "There is no good reason why the public, having exacted surety from one official for the faithful discharge of his duties, should be held by implication to have guaranteed to those sureties the faithful discharge, by other public agents and officials, of other duties having an incidental or collateral relation to the duties of the principal." See, also, *Minturn v. United States*, 106 U. S. 437, 1 Sup. Ct. 402, 27 L. Ed. 208; *Railroad Co. v. Kasey*, 30 Grat. (Va.) 218.

[2] The court correctly charged: "When an officer has held his office for two or more successive terms, and suit is brought on the last bond, it will be presumed that the default occurred during the last term, unless the sureties can prove that, as a matter of fact, the principal had been guilty of a defalcation prior to the execution of the bond sued on." The presumption is that, when the new bond was given and the new term of office entered upon, the officer had in his hands all the money which he ought to have had at the beginning of the term covered by the new bond. In *Murfree on Official Bonds*, § 219, the rule is thus stated: "When an officer is reappointed and gives a new bond, he is presumed to have on hand all money which his accounts show to be due to the government. Consequently his sureties on his new bond become immediately liable for the amount, and, if they allege that no such amount was then on hand, it is incumbent on them to show that the funds with which their principal then stood charged had been converted by him during the currency of his first bond. They are not, of course, liable for the default of their principal, committed before the execution of

their bond, but the onus is upon them to show that it was so committed for every officer is presumed to have done his duty until the contrary is proved; and, as it is the duty of an officer to have on hand balances charged to him in his official accounts, he is presumed to have such funds in hand." See, also, *Sumter v. Lewis*, 10 Rich. 171; *State v. Moses*, 18 S. O. 372; *State v. Sandifer*, 68 S. C. 210, 46 S. E. 1006; 29 Cyc. 1458, 1469, and cases cited.

[3] As to the last ground, we think the statute (1 Code 1902, § 431) is conclusive. It provides that, after the treasurer has receipted the auditor for his duplicate, he shall be charged with the taxes, assessments, and penalties charged thereon, except such as may be put on the delinquent list, and that only the following causes shall be assigned by the treasurer on the delinquent list for not collecting any tax, assessment, or penalty: (1) Sheriff's return of nulla bona; (2) that property was found, but, for want of bidders, was sold and conveyed to the sinking fund commission by the sheriff, pursuant to law; (3) execution issued and in the hands of the sheriff; (4) that such taxes, assessments, and penalties were enjoined by a competent court. No attempt was made to show failure to collect any item with which the treasurer was charged in his duplicate for any of said causes. There is no denial of the testimony of the expert accountants, Wilson and Wise, that Edwards got credit in the accounting for all such items. On the contrary, the record states that "the entries on all settlement sheets were checked up before the jury and found to be correct and to correspond with the books."

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 180)

STATE v. ASHE

(Supreme Court of South Carolina. July 5, 1911.)

EMBEZZLEMENT (§ 28*)—INDICTMENT—SUFFICIENCY.

An indictment for embezzling the proceeds of notes intrusted to accused for collection was not insufficient for failing to describe the notes.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 41, 42; Dec. Dig. § 28; *Indictment and Information, Cent. Dig. § 279.]

Appeal from General Sessions Circuit Court of York County; Ernest Moore, Special Judge. "To be officially reported."

John L. Ashe was convicted of embezzlement, and he appeals. Affirmed.

John R. Hart and W. W. Lewis, for appellant. J. K. Henry and Thos. F. McDow, for the State.

JONES, C. J. The defendant was tried, convicted, and sentenced upon an indictment charging that he on November 15, 1908, at Yorkville, S. C., "after being intrusted with certain notes for collection, and having collected the sum of five hundred and seventy-three dollars and two cents on said notes for the Planters' Fertilizer & Phosphate Company, a corporation under the laws of said state, in bills and notes and silver, lawful money of the United States, denominations and numbers to the jurors unknown, of the value of five hundred and seventy-three dollars and two cents, of the proper goods and chattels of the said Planters' Fertilizer & Phosphate Company, then and there being found, feloniously did steal, take, and carry away and fraudulently appropriate to his own use against the form of the statute," etc.

On a motion to quash the indictment, which was refused, defendant contended that the indictment violated Article 1, § 18, of the Constitution, in that it does not fully inform defendant of the nature of the accusation against him; the specific objection being that the indictment, while stating that defendant was intrusted with certain notes for collection, failed to state what notes or to describe such notes. We think the indictment sufficient. It fully informs defendant of the nature and cause of the accusation as required by the Constitution and section 58 of the Criminal Code of 1902. The offense charged is not a breach of trust in collecting or disposing of notes, but a fraudulent appropriation of certain money described in the usual way. It was not necessary to describe the notes particularly, as they were not the subjects of the misappropriation, and the money, which was the subject of the misappropriation, was fully described.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(89 S. C. 308)

STATE v. WELDON et al.

(Supreme Court of South Carolina. July 17, 1911.)

1. HOMICIDE (§ 340*)—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

Where the evidence admitted of no other inference than that decedent had been assassinated in his own house, and the sole issue was whether accused had participated in the murder, exceptions to the charge on self-defense and manslaughter were not availing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

2. HOMICIDE (§ 340*)—EVIDENCE—INSTRUCTIONS.

Where the only issue was whether accused had participated in the murder of decedent, accused may not complain of the failure of the court to elaborate in its charge the meaning of the word "malice."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

3. CRIMINAL LAW (§ 780*)—TESTIMONY OF ACCOMPLICE—INSTRUCTIONS.

A charge that the testimony of an accomplice is just like the testimony of any other witness, and that the jury are the sole judges of its weight, is not objectionable as leading the jury to understand that they need not consider the turpitude of accomplice in considering the weight to be given to his testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.*]

4. CRIMINAL LAW (§ 1065*)—APPEAL—NEW TRIAL—REVIEW.

The Supreme Court cannot consider grounds for a new trial set out in the exceptions and affidavits where the trial court had not passed on the motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2685; Dec. Dig. § 1065.*]

5. CRIMINAL LAW (§ 1131*)—APPEAL—DISMISSAL—NEW TRIAL—GROUNDS—DETERMINATION BY COURT.

Where accused, convicted of murder, applies for a new trial on the ground of threats made against accused and his counsel and the conduct of the trial, and on the ground of newly discovered evidence, and the court does not rule on such motion and defendant appeals, the appeal will be dismissed without prejudice to any right of accused to move for new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1131.*]

Appeal from General Sessions Circuit Court of Florence County; Geo. W. Brown, Special Judge.

"To be officially reported."

Alex Weldon and another were convicted of murder, and they appeal. Dismissed without prejudice.

See, also, 88 S. C. 555, 71 S. E. 33.

W. F. Clayton and Willcox & Willcox, for appellants. Walter H. Wells, Sol., for the State.

WOODS, J. Elihu Moye was brutally murdered in his own home near Ebenezer, in Florence county, on the night of the 28th of October, 1910. Very soon thereafter, the defendants, Alexander Weldon and William Burroughs, were tried for the crime at a special term of the court of general sessions held for the purpose of the trial. They have appealed from the judgment of conviction and sentence of death.

The case has given this court the utmost concern, not only because the lives of the defendants are involved, but because the record discloses that the trial took place at a time of great public excitement, because the material evidence against the defendants came almost entirely from one Clarence Ham, who claimed to be an accomplice, and who was impeached as a witness by testimony that he had confessed that his accusation against the defendants was false, and because the allegation is made that the excited crowd so took possession of the courthouse and made such threats of violence that the defendants were not given a fair trial.

[1] There is no merit in the exceptions to

the charge. Instructions to the jury on the subject of self-defense and manslaughter had no application to the case. The evidence admitted of no other inference than that Elihu Moye had been assassinated in his own house, and the sole issue before the jury was whether the defendants had participated in the murder. *State v. Du Rant*, 87 S. C. 532, 70 S. E. 306.

[2] For the same reason, the defendants cannot complain of a failure to elaborate the meaning of the word "malice," for there could be no doubt of the malice of the malefactor who committed the homicide.

The instruction as to the testimony of an accomplice was in accord with the law, as stated in *State v. Sowell*, 85 S. C. 278, 67 S. E. 316.

[3] The following language used by the court evidently could not have been understood by the jury to mean that they were not to consider the turpitude of an accomplice in considering the weight to be given his testimony. "The law in this state for a long number of years was declared by our Supreme Court to be that it was unsafe to convict upon the uncorroborated testimony of an accomplice. But our Supreme Court has recently changed that doctrine, and it is not the law now. The law in regard to the testimony of an accomplice is just like it is as to the testimony of any other witness in a case. That is to say, that you are the sole judges of the weight you should give to such testimony."

The exceptions alleging unfairness in the conduct of the trial are as follows: "His honor erred in allowing a crowd, some of whom were bent upon killing the prisoners, to take possession of the courthouse, and hold the same during the trial, occupying every available space, including the bar reserved for the lawyers, to such an extent that the jurors were entirely cut off from the view of counsel, and counsel had to request his honor on several occasions to cause the sheriff to clear away the crowd that counsel might see the witness he was examining, thus; in effect, overawing the jury, and, as such, the accused did not have that fair trial awarded them under the Constitution and laws of the state. That defendants have not had a fair and impartial trial, and have been convicted upon the testimony of Ham, an accomplice, alone, whose testimony is from the many contradictory statements unworthy of belief. That defendants' counsel, hearing the reports upon the streets of lynching as he went to the courthouse at the solicitation of the special judge, and seeing the unusual crowd in the courthouse, did not dare to ask for the three days allowed by law for fear of the murder of his clients. That from this fear he was unable to get up any testimony in behalf of his clients, and went into the trial without knowledge of his defense. That since the trial defendants' counsel has obtained the

affidavit of Sallie Weldon, the wife of Alex Weldon, which is incorporated in the case, tending to show an alibi for both of the defendants. That defendants' counsel knew nothing of this evidence, nor could have known of the same unless he had insisted upon this three days, in which event counsel fully believes that he would have endangered the lives of his clients if he had demanded his three days, and by reason thereof defendants have not had a fair trial."

After argument of the appeal, this court made the following order with respect to these exceptions: "As a basis for exceptions charging that the proceedings resulting in a verdict of conviction were so improper or irregular that they should be held not to constitute a fair and legal trial, the defendant should set out in the proposed case the facts relied upon; and, if the case as so made up be not agreed to, it should be submitted to the circuit judge for settlement. In this case the defendants' counsel has submitted to this court in support of his exceptions affidavits which have not been passed upon by the circuit judge by motion for a new trial or otherwise. As the lives of the defendants are involved, the court will overlook all irregularities, and of its own motion refer the entire record to the circuit judge so that he may report fully upon all the matters alleged in the affidavits and exceptions. It is therefore ordered that the clerk of this court do transmit to the Hon. Geo. W. Brown, the special judge who presided at the trial, a copy of the entire record, together with a copy of this order, to the end that he may forthwith certify to this court a statement of all the conditions surrounding the trial and the facts connected with the trial so far as they are germane to the exceptions above quoted and the matters alleged in the affidavits appearing in the record." In response to this order, the following certificate as to the conduct of the trial was submitted by Hon. Geo. W. Brown, the special judge who presided at the trial: "The entire appeal record having been referred to me as the trial judge in the above-stated case by an order of the Supreme Court for a full report upon 'all the matters alleged in the affidavits and exceptions,' to the end that I certify to said court a 'statement of all the conditions surrounding the trial so far as they are germane to the exceptions quoted' in said order 'and the matters alleged in the affidavits appearing in the record,' I beg leave to 'report' and 'certify' that I went from Darlington to Florence on the day of the trial of the case by morning train, arriving on or about schedule time 8:30 or 9 o'clock a. m. and court convened at 10 o'clock a. m. There was a large crowd in Florence during the day, and, when this is stated, all is stated which I know which could excite even casual interest, except that an atrocious assassination of a worthy citizen had been committed, and that the par-

ties charged with the crime were there and then to be tried, and the presence of the crowd was supposedly due to these facts. The presence of such a crowd under these circumstances was natural and proper, and was no surprise to me. I saw very many there personally known to me to be of the best citizenship of the county and of its most law-abiding and patriotic personnel. Why that crowd is denominated a mob I do not know. It certainly manifested no mob spirit to my eye or within my hearing. It was just simply a crowd and quite a crowd for Florence courtroom, and that is all that can be said about it, except 'that it was the best behaved crowd I ever saw,' and I am here quoting in effect my own words when defendant's motion for a new trial was overruled. It did crowd within the bar, of which fact I was not unobservant, but to say that it was in possession of the courthouse and held the same during the trial is a gross misconception of the conditions as I saw them. I had a right to assume, and did assume, that the presence of that crowd was for a lawful purpose not only consistent with the best citizenship, but composed, as it was, in support of law and order. It was certainly wholly lacking in any element of a riotous assemblage, and in no respect was it disorderly; and in this regard, as I am expected to make 'a full report,' it is proper that I should particularize by saying that I saw no evidence of drunkenness (or even evidence of drinking) in the crowd, and it was in all respects quiet and well behaved. An individual instance of bolsterousness or bad conduct did not come within my observation during the term. In every instance when I observed that it was becoming too much crowded within the bar, or my attention was called to such conditions, my admonitions received the most respectful consideration and obedience, and there was never any crowding within the bar that in any way interfered with the orderly dispatch of the business of the court or with the rights of counsel or the accused. If the jury was overawed, intimidated, or put in fear, I am at a loss to know what did it. No member of the jury made any complaint before, during, or since the trial to me. The sheriff was there, and he likewise made no complaint. I went to and from the courthouse unattended, and I have yet to see or hear of any threats or overawing conditions. There was no military in attendance and none suggested, though there is an excellent company in Florence, one in Darlington, and another in Timmonsville, each only 10 miles distant. Counsel for defense did not request the three days and copy of the indictment to which he was entitled on demand, and such demand would most certainly have been granted without any apprehension of danger to counsel or defendants. If there was anything

improper or irregular in this trial, I do not know it, and, as long as the statute stands for the speedy trial of criminal offenses at special terms, I doubt if there will ever be in this state a more quiet and less sensational trial. Defendants were ably defended, and the result of the trial is due to the weight which the jury gave to the testimony, which is their exclusive province."

The certificate of the circuit judge cannot of itself have the effect of an adjudication, and it fails to show that the questions made by the affidavits as to the threats made against the defendants and their counsel, the conduct of the trial, and the alleged newly discovered evidence have at any time been passed upon by the circuit court.

[4] After much consideration, there seems to be no escape from the conclusion that this court cannot now consider the grounds for a new trial set out in the exceptions and affidavits, for the reason that it does not appear in the record that they have ever been passed upon by the circuit court.

[5] Questions of fact of the gravest character are involved which should be determined by the circuit court after a full opportunity has been given to the state as well as the defendants to be heard.

The appeal must therefore be dismissed without prejudice to any right the defendants may have to move before the circuit court for a new trial.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(89 S. C. 158)

STATE v. SMITH.

(Supreme Court of South Carolina. July 5, 1911.)

INDICTMENT AND INFORMATION (§ 137*) — QUASHING—RELATIONSHIP OF CLERK TO PROSECUTOR.

It was not an abuse of discretion to quash an indictment because the clerk of the court and ex officio one of the jury commissioners was prosecutor's wife's uncle.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 137.*]

Appeal from General Sessions Circuit Court of Lee County; Geo. E. Prince, Judge.

"To be officially reported."

Lena Smith was indicted for assault and battery with intent to kill, and the State appeals from an order quashing the indictment. Affirmed.

Philip H. Stoll, for the State. M. L. Smith and Thos. H. Tatum, for respondent.

WOODS, J. This appeal is from an order of Judge Prince quashing an indictment for assault and battery with intent to kill, on the ground that L. A. Moore, clerk of the court of common pleas and general sessions for Lee county, and ex officio one of the jury

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

commissioners who had drawn the grand jury presenting the indictment, was an uncle of the wife of the prosecutor. The circuit judge thus clearly expressed that it was in the exercise of his discretion that he quashed the indictment because of the relationship of the clerk to the prosecutor. "I have held in this case what I meant to hold in the case of the State v. Perry [73 S. C. 199, 53 S. E. 169] and the State v. Henderson [73 S. C. 201, 53 S. E. 170]. It seems that I did not make myself clear in those cases. I thought in the exercise of my discretion that a man within the sixth degree was too close to participate in the drawing of the jury. That is what I intended to hold, and I am still of the opinion, and I am certain that a man within the third degree is too close kin. I think that we must not only deal fairly with alleged criminals before the courts, but we must appear to deal fairly with them, so that the public will not get an erroneous idea that there was any unfairness committed towards the parties."

After a review of the cases, Mr. Justice Gary for the court thus states the rule in State v. Perry, 73 S. C. 199, 53 S. E. 169. "The correct rule is that the consanguinity or affinity must be such as would reasonably lead to the presumption that the jury commissioner would thereby be affected in such manner as to impair the proper discharge of his duties, and this fact must be determined by the presiding judge in the exercise of a sound discretion. It would tend to retard the trial of cases very much to adopt any other rule." It may be well to remark that the trial judge in exercising his discretion is not restricted to the consideration of the degree of relationship only. The court may inquire whether the case had arisen, and whether the officer knew of its pendency when the jury was drawn. These and other pertinent inquiries in addition to the fact of relationship may well enter into the exercise of the discretion of the court. The trial judge in this instance having exercised a reasonable discretion in quashing the indictment, this court cannot interfere.

The judgment of this court is that the judgment of the circuit court be affirmed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(89 S. C. 146)

FERGUSON v. HENDERSON et al.
PALMETTO BANK OF LAURENS v. SAME.
(Supreme Court of South Carolina. July 5, 1911.)

PRINCIPAL AND SURETY (§ 45*)—EXISTENCE OF RELATION—EVIDENCE—WEIGHT.

Evidence in an action on a mortgage note held to show that defendants were principals, and not sureties as claimed by them.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 22; Dec. Dig. § 45.*]

Appeal from Common Pleas Circuit Court of Laurens County; John S. Wilson, Judge.

"To be officially reported."

Consolidated actions by John W. Ferguson against Lou Henderson and others and by the Palmetto Bank of Laurens against T. B. Henderson and others. From the judgment, defendants Lou Henderson and others appeal. Affirmed.

Simpson, Cooper & Babb, F. P. McGowan, and Richey & Richey, for certain creditors. Dial & Todd, for appellants. Ferguson & Featherstone, for respondents.

GARY, A. J. The question presented by this appeal arose out of the foreclosure of two mortgages of real estate. On the 29th of December 1906, the defendants T. B. Henderson, Lou Henderson, Sue Henderson, Belle Henderson, W. M. Henderson, T. H. Henderson, and J. R. Henderson, made and delivered to the plaintiff John W. Ferguson their promissory note for \$1,880, and, in order to secure the payment thereof, executed a mortgage on the tracts of land described in the complaint. On the 18th of January, 1908, the defendants T. B. Henderson, T. H. Henderson, and W. M. Henderson made their note whereby they promised to pay to the order of Palmetto Bank of Laurens \$1,614, and executed a mortgage on certain lands to secure the payment thereof. John W. Ferguson commenced an action on the 10th of June, 1909, to foreclose his mortgage, and made the Hendersons hereinbefore mentioned, and all subsequent creditors who had recovered judgment against the Henderson brothers, or who held mortgages executed by them on the lands described in the complaint, parties defendant. About the same time, the Palmetto Bank commenced an action to foreclose its mortgage, and made all the above-named persons parties defendant, except the Henderson sisters. These two actions were afterwards consolidated.

The Henderson sisters in their answer to the complaint of John W. Ferguson, set up the following defense: "That they signed said note, merely as surety for their brothers, the above-named T. B. Henderson, W. M. Henderson, T. H. Henderson, and J. R. Henderson, and they ask that the interest of said brothers in said property be exhausted and applied to the payment and liquidation of said debt before their interest."

The special master in his report says: "The defense of Sue Henderson, Lou Henderson, and Belle Henderson, that they are mere sureties on said indebtedness is not sufficiently made out by the greater weight of the testimony, and the other judgment creditors of the Hendersons had no notice that they claimed to be sureties, and not principal debtors." His honor the circuit judge, concurred in these findings of fact. From the order

confirming said report, the Henderson sisters have appealed to this court.

The first question that will be considered is whether there was error in the finding that the appellants were principals, and not sureties. The uncontradicted testimony shows that the note delivered to John W. Ferguson was made for the purpose of raising money, to satisfy a previous note and mortgage executed by all the Hendersons, in favor of M. W. Cooley, and that the money was so expended. As the money was borrowed for the purpose of satisfying the Cooley indebtedness, for which not only the brothers but the sisters were liable, it was not solely nor absolutely the property of the brothers, to expend as they saw fit, but was a trust fund; and, from the executions of the trust, not only the brothers but the sisters derived a financial benefit. It cannot therefore be successfully contended that the appellants were mere sureties.

Having reached this conclusion, the other questions involved become merely speculative.

Judgment affirmed.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(89 S. C. 151)

STATE v. WILLIAMS.

(Supreme Court of South Carolina. July 5, 1911.)

WITNESSES (§ 405*)—CONTRADICTION—COLLATERAL MATTERS—COMMISSION OF ANOTHER OFFENSE.

In an arson trial, it was reversible error to permit the state to contradict accused on a collateral matter by showing that on another occasion she was arrested, dressed in man's clothes, with a basket of splinters and a bottle of kerosene on her arm; the time and place being too remote to show any connection between the transaction in evidence and the one covered by the indictment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 405.*]

Appeal from General Sessions Circuit Court of Richland County; J. W. De Vore, Judge.

"To be officially reported."

Henrietta Williams was convicted of arson, and she appeals. Reversed and remanded.

De Pass & De Pass, for appellant. Solicitor Cobb, for the State.

WOODS, J. The defendant was convicted of arson at the summer term of the court of general sessions for Richland county. The sole question made by the appeal is whether there was reversible error on the trial in allowing the defendant to be contradicted on a collateral matter. On the cross-examination of the defendant the solicitor asked this question: "Weren't you arrested in Spartanburg with a basket of splinters and a bottle

of kerosene oil on your arm, and dressed in man's clothes, and when you were confronted you said you were a man, and denied you were a woman until you were arrested and carried before the police authorities, and they threatened to strip you?" and the defendant answered, "It was not me." In contradiction of the defendant on this point the solicitor was allowed, over the objection of defendant's counsel, to elicit from the housekeeper of the police station at Spartanburg the following testimony as to defendant's appearance at the police station in that city. "She was dressed in men's clothes, had on a man's hat, had a basket—one of these market baskets—had a bundle of pine splinters that size tied up with a string, and a quart bottle about two-thirds of kerosene, and a box of matches half full, covered up with a skirt or waist over them, and several little things in the bundle of roots."

That the issue thus made was collateral is evident. The reasons for excluding contradictions of a defendant on such an issue are thus stated by Mr. Justice McIver in *State v. Wyse*, 33 S. C. 582, 12 S. E. 556. "This well-settled rule is founded upon two reasons: First, that while a witness is supposed to be always ready to support his general character, he cannot be expected to be always ready to defend or explain all of his past acts; and hence the rule that in impeaching the character of a witness, the testimony must be confined to evidence of his general character, and it is not competent to prove particular facts affecting his character; second, because the admission of such testimony would tend to multiply the issues and thus confuse the jury."

The contradiction on this collateral matter was highly prejudicial to the defendant, standing her trial on the charge of arson. It amounted to evidence that at an entirely different time and place she was found in disguise with splinters, matches, and oil concealed in a basket. The time and place were too distant to indicate that the preparation attributed to the defendant was for the burning charged in the indictment or was connected with it. Such evidence could not fail to have weight with the jury as indicative of the character of the defendant. She had no notice that she would be required to disprove or explain the disguise and other preparation to which the contradiction related, and it was therefore contrary to the rules of evidence that such an issue should be brought into the trial.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause be remanded to that court for a new trial.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

39 S. C. 149)

STATE v. MILAM.

(Supreme Court of South Carolina. July 5, 1911.)

ADULTERY (§ 14*)—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of adultery.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 27, 31-33; Dec. Dig. § 14.*]

Appeal from General Sessions Circuit Court of Laurens County.

"To be officially reported."

J. F. Milam was convicted of adultery, and he appeals. Affirmed.

Richey & Richey, for appellant. R. A. Cooper, Sol., for the State.

WOODS, J. The defendant was convicted of the crime of adultery, the specification of the indictment being that he was a married man and habitually had carnal intercourse with one Anna Mack. The error assigned in the appeal is the refusal of the circuit judge to direct a verdict of acquittal or to order a new trial on the ground that no evidence was adduced tending to prove the charge.

The appeal must fail, for there was strong evidence of the guilt of the defendant. A number of witnesses testified that Anna Mack lived for about 10 years in a house on defendant's premises a short distance from his own dwelling. Dorroh Jeems and Walter Gilliam, two colored men who had worked for Milam and lived in his yard in the other end of the house occupied by Anna Mack, saw him in bed with her three times in two years. It does not clearly appear that the defendant was married at the time of the occurrences, some years before the trial, Milam's first wife having died some time before. But Mr. W. W. Adair, one of his white neighbors, testified that in the summer of 1908 the defendant introduced a woman to him as his wife saying that they had been married in Clinton; and that she lived with him for three or four weeks thereafter and then left him. In the fall of the same year, according to Adair's testimony, Milam came to him and asked his advice as to reform in his mode of life, and upon Adair's remonstrating with him, he promised to put the Mack woman out into the field after Christmas. Alma Irby, a colored woman, testified that at some time previous to the trial Milam had solicited her, and upon her replying by an accusation that he already had one negro wife, defendant said, "He had Anna and he wanted me." John D. Owings, sheriff of Laurens county, also testified that in the spring of 1909 he had gone to Milam's place at the solicitation of a negro man who wished to marry the Mack woman, and that defendant objected to the woman's leaving his premises, but at last consented when the sheriff told him that he had no right to refuse. It is thus clear that there was evidence tending to show that the

illicit relations between the parties continued after the defendant had married a second time.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(39 S. C. 217)

ROWE v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. July 7, 1911.)

1. APPEAL AND ERROR (§ 1212*)—FORMER APPEAL—DETERMINATION—EFFECT.

On a former trial, the court withdrew plaintiff's cause of action for wantonness from the jury, and accepted a verdict for defendant on a count alleging simple negligence, from which plaintiff appealed. The Supreme Court rendered a decision that the "judgment of the circuit court be reversed and the case remanded for a new trial." Held, that the judgment of the Supreme Court entitled plaintiff to a new trial on both issues of negligence and wantonness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4713; Dec. Dig. § 1212.*]

2. RAILROADS (§ 236*)—CITY ORDINANCE—SPEED OF TRAIN.

A city ordinance limiting the rate of speed of trains within the city to 10 miles an hour is valid.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 749; Dec. Dig. § 236.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by C. E. Rowe against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The defendant's exceptions referred to in the opinion were as follows:

"(1) Error in refusing to charge defendant's seventh request, to wit: Seventh request. 'I charge and instruct you that any ordinance of the city of Spartanburg limiting the rate of speed to 10 miles per hour is unreasonable as applied to a particular place, if the evidence shows that at such particular place it was impossible for the railway company to run its train at the speed limited in such ordinance, because if it is impossible to obey an ordinance it is unconstitutional.' The error being, as it is respectfully submitted, that this was a sound proposition of law, applicable to the pleadings and evidence, and should have been submitted to the jury, as requested by the defendant. It further being respectfully submitted that his honor in refusing this request erred in saying to the jury that he had already charged it in another form. It being respectfully submitted that when his honor instructed the jury that an ordinance passed by a city would be valid, unless it was 'so unreasonable as to amount to spoliation of property of the defendant,' he erred, in that an ordi-

nance may be void for unreasonableness, without actually depriving the defendant of its property.

"(2) In charging and instructing the jury in reference to the ordinance limiting the speed of the train as follows: 'Now the defendant says it is unconstitutional, and has asked me to charge you that 10 miles an hour is. I cannot charge you about what is reasonable, and what is unreasonable; I charge you that cities have a right to pass reasonable ordinances on that subject. If you come to the conclusion that the ordinance is so unreasonable as to amount to deprivation, depriving the defendant of its property, or rendering it useless under the circumstances, why it would be unreasonable under the circumstances, but I could not undertake to tell you how many miles; that is a question for you. Ordinarily a person cannot resist a city ordinance on account of mere unreasonableness; but if he can show, if he has satisfied you by the greater weight of the testimony, that the ordinance is so unreasonable as to amount to spoliation of the property of the defendant, depriving it of its property, why then it would be unreasonable, and it would be warranted in disregarding the ordinance.' The error being, as it is respectfully submitted, that by this charge his honor instructed the jury that, unless the ordinance deprived the defendant of its property, or was a spoliation of its property, it would be a reasonable, legal, and valid ordinance. Whereas, it is respectfully submitted that, if it is impossible to obey an ordinance, then it would be unreasonable, even though it did not amount to a spoliation or deprivation of the property of a defendant, and his honor should have so instructed the jury.

"(3) Because his honor erred in submitting to the jury the cause of action as to the negligence of the defendant, and in submitting to them the question whether the defendant was negligent or not, and in instructing the jury that they could find a verdict against the defendant under this cause of action. The error being, as it is respectfully submitted, that this issue having been determined in favor of the defendant when the case was tried before Special Judge C. O. Featherstone, and there being no appeal from the verdict and judgment on this issue, it is *res adjudicata*.

"(4) Because, when this case was tried before Special Judge C. C. Featherstone, the issue under the cause of action as to the alleged negligence of the defendant having been submitted to the jury, and the verdict of the jury being in favor of the defendant, and there being no appeal from this verdict, it was error for his honor to have submitted this issue to the jury.

"(5) Because his honor having instructed the jury as follows: 'Now, Mr. Foreman, if you come to the conclusion that the plaintiff is entitled to recover in this case, if you

come to the conclusion that he is entitled to recover on his allegations of negligence, either under the statute or common law, he is entitled to recover his actual damages. In a case like this the measure of damages would be the value of the property destroyed at the time it was destroyed, together with legal interest on that amount from the time—when was this suit brought? Mr. Wilson: September 2d was the date of the accident. Court: I don't know whether the measure of damages would be from the time of the accident or from the time that the suit was brought. Mr. Wilson: From the accident, your honor; that is when the damage was done. Court: Then if you find that he is entitled to that, you conclude what the value of the property was at the time of the accident, and add to that interest at the legal rate of interest. he sues, not only for actual damages, but for punitive damages also. If you come to the conclusion that the defendant company was willful, why then you would add such amount of money as you thought would be sufficient or proper to put as punishment upon the defendant for the willful acts, if you find such, because punitive damages are given, not for the purpose of compensating the plaintiff in the case, but are given for the purpose of punishing the defendant and to act as a warning to others to avoid similar acts, as well as for the purpose of vindicating the rights of the plaintiff. So if you come to the conclusion that he is entitled to any damages, you can add such amount to the actual damages as you see proper, but not exceeding the sum claimed in the complaint, which is \$500. Now, gentlemen, I think that is about all.' And the verdict of the jury showing that they did not conclude that the defendant was guilty of willfulness or wantonness, his honor erred in not granting a new trial on the ground that the verdict of the jury, being only for the actual value of the property and the interest thereon, showed that they rendered this verdict against the defendant under the cause of action for negligence, and that as such issue had been previously determined in the case when tried before Special Judge C. C. Featherstone, it was *res adjudicata*, and should not have been passed upon by the jury.

"(6) Because his honor, in refusing the motion for a new trial on the first ground upon which it was made, erred in holding that under the judgment of the Supreme Court on the appeal from the verdict and judgment heretofore rendered the plaintiff was entitled to a trial *de novo* upon both the issues of negligence and wantonness raised by the pleadings; whereas, it is respectfully submitted, his honor should have held that in granting the new trial this court only passed upon the issues raised by the exceptions then before it, and, as such exceptions only raised the question of error

in not submitting to the jury the issues under the cause of action for willfulness and wantonness, that this court in granting the new trial only granted a new trial as to such issues.

"(7) Because, when it appeared to his honor that there was no exception from the verdict of the jury and judgment of the court when the case was tried before Special Judge C. C. Featherstone, as to the cause of action alleging negligence, his honor should have held that in granting the new trial the Supreme Court only granted it as to the cause of action alleging willfulness and wantonness."

Sanders & De Pass, for appellant. Stan-yarne Wilson, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff through the wrongful acts of the defendant. There was a former appeal herein. 85 S. C. 23, 66 S. E. 1056.

The complaint contains two causes of action, one based on negligence, and the other on wantonness. On the former trial, his honor, the Presiding Judge, ruled, that there was no testimony tending to show wantonness on the part of the defendant, and withdrew that cause of action from the consideration of the jury. The jury then rendered a verdict in favor of the defendant, and the plaintiff appealed to this court, whose judgment was as follows: "It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial." On the second trial of the case in the circuit court, the jury rendered a verdict in favor of the plaintiff for the sum of \$357.60, and the defendant appealed upon exceptions which will be reported.

The first question that will be considered is whether there was error on the part of his honor, the Presiding Judge, in construing the judgment of the Supreme Court. The record contains the following statement: "This is a motion for a new trial made by the defendant upon the following grounds: 'Because, it is respectfully submitted, no issue should have been submitted to the jury, except the issue as to the liability of the defendant, under the alleged cause of action, for willfulness and wantonness.' * * * When this motion was made, my attention was called to the fact that Special Judge Featherstone had withdrawn the cause of action as to the willfulness and wantonness of the defendant from the jury, and had only submitted to them the issue as to negligence of the defendant, and that

the appeal only questioned the correctness of the rulings of his honor in withdrawing the cause of action alleging willfulness and wantonness on the part of the defendant. The record of the former trial in this case is not before me, but I have the opinion of the Supreme Court granting a new trial. The language of that opinion is as follows: 'It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.' It will be seen that there is no limitation or restriction upon this order directing a new trial; and the plaintiff was entitled, under the decision of the Supreme Court, to a trial de novo upon both the issues of negligence and wantonness raised by the pleadings. I therefore refuse the motion, so far as this ground is concerned."

[1] The former appeal was from the judgment entered upon the verdict, and not merely from the ruling of his honor, the Presiding Judge, in withdrawing from the jury the cause of action for punitive damages. The motion for a new trial on this ground was therefore properly overruled, as the judgment was reversed.

[2] The next question is whether the Presiding Judge erred in charging the jury that the ordinance of the city of Spartanburg, relative to the speed of trains within its limits, would be a valid ordinance, unless it amounted to a spoliation of defendant's property. We deem it only necessary to state that the authorities cited by the respondent's attorney clearly show that the exceptions raising this question cannot be sustained.

Affirmed.

WOODS and HYDRICK, JJ., concur.

WOODS, J. I concur, but think something should be said as to the refusal of the following request to charge: "I charge and instruct you that any ordinance of the city of Spartanburg limiting the rate of speed to 10 miles an hour is unreasonable as applied to a particular place, if the evidence shows that at such particular place it was impossible for the railway company to run its train at the speed limited in such ordinance, because if it is impossible to obey an ordinance it is unconstitutional." This request was earnestly pressed in argument, and it is not without appearance of fairness; but it is unsound, in that it leaves out of consideration the question whether by the exercise of due care and skill, the defendant railroad company could not have so constructed its track as to enable it to comply with the speed ordinance.

(20 S. C. 258)

RUSSELL v. TILLMAN et al.

(Supreme Court of South Carolina. July 8, 1911.)

EVIDENCE (§ 432*)—PAROL EVIDENCE—VARYING PROMISSORY NOTES.

Where a note only expresses a general consideration by the words "for value received," parol evidence is admissible to show a failure of consideration arising out of the nonperformance of the payee of his part of an agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1981-1989; Dec. Dig. § 432.*]

Appeal from Common Pleas Circuit Court of Lancaster County; Ernest Moore, Special Judge.

Action by S. S. Russell against J. A. Tillman and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

R. E. Wylie, for appellants. J. Harry Foster, for respondent.

GARY, A. J. This is an action on a promissory note, of which the following is a copy: "\$97.24. Lancaster, S. C., March 20, 1909. On or before the first of November next (1909), we promise to pay to S. S. Russell, at Columbia, S. C., ninety-seven and 24/100 dollars, for value received. [Signed] J. A. Tillman, D. C. Barnes."

The answer of the defendants was as follows:

"(1) That they deny each and every allegation contained in the complaint, excepting those allegations hereinafter admitted.

"(2) That they admit that, on or about the 20th day of March, 1909, at Lancaster, S. C., they executed a certain promissory note for \$97.24, made payable to the plaintiff on November 1, 1909, and delivered same to one C. G. Garrett, colored, the agent of the plaintiff, but these defendants aver that no consideration whatever has moved from the plaintiff to these defendants, and they therefore plead a failure of consideration of said note, for the reasons set forth in the succeeding paragraphs of this answer.

"(3) That plaintiff, through his said agent, C. G. Garrett, colored, on or about March 20, 1909, sold to these defendants the exclusive right to sell in the said county of Lancaster certain quilters, known as the 'Favorite Quilter,' the county right being, as said agent claimed, the sum of \$121.24. That the said agent represented that there was good money in the sale of his quilters, and promised to ship immediately to defendants a number of the quilters, at and for the price of \$1.95 each, which defendants were to sell for \$4.45 each, and from the sales defendants were to remit to plaintiff \$1.95 for each quilter sold. That the defendants, relying upon the good faith and representations of the agent of the plaintiff, at the earnest request of said agent, paid to the said agent the sum of \$24 in part of said county right, and executed their

joint note for \$97.24, the balance of said county right, and delivered said note to the said agent of plaintiff. That defendants at the same time paid to the said agent the sum of \$2.50 for a model or sample of the said 'Favorite Quilters,' which is absolutely worthless.

"(4) That the plaintiff has wholly failed to carry out his part of the contract, and has never sent, as he promised by his said agent, any of the said quilters.

"(5) That these defendants have been deceived, defrauded, and damaged by plaintiff, through his said agent, and therefore set up, by way of counterclaim to plaintiff's action, the sum of \$26.50 paid, as above set forth, by these defendants, to the said agent of plaintiff."

We have not reproduced the answer in full, for the reason that his honor, the presiding judge, ruled that it interposed only two defenses, to wit, fraud and a counterclaim.

The instrument of writing assigning to the defendants the exclusive right to sell the quilters in Lancaster county recites that the consideration was the sum of \$121.24, paid in hand to the plaintiff, the receipt of which was therein acknowledged. There was testimony tending to show failure of consideration arising out of the nonperformance by the plaintiff of his part of the contract. The record shows that his honor, the presiding judge, made the following ruling: "Mr. Foster: I move to strike out all evidence which, in any way, seeks to vary or change the terms of this note. The Court: Yes, sir. He can't vary the terms of the note by parol evidence. Anything that varies the note or contract I will have to strike out." At the close of the testimony, the plaintiff's attorney made a motion for the presiding judge to direct a verdict in favor of the plaintiff, for the amount of the note, less the counterclaim of \$26.50, which was granted, on the ground that there was no testimony tending to show fraud, and that the only other defense upon which the defendants could rely was the counterclaim for \$26.50.

The practical question presented by the exceptions is whether there was error on the part of the presiding judge in striking out the testimony hereinbefore mentioned, on the ground that it tended to vary the terms of the note and the said instrument of writing, assigning the right to sell the quilters in Lancaster county.

By reference to the answer of the defendants, it will be seen that it interposes three defenses, failure of consideration, fraud, and a counterclaim. "When the note expresses no consideration, or a merely formal or general consideration, as by the usual words 'value received,' or by similar general or formal expressions, it is evident that, if the true consideration rests in an agreement, written or oral, between the parties, the proof

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of such agreement does not necessarily tend to change the terms of the note, although by showing the true consideration upon which it is given it may control the recovery upon the note." *McGrath & Byrum v. Barnes*, 13 S. C. 328, 36 Am. Rep. 687.

In the case of *Groesbeck v. Marshall*, 44 S. C. 538, 22 S. E. 743, the action was on a promissory note, executed by J. Q. Marshall in favor of John W. Stokes, as payee, who indorsed the note, after maturity, to the plaintiff, *Groesbeck*. The defendant, *Marshall*, contemporaneously with the execution of the note, took from Stokes a receipt, and after maturity of the note the said J. Q. Marshall delivered a certificate to J. Foster Marshall, which instruments of writing were introduced in evidence, for the purpose, among other things, of showing failure of consideration of the note. The ruling of the court in that case was as follows: "We will next consider whether parol evidence was admissible to show the * * * failure of consideration of the note. The note recites simply that it was for *value received*. In a case of this kind, the case of *McGrath & Byrum v. Barnes*, 13 S. C. 328 [36 Am. Rep. 687], shows that parol evidence is admissible to show the true consideration. * * * The receipt and certificate were introduced in evidence by the plaintiff for the purpose of showing the consideration. Defendant's testimony was introduced for the purpose of showing the consideration of the note, and not for the purpose of varying the terms of the receipt and certificate. The receipt and the certificate were to be considered by the jury in coming to a conclusion as to what was the real consideration of the note, but their introduction in evidence did not prevent the defendant from showing the real consideration thereof." These authorities show that the presiding judge erred in striking out said testimony.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

(89 S. C. 173)

COOKE v. YOUNG.

(Supreme Court of South Carolina. July 7, 1911.)

USURY (§ 23*)—NOTES—INTEREST TO MATURITY.

Under Civ. Code 1902, § 1662, which makes 7 per cent. the maximum legal rate of interest, and section 1663, which provides that any person receiving more than the legal rate of interest shall forfeit all interest, and recover the original debt without interest or costs, it is not usurious for the holder of notes bearing a legal rate of interest upon discounting the notes at the maker's request to calculate interest to maturity, since it is only the performance of a lawful contract tendered and accepted in advance of the stipulated time.

[Ed. Note.—For other cases. see *Usury*, Cent. Dig. §§ 42-50; Dec. Dig. § 23.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; W. B. Gruber, Special Judge.

"To be officially reported."

Action by A. B. Cooke against W. F. Young, as administrator of S. T. Poiner, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Johnson & Nash, for appellant. Sanders & De Pass, for respondent.

JONES, C. J. This action was to recover forfeiture for alleged usury. Jury trial was waived, and the case, upon an agreed statement of the facts, was submitted to Hon. W. B. Gruber, presiding as special judge, who dismissed the complaint. On November 7, 1908, Arthur B. Cooke, the plaintiff, gave Samuel T. Poiner, defendant's intestate, two notes for \$600 each, one due on January 1, 1910, and the other on July 1, 1910, with interest from date at 7 per cent. per annum, secured by a mortgage of real estate in the city of Spartanburg, S. C. Plaintiff afterwards moved to California, and on July 21, 1909, inquired by letter of the administrator what he would take in cash payment of the notes by September 1st, to which the administrator replied that he was advised that he had no authority other than to collect the notes according to their tenor, and could not discount them, but would receive the whole amount, if he desired to pay. On August 4, 1909, J. T. Willard, a real estate agent representing plaintiff, having sold the mortgaged property, paid to defendant's attorneys the amount due upon the notes and mortgage, with interest calculated to the maturity of the notes, the interest amounting to \$117.60. The plaintiff brought action to recover double this sum, claiming that it was usurious to receive interest in excess of the amount of interest accrued up to the date of payment.

The action is sought to be maintained under the provisions of sections 1662 and 1663 of the Code, as follows:

"No greater interest than seven (7) per cent. per annum shall be charged, taken, agreed upon or allowed upon any contract arising in this state for the hiring, lending or use of money or other commodity, either by way of straight interest, discount or otherwise, except upon written contracts, wherein by express agreement, a rate of interest not exceeding eight per cent. may be charged.

"Any person or corporation who shall receive or contract to receive as interest any greater amount than is provided for in the preceding section shall forfeit all interest, and the costs of the action and such portion of the original debt as shall be due shall be recovered without interest or costs, and where any amount so charged or contracted

for has been actually received by such person or corporation, he or she, or they shall also forfeit double the total amount received in respect of interest, to be collected by a separate action or allowed as a counterclaim in any action brought to recover the principal sum."

It is conceded that there is no usury in the term of the contract. It cannot therefore be usury to receive payment according to such terms. The fact that the debtor for his own convenience voluntarily chooses to pay before maturity the amount of principal and interest due at maturity cannot operate to taint the transaction with usury, as that is nothing more than performance of a lawful contract, although tendered and accepted in advance of the stipulated time. The statute has no reference to the receipt of the principal debt. The receipt of the interest in advance of the time of stipulated payment could not be within the statute, which has been construed not to forbid the taking of lawful interest annually in advance. *Newton v. Woodley*, 55 S. C. 132, 32 S. E. 531, 33 S. E. 1; *Heyward v. Williams*, 63 S. C. 470, 41 S. E. 550.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(89 S. C. 153)

STATE v. BARWICK.

(Supreme Court of South Carolina. July 5, 1911.)

1. WITNESSES (§ 301*)—CROSS-EXAMINATION—ACCUSED PERSONS.

In the trial of a police officer for homicide, wherein he claimed that decedent was shot by a man pursued by the officer, it was proper to ask accused on cross-examination if he did not give certain testimony before the mayor's court showing that the pursued man could not have hit decedent, the evidence not being improper, as in effect compelling accused to testify against himself in violation of Const. art. 1, § 17.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1043-1046; Dec. Dig. § 301.*]

2. WITNESSES (§ 305*)—CROSS-EXAMINATION—ACCUSED PERSONS.

Under Cr. Code 1902, § 64, permitting accused to testify if he desires to do so, and under section 65, providing that no person shall be required to answer any question tending to incriminate himself, when an accused voluntarily elects to testify, he assumes the position of an ordinary witness, and is subject to cross-examination to test his accuracy, veracity, and credibility, subject to the control of the trial court, and subject to his right to decline to answer any question tending to incriminate him.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1053-1057; Dec. Dig. § 305.*]

3. CRIMINAL LAW (§ 448*)—EVIDENCE—OPINIONS.

In a homicide case, a witness may state the direction of a shot, judging from his hear-

ing its sound, the testimony not being inadmissible as stating a conclusion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1035-1039, 1041-1043, 1048-1051; Dec. Dig. § 448.*]

4. CRIMINAL LAW (§ 858*)—TAKING PAPERS TO JURY ROOM—JUDICIAL DISCRETION.

In a homicide case, it was not an abuse of discretion to permit the jury, in retiring, to take with them a diagram of the locality of the shooting which had been introduced in evidence, any incorrectness of the diagram being in evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2056-2059; Dec. Dig. § 858.*]

5. CRIMINAL LAW (§ 812*)—INSTRUCTIONS—RACIAL PREJUDICE.

Where, in the trial of a police officer for homicide while pursuing a third person, one of accused's witnesses admitted that he may have said in a joking way that "the country was going to the devil if they could convict a white man for killing a negro," it was proper to instruct that the law is applicable the same to every man, and knows no pets nor difference between an Indian, Japanese, citizen of the state, African, or Caucasian, etc.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1974-1978; Dec. Dig. § 812.*]

6. HOMICIDE (§ 341*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where, in a homicide case, the state's evidence was both direct and circumstantial, it was not reversible error to omit to instruct that when proof rests upon circumstantial evidence the circumstances must have admitted of no other reasonable hypothesis than guilt, where no special instruction was requested, and the general law applicable to the case was charged.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 721; Dec. Dig. § 341.*]

Appeal from General Sessions Circuit Court of Sumter County; Thos. S. Sease, Judge.

"To be officially reported."

Robert M. Barwick was convicted of manslaughter, and he appeals. Affirmed.

H. C. Haynsworth, for appellant. P. H. Stoll, Sol., for the State.

JONES, C. J. [1] The defendant in October, 1908, was policeman of the town of Pine-wood in Clarendon county, and on arrival of the Saturday night train from Sumter was opening a way through the crowd for some lady passengers, when Thomas Singleton, according to defendant's version, declared he would stand back for no damn man, whereupon defendant seized Singleton to arrest him for cursing and refusing to open the way. Singleton broke loose and ran, and the defendant pursued, firing his pistol towards him several times. The deceased, Sam Bracy, was standing in line of the firing and was struck by a bullet, which gave him a mortal wound, of which he died some days later in a hospital in Sumter, S. C. The defendant was indicted for the murder of Bracy, and was convicted of manslaughter with recommendation of mercy.

The testimony for the state was to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

effect that deceased was struck by a bullet from the pistol of defendant, but the defendant testified to the effect that Singleton while running away, or some one in the direction he was running, shot at defendant, that defendant did not shoot until after this firing, and the suggestion was that deceased may have been shot by Singleton. On cross-examination of defendant, who had testified in his own behalf, the solicitor was allowed to interrogate defendant as to his statements under oath before the mayor's court. Defendant was asked if he did not state before the mayor: "I did not see Singleton with a pistol, but he shot back at this place, also he shot before he got to the man that was shot." "If Singleton shot at all he shot before he got to the man that was shot." The effect of this statement, if true, would be to show that if Singleton shot in such a situation he could not have hit deceased. The defendant denied that he made such statement, and no effort was made to contradict by any written statement or otherwise.

The first, second, and third exceptions allege that it was error to admit this testimony, which in effect was compelling defendant to give testimony against himself in violation of article 1, § 17, of the Constitution, which provides that no person shall be compelled in any criminal case to be a witness against himself. Appellant relies upon *State v. Senn*, 32 S. C. 396, 11 S. E. 292, to sustain these exceptions, but we do not think the case is controlling. The question in that case was whether the coroner could testify as to statements made at the inquest by one then examined as a witness, who was afterwards indicted and was on trial. Justice McIver was of the opinion that parol evidence of such statement was not admissible when the statement was in writing, and, further, that such admissions were not free and voluntary when made by a witness under summons to testify. Justice McGowan held the testimony admissible. While Chief Justice Simpson appears to have concurred generally in the opinion of Justice McIver, he nevertheless indorsed on the opinion of Justice McGowan his reasons for not concurring therein, and these reasons contained no objection to the view of Justice McGowan on this point. The question at bar is different. Section 64 of the Criminal Code of 1902, provides: [2] "In the trial of all criminal cases the defendant shall be allowed to testify (if he desires to do so, and not otherwise) as to the facts and circumstances of the case;" and section 65 provides that no person shall be required to answer any question tending to criminate himself. When a defendant voluntarily elects to be a witness in his own behalf he thereby assumes the position of any ordinary witness, and is therefore subject to cross-examination to test his accuracy, veracity, or credibility, subject to the control of the trial court, and subject to his right to decline to answer any question tend-

ing to criminate him. *State v. Williamson*, 65 S. C. 245, 43 S. E. 671; *State v. Andrews*, 73 S. C. 280, 53 S. E. 423; *State v. Stukes*, 73 S. C. 391, 53 S. E. 643; *State v. Rowell*, 75 S. C. 508, 56 S. E. 23; *State v. Hunter*, 82 S. C. 157, 63 S. E. 685.

[3] The witness Toomer, over objection that the testimony was matter of opinion, was allowed to state the direction of the first shot he heard, judging from the sound of it. The exception to this ruling cannot be sustained. A conclusion as to the direction of sound is an instantaneous deduction or impression from the sense of hearing and does not fall within the class of opinion evidence, but is a matter of fact or knowledge, within the rules of the law. *McKelvey on Ev.* para. 123-124.

[4] When the jury was about to retire they asked whether they might take with them a diagram of the locality of the shooting which had been introduced in evidence without objection. Counsel for defendant called attention to the fact that the diagram was incorrect, and by this objected to the jury having the diagram. The court permitted the jury to take the diagram with them and this action is the basis of an exception. "Allowing papers introduced in evidence to be taken by the jury to their room rests in the discretion of the presiding judge, which will not be disturbed except in case of abuse." *Church v. Elliott*, 65 S. C. 258, 43 S. E. 674. We find no abuse of discretion here. Whatever evidence there was to show wherein the diagram was incorrect was before the jury.

[5] One of the witnesses for the defense admitted that he may have said in a joking way, without meaning it, that the country was going to the devil if they would convict a white man for killing a negro. The court charged the jury: "The law is applicable the same to every man. The law knows no pets. The law knows no difference between an Indian, Japanese, a citizen of the state, an African or a Caucasian. I could not charge you different law according to the parties interested, much less could you try the facts differently, the parties being of a different race, either Japanese, Chinese, African, or Caucasian. There is no color line in the law, and there shall be none under your oath in the jury box." The appellant excepts to this charge as upon a matter not in issue, and as tending to divert the jury from the true consideration of his defense. We think the charge was not only sound, but was proper in the circumstances, and could not possibly have prejudiced any right of defendant.

The thirteenth exception is based upon a misapprehension of the charge as it clearly appears therein that the jury were instructed that to convict defendant they must find him guilty beyond a reasonable doubt.

[6] The fourteenth exception assigns error in failing to instruct the jury that when the

proof of the state rests upon circumstantial evidence, the circumstances must admit of no other reasonable hypothesis than that the defendant did the killing. The state's evidence was both direct and circumstantial. There was no request by defendant for special instruction as to the rule governing conviction on circumstantial evidence alone, and in the absence of such a request a mere failure to charge in this respect is not reversible error. The general law applicable to the case was charged and the defendant given the benefit of any reasonable doubt of his guilt.

The remaining exceptions were not discussed or relied on in argument of appellant, and we deem it only necessary to say that they afford no good ground for reversal.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(89 S. C. 274)

LEE v. NORTH WESTERN R. CO.
(Supreme Court of South Carolina. July 11, 1911.)

1. APPEAL AND ERROR (§ 1064*)—“GROSS NEGLIGENCE”—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

The error in a charge, in an action for injuries in a collision at a crossing, which defines “gross negligence,” within Civ. Code 1902, § 2139, relieving a railroad company from liability if the person injured was guilty of gross negligence, as the want of any degree of care for his own safety is not prejudicial, since the difference between want of slight care and the want of any care is too shadowy to affect the verdict of a jury of ordinary intelligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3168-3173; vol. 8, p. 7675.]

2. RAILROADS (§§ 320, 350*)—CROSSINGS—OBLIGATION OF TRAINMEN.

Where trainmen approaching a crossing discover that a team is rapidly approaching the crossing, and is beyond the control of the driver, they must exercise reasonable care to prevent a collision, but it is not their duty, as a matter of law, to stop the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1014, 1165; Dec. Dig. §§ 320, 350.*]

3. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in an action for injuries at a crossing, the undisputed evidence showed that the trainmen, on seeing the traveler approach the crossing, applied the emergency brakes and did all they could to stop the train and prevent the collision, the error in a charge that trainmen who see that the team of a traveler on a highway, approaching the crossing, is beyond his control must do all they can to stop the train, to prevent injury, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221; Dec. Dig. § 1064.*]

Appeal from Common Pleas Circuit Court of Kershaw County; Geo. E. Prince, Judge.
“To be officially reported.”

Action by Stephney Lee against the North Western Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. O. Purdy and Clark & Van Treskow, for appellant. De Pass & De Pass, for respondent.

HYDRICK, J. Plaintiff recovered judgment for personal injuries received by him in a collision with defendant's cars at a highway crossing. For a former appeal in this case, see 84 S. C. 125, 65 S. E. 1031.

When neglect to give the signals required by statute at highway crossings contributes to the injury of persons or property at such crossings by collision with the engine or cars of a railroad corporation, the law imposes upon the corporation liability for damages caused thereby, “unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law; and that such gross or willful negligence or unlawful act contributed to the injury.” 1 Code 1902, § 2139.

[1] There are only two grounds of appeal. The first assigns error in defining gross negligence in the charge to be “the want of any degree of care for his own safety”; and the second, in charging that, when those in charge of a railroad train approaching a crossing see that the team of a traveler on the highway, also approaching the crossing, is beyond his control, it is their duty to do all they can to stop the train to prevent injury. The Presiding Judge erred as pointed out in each of these exceptions. Nevertheless the judgment should be affirmed, because the errors were not prejudicial. The difference between the want of slight care and the want of any care is more technical and metaphysical than practical and substantial, and too shadowy to affect the verdict of jurors of ordinary intelligence and common sense.

[2] It will not do to say, as matter of law, and under all circumstances, that, when those in charge of a train approaching a crossing see a team, also rapidly approaching it, and beyond the control of the driver, it is their duty to stop the train to prevent collision; for what should be done to prevent collision is ordinarily a question of fact to be decided from all the circumstances. These may indicate to those in charge of the train that a collision would more certainly be prevented by increasing the speed of the train, so that it would cross the highway before the team could reach the crossing. The duty, under such circumstances, is merely to exercise due and reasonable care to prevent a collision, and what that would

be would depend upon all the circumstances. *Gue v. Wilson*, 87 S. C. 144, 69 S. E. 99.

[3] But the uncontradicted testimony shows that, as soon as those in charge of defendant's train saw the plaintiff approaching the crossing, they applied the emergency brakes, and did all they could to stop the train and prevent the collision. No other reasonable inference can be drawn from the testimony than that what they said they did were the proper and only things that could have been done at that time, and under those circumstances, to prevent the collision. As they unquestionably did what the court told the jury they should have done, the error could not have affected the result.

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 237)

CALDER v. SOUTHERN RY. CO. et al.
(Supreme Court of South Carolina. July 12, 1911.)

1. CARRIERS (§ 414*)—PASSENGERS ON PULLMAN CAR—PROTECTION.

A carrier must exercise the utmost care for the safety of a passenger on a Pullman car, and where the passenger, while asleep in her berth, was assaulted and robbed the carrier and the sleeping car company were both liable for a negligent failure to protect the passenger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1582; Dec. Dig. § 414.*]

2. REMOVAL OF CAUSES (§ 36*)—JOINT LIABILITY.

A complaint which alleges the joint liability of a domestic carrier and a foreign sleeping car company for injuries to a passenger, received while in her berth, is not objectionable as a sham to prevent the foreign company from removing the action to the federal court.

[Ed. Note.—For other cases, see *Removal of Causes*, Cent. Dig. § 79; Dec. Dig. § 36.*]

3. CARRIERS (§ 306*)—CARRIAGE OF PASSENGERS—LIABILITY OF LESSOR.

A railway company leasing its road is jointly liable with the lessee for negligent injury to a passenger of the lessee.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1249; Dec. Dig. § 306.* *Railroads*, Cent. Dig. § 812.]

4. CARRIERS (§ 413*)—PASSENGERS—OBLIGATION OF SLEEPING CAR COMPANIES.

A sleeping car company must take proper care to keep watch over its passengers asleep in their berths, even before it has notice of any danger or of facts sufficient to cause it to anticipate danger to any particular passenger, and robbery is a danger which it must guard against.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1583-1588; Dec. Dig. § 413.*]

5. CARRIERS (§ 416*)—CARRIAGE OF PASSENGERS—PUNITIVE DAMAGES.

The failure of the servants of a sleeping car company to keep watch while a passenger was asleep in her berth is a reckless disregard of her safety, and where the passenger was assaulted and robbed the company is liable for punitive and compensatory damages.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1598; Dec. Dig. § 416.*]

6. CARRIERS (§ 416*)—ROBBERY OF PASSENGER—PUNITIVE DAMAGES—INSTRUCTIONS.

An instruction authorizing the jury to award punitive damages against a sleeping car company for injuries to a passenger assaulted and robbed while asleep in her berth, if the jury believed that there was a conscious disregard by the company's servants to observe due care, and that a willful invasion of the passenger's rights was not essential to justify such damages, properly submitted the issue of punitive damages.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 416.*]

7. DAMAGES (§ 216*)—MENTAL SUFFERING—INSTRUCTIONS—"ASSAULT."

In an action against a sleeping car company for injuries to a passenger assaulted and robbed while asleep in her berth, a charge that the law does not allow a recovery of damages for mental suffering, in the absence of bodily injury, that the passenger could recover such damages as she actually sustained by reason of the assault, that it was not necessary to touch a person to constitute an assault, which was an attempt to apply even the least actual force causing apprehension of immediate peril, and that the amount of damages for mental suffering depended on the circumstances, was not objectionable as making a well-founded apprehension of immediate peril elements of damage, irrespective of whether they were caused by physical injury, or the result of "assault," as technically defined.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 532-538; vol. 8, p. 7582.]

8. DAMAGES (§ 181*)—PUNITIVE DAMAGES—WEALTH OF DEFENDANT—ADMISSIBILITY.

Evidence of the wealth and pecuniary ability of defendant is admissible, where punitive damages are recoverable.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 474; Dec. Dig. § 181.*]

Appeal from Common Pleas Circuit Court of Charleston County; R. C. Watts, Judge.

"To be officially reported."

Action by D. B. Calder against the Southern Railway Company and others. From a judgment for plaintiff against defendant Pullman Company, it appeals. Affirmed.

The following are defendant's exceptions:

"(1) In taking jurisdiction of this case and in refusing the application for an order accepting the petition and bond for removal; it is submitted that the court was without jurisdiction to try this case for the reasons stated in the petition for removal and that the cause was removed into the Circuit Court of the United States by the filing of said petition and bond for removal.

"(2) In refusing to accept said petition and bond for removal, when the petition alleged that the joinder of the resident defendant was fraudulent, for the purpose of defeating jurisdiction of the United States court, and when the allegations of the complaint itself show separate and distinct causes of action against each defendant, a separate controversy, and a removable case.

"(3) In refusing to accept said petition and bond for removal and in taking jurisdiction

of said case, because the liability of the lessor railroad company, if any, is not a joint liability with the lessee railroad company, but is contractual, and is based upon the lease or statute; further because the facts alleged show the wrongs complained of were not the joint and concurrent acts of both defendants, and because there was no community in the alleged wrongdoing.

"(4) In refusing to accept the petition and bond for removal, when the complaint alleged two causes of action, viz., assault by a third person, and loss of property. As to the assault no cause of action is stated because there is no allegation of knowledge of danger or reason to apprehend danger. As to the loss of property, it is submitted a railroad company is not responsible for the loss of hand baggage of a passenger in a sleeping car, lost by the alleged negligence of the employes of the sleeping car company in not keeping watch. Certainly the imputed liability, if any, would be limited to the lessee company, and not to the lessor. The controversy as to the Pullman Company is separable, because its liability is direct, while the liability of the railroad company is in one case (if any) imputed, and in the other depends upon contract (the lease), and no joint tort is alleged, no community in wrongdoing.

"(5) In overruling the demurrer, it is submitted the demurrer to the cause of action alleging the assault upon plaintiff by a third person should have been sustained, because as to that cause of action the complaint fails to state a cause of action, in that there is no allegation in said complaint that defendants had any knowledge of the existence of the danger of such unexpected assault, or of circumstances from which such danger may have reasonably been anticipated.

"(6) In overruling the motion for nonsuit; it is submitted the nonsuit should have been granted because: There was no evidence to sustain the material allegations of the complaint. There was no evidence to sustain the allegation that the defendant, either through negligence or willfulness, caused any loss or injury to plaintiff. The evidence was that whatever loss or injury occurred to plaintiff was due to the wholly unauthorized and unlawful act of a third person, coming secretly and suddenly and unexpectedly into the car, for which the defendant is in no way responsible, and could not have reasonably foreseen or prevented. In any event, the nonsuit as to the cause of action for vindictive damages should have been granted, upon the ground that there was no testimony to sustain the allegations of willfulness or wantonness on the part of the defendant, its servants, or agents.

"(7) We submit the Presiding Judge erred in charging the jury that punitive damages could be awarded in this case; there being no evidence to support such cause of action.

"(8) We submit the Presiding Judge erred

in charging the jury that punitive damages are not only recoverable for a wanton, high-handed, or willful invasion of plaintiff's rights, but that the jury were authorized to find punitive damages, if they believe there was a conscious disregard on the part of the defendant, its agents, and servants, to do their duty, a conscious failure to observe due care, which was the proximate cause of the injury. We submit every act of simple negligence is in a sense conscious, and negligence never warrants punitive damages. The only conscious failure to exercise due care which warrants punitive damages must be such a conscious failure as has in contemplation the injurious consequences reasonably to be expected to result from the act.

"(9) We submit the Presiding Judge erred in charging the fifteenth request of plaintiff, as follows: 'The jury are instructed that, where the acts of the servant of a corporation are not only negligent, but wanton and willful—that is, in plain disregard of a known duty, or in a conscious failure to observe due care in such case—the jury may award in addition to compensatory damages other damages, known as punitive, exemplary, or vindictive damages. Such damages are for the purpose of deterring a defendant, or other persons in like conditions, from committing the same wrongs and injuries.' By this request wantonness and willfulness are defined as disregard of a known duty, or a conscious failure to observe due care. We submit this is not the law. Before conscious failure to exercise due care will warrant punitive damages, it must have in contemplation the injurious consequences to be expected from the act; it must in effect amount to willfulness or intentional injury.

"(10) It is submitted the circuit judge erred in first charging the jury that plaintiff could recover 'such damages as you think she has actually sustained by reason of any assault committed on her,' and then charging plaintiff's fifth, sixth, seventh, and eighth requests, defining technical assault and charging that it was not necessary to touch the person to constitute an assault; that an assault was an attempt to apply even the least actual force, causing apprehension of immediate peril; and then charging plaintiff's twelfth request, as follows: 'The jury are further instructed that the amount of the damages for mental anguish suffered by the plaintiff, such as terror and horror of mind, depends upon the circumstances of the case as found by the jury from the evidence, and is to be awarded in their sound discretion.' It is submitted that the jury were in effect erroneously charged that fright, or 'a well-founded apprehension of immediate peril,' terror, or horror of mind, were elements of damage, irrespective of whether the same were caused by applicable physical injury, or were the result of assault, as technically defined.

"(11) We submit that apprehension or fear caused by assault without battery is not an element of damage. The charge of the circuit judge was misleading, at least confusing, for though the jury was charged that damages for mental anguish in the absence of bodily injury could not be awarded, yet the jury may well have understood from the charge that horror and terror, caused by assault without battery, were a basis for damages, while other mental anguish was not, unless coupled with the bodily injury.

"(12) We submit the circuit judge erred in refusing the eleventh request of defendant as follows: 'I charge you that you cannot hold the defendant liable in this case for the wrongful acts of third persons causing loss or damage to plaintiff, unless the defendants, their servants, or agents, had knowledge of the danger, or of facts or circumstances from which that danger might reasonably be inferred.' We submit that the request contained a sound proposition of law applicable to the case, and the defendant had the right to have the same charged. The error was emphasized by the Presiding Judge saying: 'I refuse to charge you that. Whenever a sudden riot breaks out on a train and any one is injured, and the railroad authorities had no reason to apprehend any danger of that sort, they are not responsible; however, I will meet the issue fair and square,' etc., thereby limiting and restricting the general principle of law to cases of sudden 'riot,' and making the protection apply to 'railroad authorities' alone, although the cases had already been nonsuited as to the railroad companies (defendants).

"(13) In refusing the twelfth request of defendant, as follows: 'I charge you in this case you cannot find any damages for the alleged assault, but your verdict must be confined to the allegations and proof relating to the loss of property.' We submit there was no evidence upon which to hold the defendant liable in damages for the alleged assault.

"(14) In refusing the thirteenth request of defendant, as follows: 'I charge you that in this case you cannot find any punitive damages against the Pullman Company; there being no evidence to sustain that cause of action.' We submit there was no evidence to sustain a cause of action for punitive damages, and the charge should have been given.

"(15) We submit the Presiding Judge erred in refusing the motion for new trial because: There was no evidence to support the verdict. Because the verdict was contrary to the charge of the Presiding Judge. Because the damages are excessive. Because there was no evidence in this case to support a verdict for vindictive damages. Because of error in refusing to charge the eleventh, twelfth, and thirteenth requests to charge submitted by defendant. Because of error in refusing to grant the nonsuit.

"(16) We submit the verdict is so excessive

in this case as to show, or authorize the inference, that it is the result of prejudice or caprice."

W. Huger Fitzsimons, for appellant. Legare, Holman & Baker, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff through the wrongful acts of the defendants.

The following statement appears in the record: "This action was commenced on the 15th day of May, 1909, by the service of the summons and complaint. Within due time counsel for the defendant the Pullman Company filed a petition and bond for the removal of the case into the United States Circuit Court. Plaintiff moved upon a transcript of the record, in the United States Circuit Court, for an order remanding the case into the state court. The case was remanded by an order of Judge Brawley, U. S. judge, made on the 16th day of July, 1909. On October 13, 1910, upon the call of the case for trial in the state court, counsel for the defendant the Pullman Company presented the petition and bond for removal, and asked for an order of removal, pursuant to notice given. After argument the Presiding Judge refused the motion. The case then came on for trial before the Honorable R. C. Watts, Presiding Judge, and a jury on October 13, 1910. After the complaint was read, defendants then read and argued the demurrer thereto, dated and served on the 7th day of April, 1910. The demurrer was overruled. At the close of plaintiff's testimony, motions for nonsuit were made by the defendants. After argument an order of nonsuit was passed as to the defendants Southern Railway and Southern Railway, Carolina Division, but the court refused the motion for nonsuit as to the defendant the Pullman Company. The case went to the jury upon the charge of the judge, and the jury returned a verdict for the plaintiff for \$7,500, on the 15th day of October, 1910. A motion for a new trial was duly made and refused." The defendant appealed upon exceptions, which will be reported.

The allegations of the complaint material to the questions involved are as follows: "That heretofore, on the 6th day of July, A. D. 1908, the plaintiff above named procured transportation from Charleston, S. C., to Marietta, Ga., over the line of defendant's road and connecting carriers; that she purchased from the Pullman Company, in addition to her railroad transportation, a ticket which entitled her to a berth on one of the sleeping cars of the Pullman Company from Charleston, S. C., to Atlanta, Ga., scheduled to leave Charleston, S. C., at 11 o'clock p. m.; that the plaintiff above named boarded a Pullman car attached to one of the trains of the defendants, and upon entering said Pullman car retired for the night to her berth; that plaintiff alleges that when said train reached a point on the line of the defend-

ant's road at or near Dorchester, a station situated in the county of Dorchester, in said state, on the line of the South Carolina & Georgia Railroad Company, one of the constituent roads above mentioned, she was assaulted by a man in her berth; that he rudely put his hands upon her arms and body; and that he forcibly took her satchel, which she had with her in her berth, together with the contents thereof; and that the same has never been recovered by the plaintiff; that at the time said assault was made upon the plaintiff in her berth she was asleep; and was awakened by such assault; that she called loudly for help, but that no response came to her calls from the officers or agents of the defendants in charge of said sleeping car, and that the person so assaulting her escaped with her satchel; that the defendants above named were jointly and concurrently negligent in not keeping a watch over the sleeping passengers in said sleeping car, in that the conductor and porter of said sleeping car retired for the night and went to sleep, and were in no condition or position to discover any person attempting to commit robbery in said car, and that the defendants were jointly and concurrently negligent in allowing the doors of said car to remain open, so that persons from the outside might have access and entrance thereto; and that the defendants, by and through its servants and agents, and by and through their joint and concurrent acts, negligently, willfully, and wantonly failed to keep a watch, so as to prevent persons from entering said car from the outside, and to prevent persons within said car from molesting the plaintiff and depriving her of her property, and committing an assault and insult upon her person; that plaintiff alleges and charges that it was the duty of the defendants to keep a reasonable watch over the sleeping passengers in said car; and plaintiff further alleges and charges that the defendants failed in their duty in this respect in the manner as above set forth." The Pullman company denied all except the formal allegations of the complaint. We proceed to the consideration of the exceptions, though not in their regular order.

[1] Second Exception:

It was the duty of the railroad company, when it accepted the plaintiff as a passenger, to exercise the utmost care and precaution for her safety, until she arrived at her destination. The fact that she also became a passenger on the Pullman car, and was asleep in her berth at the time of the alleged robbery, and technical assault and battery upon her incident to the robbery, did not relieve the railroad company of its responsibility in this respect. The rule is thus stated in *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141: "The law will conclusively presume that the conductor and porter assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping car in which Roy was riding when

injured exercised such control, with the assent of the railroad company, for the purposes of the contract under which the railroad company undertook to carry Roy over its line, and in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping car company, its conductor, and porter, were by law the servants and employees of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company, whose cars are used by and constitute a part of the train of the railroad company, to throw off the duty of providing proper means for the safe conveyance of those whom it has agreed to convey." This principle is recognized in the case of *Taber v. Railway*, 81 S. C. 317, 62 S. E. 311, wherein the court uses this language: "The delict, if any, was a breach of duty by the Pullman Company, since it appertained peculiarly to the contract of that company to furnish berth accommodations, as distinguished from the defendant's contract of safe and comfortable transportation."

[2] Not only the assault and battery, but likewise the robbery (which is an offense against the person, as well as against property), endangered the safety of the plaintiff, and rendered both the railroad company and the sleeping car company liable for such damages as she may have sustained by the alleged failure of the Pullman Company to discharge its duty in properly protecting her person from such dangers during her hours of slumber. Therefore it cannot be successfully contended that the joint liability alleged in the complaint was sham and pretensive.

[3] Third Exception:

It is only necessary to cite the case of *Reed v. Railway*, 75 S. C. 162, 55 S. E. 218, to show that this exception cannot be sustained. In that case it was held that the Southern Railway Company, Carolina Division, was liable, even to an employee of the Southern Railway Company, its lessee, for negligence and wantonness on the part of the Southern Railway Company, causing injury to such employee.

Fourth Exception:

Conceding the proposition to be sound that "a railroad company is not responsible for the loss of hand baggage of a passenger in a sleeping car, lost by the alleged negligence of the employees of the sleeping car company in not keeping watch," nevertheless this exception cannot be sustained, if the allegations of the complaint are sufficient to constitute a cause of action, based upon the alleged assault and battery; and whether they are sufficient for that purpose will be determined when we come to the consideration of the next exception.

[4] Fifth Exception:

The duty imposed upon the sleeping car company (which likewise rests upon the railroad company, in so far as the safety of the passenger may be involved) is thus defined in the case of *Carpenter v. Railway*, 124 N. Y. 57, 26 N. E. 277, 11 L. R. A. 762 (21 Am. St. Rep. 644): "A corporation engaged in running sleeping coaches, with sections separated from the aisle only by curtains, is bound to have an employé, charged with the duty of carefully and continually watching the interior of the car, while berths are occupied by sleepers. *Pullman Car Co. v. Gardner*, 3 Penny. (Pa.) 78. These cars are used by both sexes, of all ages, by the experienced and the inexperienced, by the honest and the dishonest, which is understood by the carriers; and, though such companies are not insurers, they must exercise vigilance to protect their sleeping customers from robbery. A traveler who pays for a berth is invited and has the right to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves, or his person from insult, and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed. Considering the compensation received for such services, and the hazards to which unguarded and sleeping travelers are exposed, the rule of diligence above declared is not too onerous."

The appellant relies upon the doctrine thus stated in 1 *Petter on Carriers of Passengers*: "Carriers of passengers are not insurers of the entire immunity of their passengers from the misconduct of fellow passengers, or of strangers, any more than they are insurers of the absolute safety of passengers in other respects. Nor can the carrier be held liable for such misconduct on the principle of respondeat superior, as in the case of the misconduct of his servants. But, although the doctrine is of comparatively recent growth, it is now firmly established that a carrier of passengers must exercise the same high degree of care to protect them from the wrongful acts of their fellow passengers, or of strangers, that is required for the prevention of casualties, in the management and operation of its train, namely, the utmost care, vigilance, and precaution consistent with the mode of conveyance, and with its practical operation. While not required to furnish a police force sufficient to overcome all force when unexpectedly and suddenly offered, it is the carrier's duty to provide help sufficient to protect the passenger against assaults from every quarter, which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties; and, having furnished such force the carrier is chargeable with their neglect, in failing to protect a passenger from assaults by strangers. This strict rule of duty must, howev-

er, be applied in view of the relation which the carrier sustains to all the passengers, and the circumstances of each particular case calling for its exercise. Knowledge of the existence of the danger or of facts and circumstances from which the danger may be reasonably anticipated, is necessary to fix a liability upon the carrier for damages sustained in consequence of failure to guard against it."

This language is quoted with approval in *Franklin v. Railway*, 74 S. C. 332, 54 S. E. 578, and the principle is recognized in the subsequent cases of *Anderson v. Railway*, 77 S. C. 434, 58 S. E. 149, 122 Am. St. Rep. 591; *Taylor v. Railway*, 78 S. C. 552, 59 S. E. 641; and *Norris v. Railway*, 84 S. C. 15, 65 S. E. 936. The defendant also relies upon the case of *Connell's Ex'rs v. Railway*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786. In that case the court uses this language: "Robbery is of frequent occurrence, and larceny more so, and to invite a passenger to enter a sleeping car with his property, and to go to sleep in the confidence that his person and property will be shielded and protected by those who have undertaken that duty, imposes a very high degree of care and watchfulness upon the sleeping car company. Passengers are invited to enter and to sleep. They are thereby disarmed and incapacitated for self-protection. Carriers are paid to preserve, watch, and ward over their sleeping guests, and they are rightfully held to a due and faithful discharge of the obligations thus assumed. Experience teaches us that when property is exposed to theft, it is apt to be stolen; but murder is of infrequent occurrence. When, therefore, a sleeping car company receives a passenger, and he retires to rest, it may well be assumed to anticipate and be required to protect him against a crime which is likely to occur whenever the temptation and the opportunity are presented. It cannot be deemed to have anticipated, nor be expected to guard and protect him against, a crime so horrid, and happily so rare, as that of murder."

The rule that the duty of the carrier to a passenger, from the wrongful acts of a fellow passenger or stranger, only applies when the carrier has knowledge of the existence of the danger, or of facts and circumstances from which the danger may be reasonably anticipated, is not applicable to passengers asleep in their berths. The principle announced in *Franklin v. Railway*, 74 S. C. 332, 54 S. E. 578, and the subsequent cases, was applied where the facts were quite different from those in the present case, and in none of them were the rights of a sleeping passenger involved. In the case of passengers, other than those in sleeping cars, it may reasonably be expected that they will be able to give notice of the necessity for protection, but knowledge of the fact that a passenger is asleep in his berth is, in itself,

notice of the necessity for taking proper precautions to safeguard him, as at that time he may be presumed to be powerless to give notice of threatened danger.

In the present case the testimony shows that the Pullman Company recognized the necessity for guarding the safety of the passengers, even before receiving notice of danger, or of facts from which danger might reasonably be anticipated, by requiring either the conductor or the porter to be on duty during the entire time the passengers are asleep, for the purpose of giving them protection generally, without reference to any particular danger to a passenger. Therefore it is evidence of negligence for the sleeping car company to fail to keep a proper watch, even before it has other notice of the danger, or of such facts as are sufficient to cause it to anticipate danger, to a particular passenger.

In regard to the case of *Connell's Ex'rs v. Railway*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786, we would say that, in so far as it announces the principle that robbery is a danger to the safety of the passenger, which a sleeping car company should guard against, it states the principle correctly. But if it is to be construed as ruling that a sleeping car company cannot be held liable for damages, when a passenger is murdered by a stranger, although both the conductor and porter went to sleep, leaving the passengers unprotected, on the ground that murder was a danger not reasonably to be anticipated, then such a rule is not to be followed. We, however, do not think the court intended to go to that extent, as it did not appear in that case that the sleeping car company had failed to keep a general watch over the passengers. Therefore that case cannot be regarded as authority for the proposition that it is not the duty of a sleeping car company to take proper care to keep a watch over its passengers, even before it has notice of danger, or of circumstances sufficient to put it on inquiry, which, if pursued with due diligence, would lead to knowledge of the danger.

[5] Sixth Exception:

There was testimony tending to sustain the allegations of the complaint as to the failure of the servants of the Pullman Company to keep a watch while the plaintiff was asleep in her berth, and the said allegations show a reckless disregard of the plaintiff's safety, and that there was a conscious failure on the part of the Pullman Company's servants to discharge their duty. It cannot therefore be successfully contended that the testimony did not show that the plaintiff was entitled to compensatory, as well as punitive, damages.

[6] Seventh and Eighth Exceptions:

These exceptions cannot be sustained for

the reason that the charge conformed to the rule announced in the cases of *Pickens v. Railway*, 54 S. C. 498, 32 S. E. 567, *Myers v. Railway*, 64 S. C. 514, 42 S. E. 598, and *Sullivan v. Railway*, 74 S. C. 377, 54 S. E. 586.

[7] Tenth Exception:

His honor, the Presiding Judge, charged the following request, which was presented by the appellant's attorneys: "The law in this state does not allow recovery of damages for mental suffering in the absence of bodily injury, in a case of this kind, and I charge you that, if you believe from a preponderance of the testimony that plaintiff received no bodily injury, then no damages for mental suffering are allowed." There are other portions of the charge to the same effect. This clearly shows that the exception cannot be sustained.

[8] Sixteenth Exception:

C. C. Freat, a witness for the appellant, thus testified, on cross-examination: "Q. As you say you are superintendent of this district? A. Charleston district and the territory adjacent to Charleston. Q. How many districts had the Pullman Company in the United States? A. I am not sure, offhand; I suppose 25 or 30. Q. It takes in the whole territory of the United States? A. Yes, sir; practically so. Q. They run Pullman cars throughout the whole United States? A. Yes, sir." The reasonable inference from this testimony is that the Pullman Company is an exceedingly wealthy corporation. "In cases involving the doctrine of punitive damages, it is very generally held that evidence of the defendant's wealth and pecuniary ability, is admissible. The reason of the rule admitting evidence of the defendant's wealth and pecuniary ability rests in the consideration that a pecuniary mulct which would operate as a sufficient punishment to a man of small means would, be inadequate in the case of a person of great wealth, and what would be a proper penalty in the latter case would be excessive and immoderate in the former. The rule admitting such evidence is indeed, it has been said, a fair corollary of the rule of exemplary damages." 12 Enc. of Law, 47; *Rowe v. Moses*, 9 Rich. 423, 67 Am. Dec. 560; *Burckhalter v. Coward*, 16 S. C. 435; *Harris v. Marco*, 16 S. C. 575; *Duckett v. Pool*, 34 S. C. 311, 13 S. E. 542. The appellant has failed to satisfy this court that the verdict was the result of prejudice or caprice. This exception cannot therefore be sustained.

The exceptions which have not been considered specifically have either been disposed of by what was said in considering the other exceptions, or are too general.

Judgment affirmed.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(89 S. C. 134)

STATE v. DURHAM.

(Supreme Court of South Carolina. July 1, 1911.)

1. CRIMINAL LAW (§ 401*)—BEST EVIDENCE—WARRANT OF ARREST.

Two witnesses for the state in a prosecution for homicide testified that deceased had no pistol, and did not shoot at defendant. They were asked on cross-examination if they had not been arrested for stealing the pistol which deceased had on that occasion. One of them said he had. The other denied it, but said that he had been arrested on some other charge connected with the homicide. *Held* that, since the charge against the witnesses was irrelevant and immaterial, the warrant on which they were arrested involved only a collateral matter as to which parol evidence of the magistrate who issued the warrant that they were not charged with stealing decedent's pistol, but with being accessories to the murder, was not objectionable on the ground that the warrant was the best evidence of its contents.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 884; Dec. Dig. § 401.*]

2. CRIMINAL LAW (§ 1169*)—EVIDENCE—RULINGS.

Admission of irrelevant or incompetent evidence is not reversible error, unless prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8137; Dec. Dig. § 1169.*]

3. HOMICIDE (§ 347*)—SENTENCE—APPEAL.

Where accused was convicted of manslaughter and sentenced to hard labor in the penitentiary for 10 years, it was not reversible error to fail to sentence him to hard labor on the public works of the county, and, in the alternative, to imprisonment at hard labor, as required by Act Feb. 23, 1903 (24 St. at Large, p. 110), but the sentence will be set aside and case remanded for new sentence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 725; Dec. Dig. § 347.*]

Appeal from General Sessions Circuit Court of Greenville County; D. S. Henderson, Special Judge.

"To be officially reported."

Dave Durham was convicted of manslaughter, and he appeals. Sentence set aside.

J. M. Daniel and Cothran, Dean & Cothran, for appellant. P. A. Bonham, Sol., for the State.

HYDRICK, J. Defendant was convicted of manslaughter, and sentenced to hard labor in the state penitentiary for 10 years. The state examined only two witnesses to the fatal encounter, both of whom testified that deceased had no pistol, and did not shoot at defendant. Defendant's attorney asked them on cross-examination if they had not been arrested and put in jail on the charge of stealing the pistol which deceased had on that occasion. One of them said that he had. The other denied it; but said that he had been arrested and put in jail on some charge connected with the homicide in question, but that he did not know what the charge was. It appears that both were ignorant negro boys, and that they were released from cus-

tody after a few days confinement. The state then proved by the magistrate who issued the warrant for their arrest that they were not charged with stealing deceased's pistol, but with being accessories to the murder.

[1] The first exception assigns error in admitting the magistrate's testimony as to the charge contained in the warrant on the ground that the warrant was the best evidence of the charge therein contained. The charge against the witnesses was irrelevant and immaterial. *State v. Wyse*, 33 S. C. 591, 12 S. E. 556; *Kirkland v. Railway*, 79 S. C. 273, 60 S. E. 668, 123 Am. St. Rep. 848. Therefore the warrant involved only collateral matter as to which parol evidence was admissible. *Charles v. Railroad Co.*, 78 S. C. 39, 58 S. E. 927, 125 Am. St. Rep. 762.

[2] Moreover, the rule is well settled that the admission of irrelevant evidence or of incompetent evidence on an immaterial issue is not reversible error, unless it is made to appear that it was prejudicial, which has not been done in this case.

[3] The second exception complains that the sentence was not in the alternative as prescribed by the statute, which reads: "All able-bodied male convicts, whose sentences shall not be for a longer period than ten years, * * * shall be sentenced to hard labor upon the public works of the county in which convict shall have been convicted, and in the alternative to imprisonment in the county jail or state penitentiary at hard labor." 24 Stat. p. 110. The failure to impose the alternative sentence required by the statute was no doubt due to an oversight of the presiding judge. As the error relates only to the sentence, the verdict will not be disturbed, but the sentence imposed will be set aside and the case remanded to the circuit court, with instructions to impose sentence in the alternative, as required by the statute. Judgment accordingly.

JONES, O. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 132)

STATE v. GREEN.

(Supreme Court of South Carolina. July 1, 1911.)

1. INTOXICATING LIQUORS (§ 139*)—"KEEP IN POSSESSION"—CONSTRUCTION—"STORE."

The words "store and keep in possession," as used in 26 St. at Large, p. 60, prohibiting the unlawful accepting, receiving, storing, and keeping in possession alcoholic liquors contrary to law, involve the idea of continuity or habit, and have no different construction or meaning in counties where the sale of liquor is prohibited from that which they have in counties where liquors are lawfully sold through dispensaries.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. § 139.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3914-3923; vol. 8, p. 7699; vol. 7, pp. 6672-6675; vol. 8, p. 7805.]

2. INTOXICATING LIQUORS (§ 139*)—KEEPING IN POSSESSION—INSTRUCTIONS.

In a prosecution under 26 St. at Large, p. 60, relating to the unlawful keeping, storing or receiving of alcoholic liquors, the court erred in charging that it was unlawful for one to have liquor in his possession in a prohibition county without reference to the quantity or purpose.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. § 139.*]

Appeal from General Sessions Circuit Court of Sumter County; R. W. Memminger, Judge. "To be officially reported."

Lloyd Green was convicted of unlawfully receiving, storing, and keeping in possession alcoholic liquors contrary to the statutes, and he appeals. Reversed.

C. Capers Smith, for appellant. P. H. Stoll, Sol., for the State.

HYDRICK, J. The appellant was convicted on an indictment charging that he "did unlawfully accept, receive, store, and keep in possession" alcoholic liquors, contrary to the statute. He admitted having liquor in his possession, but claimed that he had it only for his own personal use. He requested the court to charge the jury that the term "storing and keeping in possession," used in the statute, involves the idea of continuity or habit. The court charged that that was correct under the old dispensary law, when the state engaged in the sale of liquors, and that

it would be correct as applied to the law in any county in the state in which there is now a dispensary, but that in a county which has no dispensary (such as Sumter, where the indictment is laid), the mere having liquor in possession, no matter for what purpose, nor how small a quantity it may be, is illegal.

[1] We think his honor erred in holding that the words "store and keep in possession" have a different meaning and construction in counties where the sale of liquor is prohibited from that which they have in counties where liquors are lawfully sold through dispensaries. We find no warrant in reason or authority for such variable construction of a statute. In *Easley v. Pegg*, 63 S. C. 102, 41 S. E. 18, it was held that "the offense of storing and keeping in possession contraband liquors involves the idea of continuity or habit." The same construction and meaning must be given the same words used in the act of 1909 (26 St. at Large, p. 60) as was given them in the act of 1897 (22 St. at Large, p. 535).

[2] The court also erred in charging that it was unlawful for one to have liquor in his possession in a prohibition county, no matter what quantity or for what purpose. *State v. Rookard*, 87 S. C. 442, 69 S. E. 1076.

Reversed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(99 S. C. 323)

FLAGLER v. ATLANTIC COAST LUMBER CORPORATION.

(Supreme Court of South Carolina. July 13, 1911.)

1. LOGS AND LOGGING (§ 3*)—TIMBER DEED—CONSTRUCTION.

Complainant, on June 10, 1899, executed a timber deed to defendant's assignor, reciting that complainant had bargained, sold, released and delivered unto the grantee, his heirs, etc., all the timber of 12-inch stump diameter and upwards, on the ground at the time of cutting, then standing on the tract described, to have and to hold the timber unto the grantee, his heirs, etc., with the right of entry, and to cut roads, etc., complainant agreeing to warrant and defend the title to the timber to the grantees, etc., against all persons claiming the same or any part thereof, it being agreed that the time limit of the conveyance was 10 years from the time the grantees began cutting and removing the timber, but that complainant agreed that the time might be extended from year to year on payment of interest on the purchase price. *Held*, that such deed did not constitute a conveyance of the timber in fee with the right of the grantee to a sufficient interest in the land to support the growth of the trees so long as they should live, but that the grantee and his assignee was bound to commence the removal of the timber within a reasonable time.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. APPEAL AND ERROR (§ 172*)—REVIEW—QUESTIONS NOT RAISED AT TRIAL.

Where a grantee in a timber deed was required to commence removing the timber within a reasonable time, the Supreme Court on appeal would not determine what would be a reasonable time, where that question had not been considered by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 172.*]

3. LOGS AND LOGGING (§ 3*)—ILLEGAL PROVISION OF DEED—EFFECT.

That a timber deed contained a provision requiring the grantor to pay the taxes on the timber in violation of the statute imposing that burden on the grantee, did not invalidate the deed.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

Appeal from Common Pleas Circuit Court of Williamsburg County; Geo. E. Prince, Judge.

"To be officially reported."

Suit by A. W. Flagler against the Atlantic Coast Lumber Corporation. Decree for defendant, and plaintiff appeals. Reversed and remanded.

W. F. Clayton and Henry Buck, for appellant. Willcox & Willcox, for respondent.

BUCKER, A. A. J. On the 10th day of June, 1899, the plaintiff appellant entered into an agreement with one R. L. Montague by the terms of which he, for a valuable consideration, conveyed to the said R. L. Montague the timber then growing upon two tracts of land amounting to 230 acres, the exact language as to the timber being "all the timber of every kind and description of twelve (12) inches stump diameter and upwards, twelve

inches from the ground at the time of the cutting, now standing and being" upon the land then more accurately described. Subsequently to the execution of this instrument, but prior to the commencement of this action, the grantee conveyed his interest to the Atlantic Coast Lumber Corporation, the defendant herein. September 22, 1910, the plaintiff appellant served his complaint herein, and motions to strike out certain portions thereof were made, as well as like motions to strike out certain paragraphs of the answer, and thereupon such orders were taken, unnecessarily to set out here, as resulted in the following amended complaint:

"Amended Complaint.

"The plaintiff complaining of the defendant alleges:

"(1) That defendant is a corporation chartered under the law of the state of South Carolina.

"(2) That the plaintiff was, at the times, hereinafter mentioned, and is now the owner in fee of that certain plantation in Williamsburg county, state of South Carolina, containing two hundred and thirty acres, more or less, and bounded as follows, On the north by lands of the estate of James Coker, on the east by lands of Louis Yarborough, on the south by lands of Louis Yarborough and J. F. Brockington, and on the west by the Northeastern Railroad and lands conveyed by R. T. Flagler.

"(3) That on June 10, 1899, the plaintiff entered into a contract with one R. L. Montague, whereby plaintiff conveyed to R. L. Montague all of the timber, excepting oak and hickory, then standing on the above-described tract of twelve inches and above in diameter twelve inches from the ground, and that said contract was assigned by R. L. Montague to the defendant herein, which is the present owner thereof.

"(4) That inter alia, the said contract reads as follows: 'It is agreed that the time limit of this conveyance, as above set forth, shall be ten years from the time the second party begins cutting and removing the said timber from the lands above described; but the first party agrees that the said time limit may be extended from year to year thereafter, upon payment by the said second party, his heirs, executors, administrators or assigns, to the first party, his heirs, executors, administrators or assigns, of interest on the original purchase price above mentioned at the rate of six per cent. per annum.'

"(5) That more than eleven years have elapsed, and the defendant has made no action or effort to cut and remove the timber, nor is there any prospect that defendant will in the near future, or at any time, cut and remove said timber; and, by reason of defendant's long delay, plaintiff alleges that said contract cannot be equitably enforced as be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tween plaintiff and defendant, as many trees not twelve inches in diameter twelve inches from the ground at date of this contract in the long lapse of time from June 10, 1899, have by reason of eleven years' growth become twelve inches and more in diameter, and it will be impossible to separate them in cutting said timber.

"(6) That plaintiff, after waiting more than ten years, is informed and believes that said plaintiff has in good faith tendered the defendant the money paid by Montague to plaintiff and demanded that his deed be canceled and delivered to him, and defendant has declined to do so.

"Wherefore plaintiff demands judgment against the defendant that defendant be required to deliver to the clerk of this court the contract or deed aforementioned, and that said clerk cancel the same of record, and for such further relief as to the court may seem just, and for the cost of this action. W. F. Clayton, Plaintiff's Attorney."

And amended answer:

"Answer to Amended Complaint.

"The defendant, by way of answer to the amended complaint served under the order of the court striking out certain matter from the original complaint, alleges:

"(1) That it admits the allegations of the first, second, and fourth paragraphs of said complaint.

"(2) That it admits that plaintiff on June 10, 1899, executed to R. L. Montague a deed and contract conveying to him certain timber, and that defendant has succeeded to the rights of said Montague under said deed and contract as alleged in the third paragraph of said complaint, but it denies that said deed and contract conveyed only the timber then standing on the land twelve inches and above in diameter twelve inches from the ground, and on the contrary alleges that it conveyed the timber then standing that should be twelve inches in diameter twelve inches from the ground at the time of cutting.

"(3) That it admits that as alleged in the eighth paragraph of said complaint more than eleven years have elapsed, and it has not attempted to cut and remove said timber, but it denies each and every other allegation in said complaint contained. Willcox & Willcox, Henry E. Davis, Defendant's Attorneys."

The contract was as follows:

"Title to Timber.

"State of South Carolina, County of Williamsburg.

"A. W. Flagler to R. L. Montague.

"This deed and contract made the 10th day of June, in the year of our Lord eighteen hundred and ninety-nine (1899) by and between A. W. Flagler, of the county of Williamsburg and state of South Carolina, of the first part, herein called the first party, and R. L. Montague of the city of Norfolk, of

Norfolk county and state of Virginia, of the second part, herein called the second party:

"Witnesseth, that the first party for and in consideration of the premises and the sum of seventy-five dollars cash in hand paid by the second party at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, released and delivered unto the said second party, his heirs, executors, administrators and assigns, all the timber of every kind and description of twelve (12) inches stump diameter and upwards, twelve inches from the ground at the time of cutting, now standing and being upon that certain tract, piece or parcel of land known as the 'Home Tract' lands and upon which A. W. Flagler now lives, exception being made to the following described timber which is not conveyed under this contract, all the oak and hickory timber. The said lands are bounded and described as follows, to wit, all that certain piece, parcel or tract bounded on the north by lands of the estate of James Coker, on the east by lands of Louis Yarborough, on the south by lands of J. E. Brockington and Louis Yarborough, and on the west by the Northeastern Railroad and lands conveyed to me by R. T. Flagler, this tract being composed of two tracts of land conveyed to me, one by J. F. Brockington by deed dated April, 1881, containing two hundred and thirty-eight acres, seventy-four acres of which being conveyed to my son, R. T. Flagler, leaving one hundred and sixty-four acres, and the other by E. J. C. Matthews by deed dated the 15th July, 1878, containing sixty-six acres, making in total a tract containing two hundred and thirty (230) acres, situate in the township of Ridge, county of Williamsburg and state of South Carolina. To have and to hold the said timber on the land described above unto the said second party, his heirs, executors, administrators and assigns, together with the exclusive right and privilege to the second party, his heirs, executors, administrators and assigns, to enter freely upon the said described land, to cut roads through the same or other contiguous land of the said first party, to lay out, make and construct all necessary or convenient railroads, tramways, cartways, stables and other fixtures upon the said land and contiguous lands of the said first party, and to have and enjoy all such right of way upon and over the same and to do and perform all such work as may in the opinion and discretion of the said second party, his heirs, executors, administrators and assigns be necessary for the cutting, handling, hauling and removing of the said timber, and to have and use a permanent right of way eighty (80) feet wide upon and across the land above described, to be selected and located by the said second party, his heirs, executors, administrators and assigns, for a permanent railroad or tramway or for any permanent branch railroad or tramway.

"It is further agreed that the said second party shall have the privilege and be entitled to use free of charge such small timber as may in the judgment of the said second party, his heirs, executors, administrators or assigns, be required to build, construct and maintain railroads, cartways, roadways and other fixtures during the continuance of this contract for the removal of the timber herein conveyed. And the said first party agrees to pay all further taxes on the said land and timber. The first party reserves the right to use any timber for ordinary plantation purposes on said land. The first party hereby agrees to warrant and forever defend the title of the said timber unto the said second party, his heirs, executors, administrators and assigns against all others lawfully or otherwise claiming or to claim the same or any part thereof. It is agreed that the time limit of this conveyance as above set forth shall be ten (10) years from the time the second party begins cutting and removing the said timber from the lands above described; but the first party agrees that the said time limit may be extended from year to year thereafter upon the payment by the said second party, his heirs, executors, administrators and assigns, to the first party, his heirs, executors, administrators or assigns of interest on the original purchase price above mentioned at the rate of 6 per cent. per annum. The second party, his heirs, executors, administrators and assigns shall pay any damage that may accrue to the first party, his heirs, executors, administrators or assigns, by reason of any negligence on the part of the agents or employes of the second party, his heirs, executors, administrators and assigns, and for damage done to growing crops, by virtue of right of way hereinbefore provided for, said damage shall be ascertained and assessed by two disinterested persons, one to be chosen by each of the parties to this contract, and in case they disagree the two so chosen to select a third, and the report of said appraisers made in writing shall be final and binding. All the covenants, stipulations and agreements herein assumed or undertaken shall be binding upon their heirs, executors, administrators and assigns.

"Witness our hands and seals this 10th day of June in the year of our Lord eighteen hundred and ninety-nine and in the one hundred and twenty-third year of the sovereignty and independence of the United States of America. A. W. Flagler. [L. S.] R. L. Montague. [L. S.] Signed, sealed and delivered in the presence of: S. McB. Scott, H. G. Askins, as to A. W. Flagler. L. N. Overton, H. K. Weaver, as to R. L. Montague. [Int. Rev. Stamp, Can. \$1.00.]"

To which there was attached in usual form the renunciation of dower of Mrs. Ella S. Flagler.

Upon the issues thus joined Judge Prince, before whom the case was finally heard, dismissed the complaint in the following decree:

"Decree.

"This suit was brought for the purpose of having the court decree a certain conveyance of timber to be void. The conveyance was executed by the defendant to one R. L. Montague, and bore date June 10, 1899. Defendant is at present entitled to the property and rights acquired by Montague from plaintiff.

"The conveyance above mentioned contained the following covenant or agreement, which appears below the granting, habendum, and warranty clauses of said conveyance, to wit: 'It is agreed that the time limit of this conveyance, as above set forth, shall be ten years from the time the second party begins cutting and removing the said timber from the lands above described; but the first party agrees that the said time limit may be extended from year to year thereafter, upon the payment by the said second party, his heirs, executors, administrators and assigns, to the first party, his heirs, executors, administrators or assigns, of interest on the original purchase price above mentioned at the rate of 6 per cent. per annum.'

"By the terms of this conveyance, plaintiff 'granted, bargained, sold, released and delivered' to Montague, 'his heirs, executors, administrators and assigns,' all the timber therein described, 'to have and to hold all and singular the said timber unto the said' R. L. Montague, 'his heirs, executors, administrators and assigns.' This conveyance contains the following covenant of warranty, to wit: 'The said first party (A. W. Flagler) hereby agrees to warrant and forever defend the title to the said timber unto the second party (R. L. Montague), his heirs, executors, administrators and assigns against himself and all others lawfully or otherwise claiming or to claim the same or any part thereof.' Immediately after the covenant of warranty appears the agreement by reason of which, it is charged by plaintiff that this conveyance should be declared void. The plaintiff takes the further position in his complaint that more than 11 years has elapsed since the date of said conveyance, and that no motion has been made by plaintiff to cut the timber. By reason of this alleged long delay, he contends that the contract cannot be equitably enforced because of the fact that on account of 11 years' growth a large number of trees have reached the contract size since the date of the contract. At the trial, this last position was abandoned, plaintiff's counsel stating that this charge was made on account of a mistake in his reading of the conveyance. The case really turns upon the construction of the conveyance in question.

"My construction of this paper is that it conveys to R. L. Montague the timber therein described in fee simple, and that by this conveyance he became entitled to the timber in fee simple together with a sufficient interest in the soil to sustain the trees. Montague

had the right to enter at any time upon the land and cut the timber. This being true, a subsequent covenant or agreement tending to limit the time Montague should have for cutting and removing the timber after he should once commence such cutting and removal, could not have the effect of defeating or limiting the purchaser's title to the timber in question, or to the interest in the soil necessary to support same.

"My conclusion, to the effect that the deed in question conveys the timber to the grantee named therein in fee simple with a sufficient interest in the soil to sustain the trees, is based on the cases of *Knotts v. Hydrick*, 12 Rich. 314, and *Wilson Lumber Company v. D. W. Alderman & Sons Company*, 80 S. C. 106 [61 S. E. 217, 128 Am. St. Rep. 865].

"My conclusion, to the effect that the estate created by the granting clauses of the deed is not affected by the covenant as to removal, is based on the case of *Crawford v. Atlantic Coast Lumber Corporation*, 79 S. C. 166 [60 S. E. 445], and authorities therein cited.

"It is therefore ordered, adjudged and decreed that the relief prayed for be refused and the complaint be dismissed, with costs. Geo. Prince, Presiding Judge."

From which action the plaintiff duly served notice of intention to appeal, and now comes to this court with the following exceptions:

"Exceptions.

"Plaintiff excepts to the rulings of the presiding judge and to the construction placed on the conveyance herein, on the following grounds:

"First. Because his honor erred, it is respectfully submitted, in holding that under the terms of the conveyance herein R. L. Montague was granted all of the timber therein described in fee simple, and by this conveyance he became entitled to the timber in fee simple, together with sufficient interest in the soil to sustain the trees. And that the said Montague and respondent, his grantee, have the right at any time to enter upon the land and cut the timber, whereas, it is respectfully submitted that, in construing this deed, effect should be given to each clause therein, and by the proper construction, the said R. L. Montague was conveyed to only so much timber as was removed within the time limit.

"Second. Because his honor erred, it is respectfully submitted, in holding that the clause limiting the time in which the timber was to be removed is a subsequent covenant or agreement and should not have the effect of defeating or limiting Montague's title to the timber in question, or the interest in the soil necessary to support same, it being respectfully submitted that under the terms of this conveyance the said Montague took a determinable fee, and to him was conveyed only so much timber in fee as was remov-

ed within the time specified; that the time limit was not a covenant or agreement, but was in the nature of a condition, and should be given effect as such; that such construction should be given to the deed as will give effect to each clause, and, by proper construction of the deed, only such timber as was removed, within the time specified, was conveyed to the said Montague in fee simple, and that the said Montague, under the terms of the conveyance was bound to commence to cut the timber within a reasonable time; that more than eleven years having elapsed and the said Montague and the respondent herein, his grantee, not having command to cut and remove said timber, all their rights thereunder are lost; that such construction is necessary, in order to give effect to the intention of the parties, as legally expressed.

"Third. Because his honor erred, it is respectfully submitted, in holding that under the terms of the said conveyance the said Montague was conveyed the timber therein described in fee simple, with the right to enter upon the said land and cut and remove the timber at any time, in that such construction is against public policy, in that the plaintiff herein is permanently deprived of the right to the use of the soil and its cultivation, which could not have been the intention of parties taken from the whole instrument, and which would prevent the development and improvement of the natural resources of the commonwealth.

"Fourth. Because his honor erred, it is respectfully submitted, in not holding that the conveyance was void by reason of the provision therein that plaintiff should pay the taxes on the timber, when the laws of the state place that burden upon the owner thereof, and such provision is contrary to law and void as against public policy.

"Fifth. Because his honor erred, it is respectfully submitted, in not holding that the conveyance herein is void for uncertainty. W. F. Clayton, Henry Buck, Appellant's Attorneys."

The questions then presented to this court, as raised by the appellant for consideration, are: First. That the grant to the defendant respondent was for a limited time only, and that the court in construing the contract should determine that this time was a reasonable time from the making of the contract. Second. That as 11 years have elapsed since the making of the contract, that more than a reasonable time has expired and that the rights of the defendant respondent have terminated. Third. That in view of the agreement in the contract that the plaintiff should pay the taxes on the timber during the continuance of the contract is in violation of the law, and that the contract is therefore void.

In behalf of the defendant respondent it is claimed: First. That under the language

of the contract that the defendant took a fee-simple title to the timber and such interest in the land as was necessary to support the timber, and that this question was stare decisis in this state, and for this position relied upon the authority of *Knotts v. Hydrick*, 12 Rich. 314, and *Wilson Lumber Company v. Alderman & Sons Company*, 80 S. C. 106, 61 S. E. 217, 128 Am. St. Rep. 865. And, under the case of *Crawford v. Atlantic Coast Lumber Company*, that the limitations, if any, of this contract could not affect the fee-simple character of the grant.

[1] In the discussion of the case before the court, the question that certain phases of the contract were presented to this court on appeal, when not directly raised by the pleading, was waived by counsel for the respondent, and they joined in the request that the contract in question be fully construed by this court. For the purpose of convenience we will first consider the question of the correctness of the position taken by respondent's counsel, that the main question at issue is already settled in this state under the authority of *Knotts v. Hydrick*, 12 Rich. 314, and *Wilson Lumber Company v. Alderman & Sons Company*, 80 S. C. 106, 61 S. E. 217, 128 Am. St. Rep. 865. If this be true, it follows that all of the questions raised by the appellant must be decided adverse to him without further reason, except the question raised by the fourth exception. It is therefore necessary to examine into the cases cited to see if they do establish that which is claimed for them by the defendant and fix its claim to the timber under the terms of the present contract.

The case of *Knotts v. Hydrick*, supra, was decided on the following facts: There the grant was not of timber, but of land, with an express reservation to the grantor of "all timber growing on said land suitable to be sawed into lumber." The grantee gave notice to the grantor of the deed to remove the timber, which the grantor did not do, and the grantee then girdled the trees, and the action arose by reason of the grantor suing the grantee for the value of the trees rendered unfit for lumber. Under these circumstances, this court held that the grantor had not only an estate in the trees, but also such an interest in the soil as was necessary to sustain them, and, further, that such an estate cannot be terminated by the grantee by giving the grantor notice and a reasonable time to remove the timber. It is well to be observed that in this case there were no words used in the contract or deed which undertook to limit the time within which the timber was to be removed.

In *Wilson Lumber Company v. Alderman & Sons Company*, one McElveen conveyed to Wilson all the timber upon a certain tract, with habendum to Thomas Wilson and his heirs and assigns forever with the usual general warranty. Within a year Wilson

built a tramway to the land, cut and sawed some of the timber, and then removed the tramway and milling machinery. Subsequently he conveyed his interest to Wilson Lumber Company, and the heirs of McElveen, the grantor of Wilson, conveyed the timber to Alderman & Sons Company for a term of years, and some time thereafterwards the latter company went upon the land and cut some of the timber, and the action was commenced by the Wilson Lumber Company for an injunction to restrain the defendant from cutting the timber. At the trial it was agreed after the construction placed by the presiding judge (Judge Prince) upon the deed from McElveen to Wilson that there was nothing for the jury to pass upon, he holding that the deed being in form a fee-simple deed without conditions or limitations it conveyed the timber with such interest in the land as was necessary to sustain the trees. And upon appeal his construction of the deed was sustained by this court in an opinion rendered by Chief Justice Jones.

Under these cases, then, and our attention has been invited to no others, is the main question presented by the appeal in the present case decided adversely to the appellant's position? It will be noted that neither in the case of *Knotts v. Hydrick* nor in *Wilson Lumber Company v. Alderman & Sons Company* was there an attempt made in the deeds to limit the right of the owner of the timber to any given period of removal. In the first case there was simply a retention of title to the timber in the deed by the grantor, and in the latter case a grant thereof without limitations or conditions, and all this court held was that in the absence of such limitations upon the right of removal that such right of removal continued to exist in the owner of the timber. In other words, the deeds under construction failed to show by anything on their face any intention on the part of the parties thereto of limiting the right to remove.

In the case now presented, an attempt has been made to limit the time in which removal can be had: "It is agreed that the time limit of this conveyance as above set forth shall be ten (10) years from the time the second party begins cutting and removing the said timber from the land above described. * * *

And in reference to the right of the grantee to build and maintain tramways, roadways, etc., "during the continuance of this contract for the removal of the timber herein conveyed," there is evidently an attempt to limit the time of removal by the grantee of the timber. And without at this time passing upon the question of the sufficiency of such an attempt to carry out the intent, it is enough to say that the words used in the contract were absent in *Knotts v. Hydrick* and *Wilson Lumber Company v. Alderman & Sons Company*, nor were any provisions of

similar import found in either of these cases; we are therefore of opinion that they do not control the case now under consideration.

The question presented then by this case not having heretofore been passed upon by this court, it becomes necessary to examine the authorities to ascertain what the law is. Before doing so, though, let us first turn to the contract itself, and see what light it gives as to the intention of the parties, for in the last analysis their intent is the controlling factor in the construction of the deed, provided the instrument furnishes the evidence of the intent, and here it is to be borne in mind that whilst the deed in the words used is at first such words as ordinarily convey a fee-simple title that the deed is signed by both the grantor and the grantee, and the reason for this lies in the fact that the parties intended to bind each other to certain obligations; upon the grantor, the passing of the title to the grantee, and upon the grantee, not only the right to remove, but, in a qualified sense, the duty also of so doing. A time limit of some kind was evidently in contemplation, the exact wording of it was: "It is agreed that the time limit of this conveyance as above set forth shall be ten (10) years from the time the second party begins cutting and removing the said timber from the lands above described. * * *" It is contended by the respondent that this language is plain, simple, and unambiguous, that it simply means that when the owner of the timber commenced cutting he must finish within 10 years. But the obstacle in the way of the adoption of this view is that it presupposes that the grant was for practically an indefinite period, as there is nothing within the grant which shows when the cutting and removing of the timber is to begin. The grant in terms was "all the timber of every kind and description of twelve (12) inches stump diameter and upwards, twelve inches from the ground at the time of cutting, now standing and being upon that certain tract of land." So it would follow that there would be nothing to prevent the grantee from indefinitely holding the land in its original condition: For whilst it is admitted that the work of cutting and removing must be done within the period of 10 years from the date of the commencing, it is maintained that it lies solely within the discretion of the grantee to determine when he will commence, limited only by the provision in the agreement that the timber sold must have been in existence upon the tract at the time when the contract was made. As long as such a tree existed the right to commence cutting would remain with the grantee. How long do trees live? Certainly it is not unreasonable to suppose that many of them live for a hundred or more years, and if the respondent is right, then on June 9, 1909, the respondent or its assigns could commence to cut this timber, and in the meantime the land would remain incumbered and unfit for cul-

tivation. And during this long period the grantee was to pay taxes, not only on the land, but on the timber as well. Was this contemplated by the parties? We think not. Some lesser period of time must have been in the minds of the grantor and grantee. What this lesser period was the agreement fails to show. What rule does the law supply in such a case? In the case of *Hall v. Eastman*, 89 Miss. 588, 43 South. 2, 119 Am. St. Rep. 709, the time limit was as follows: "This deed is to continue and remain in force until said Eastman, Gardiner & Co., their successors and assigns, commence to cut and lumber the same and for one year thereafter and then to become void and of no effect." In construing this clause for all essential purposes the same as that under consideration, the court held that the grantee must commence the work within a reasonable time.

McRae v. Stillwell, Millen & Co., 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513, is also directly in point. There the grant was to "all the pine timber suitable for sawmill purposes" on 11 described lots of land, each containing 202½ acres. The paper also contained the following clause: "I acknowledge the receipt of the sum of \$550 in cash, and note dollars this day paid me by party of second part; and do agree that amounts left unpaid this day shall be paid as follows: When each lot is entered to cut said timber, the balance due on each lot is \$100, which will be due as above stated; and I also for the above-stated consideration, give, bargain, sell, alien, and convey to said party of the second part, their heirs and assigns, the full right of way to railroads, tramroads, and wagonroads in and through this said land for the purposes above stated, said right of way to continue as long as said mill operation may require." In construing this contract, the court, speaking through Mr. Justice Cobb, with reference to the last portion of the above quotation, held that the use of this language indicated an intention upon the part of the party to limit the time of the building of such railroads, tramroads, etc., and therefore of the right to cut and remove the timber, the court saying "that it was the intention of the parties to this instrument that the grantees should become the owners of the timber suitable for sawmill purposes growing on the land at the date of the execution of the deed, and that such timber was to be removed from the premises at a reasonable time after execution of the conveyance." And the court further animadverted to our case of *Knotts v. Hydrick*, and in effect drew the same distinction from it that we have hereinbefore set out. In this connection it is well to note that in the case of *Hall v. Eastman*, supra, which was the first case of this kind arising in the state of Mississippi, and in which the doctrine that where no time was fixed for the commencement of the removal of the timber, but some time was evidently in the contemplation of the party, that the courts

would imply a reasonable time. That thereafter the question was presented to that court, similar to the facts of *Knotts v. Hydrick*, and *Wilson Lumber Company v. Alderman & Sons Company*; that is to say, a case in which from the contract no time limit was fixed directly, nor by implication, that the court came to the same conclusion that this court did in those cases. This was the result in the case of *Butterfield Lumber Company v. Guy*, 92 Miss. 361, 46 South. 78, 15 L. R. A. (N. S.) 1123, 131 Am. St. Rep. 540. In the state of North Carolina, while we are not prepared at this time to adopt the entire reasoning of the courts, it is sufficient to say that the doctrine of a reasonable time to commence under a contract, such as that in this case, has been adopted. *Bunch v. Elizabeth City Lumber Company*, 134 N. C. 116, 46 S. E. 24.

It is not necessary to discuss the large number of citations of counsel in their arguments. Suffice it to say that we are of opinion that, both by the inherent reason of the thing, as well as by authority, that the true rule is that wherever it is apparent in a contract that the parties had in view some time for the commencement of the removal of the timber, which intent was not embodied in the terms of the contract, that the law will presume, and will enforce that such commencement of the removal of the timber shall be within a reasonable time from the date of the contract.

[2] As to what constitutes a reasonable time, we will not undertake to decide as that matter has not been considered by the trial court.

Upon the doctrine laid down in *Crawford v. Atlantic Coast Lumber Company*, 79 S. C. 166, 60 S. E. 445, suffice it to say that under the construction we have given this deed, that case is not applicable because it is conceded by all the authorities that if the intent of the parties can be gathered from the instrument, that such intent must be given effect, and in this case we have found from the contract what that intent was, and in addition to this it may be stated that there was prior to the warranty clause in this case a distinct reference to such limitation of time to the apparently otherwise fee-simple grant made, for the contract in speaking of the granting of rights for railroads and cart roads, etc., says "during the continuance of this contract for the removal of the timber herein conveyed."

[3] As the fourth exception, that the conveyance was void because it provided that the plaintiff should pay the taxes on this timber when the law required this burden to be borne by the defendant, we cannot sustain, because we can see no reason why the violation of the law should carry with it any other penalty than that affixed by the law, and this exception is therefore over-

ruled. This disposes of all of the questions raised by the appeal.

It follows from what has herein been set out that the presiding judge was in error in dismissing the complaint, and the case is remanded for the purpose of taking testimony and determining as to what would be a reasonable time within which to commence removing the timber from the land in dispute, under all the facts and circumstances surrounding the parties at the time of the making of the contract; and it is so ordered.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(89 S. C. 314)

WESLEY v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. July 17, 1911.)

CARRIERS (§ 382*)—EJECTION OF PASSENGER—PLEADING—DAMAGES—"GROSS NEGLIGENCE."

An allegation in the complaint against a carrier that the action of the defendant in ejecting plaintiff "was not only a gross violation of the obligation which it had assumed to carry the plaintiff, but was a willful, wanton, and malicious violation of the plaintiff's rights as a passenger," did not limit plaintiff to recovery of punitive, but permitted recovery of actual, damages; the words "gross negligence" do not ordinarily import recklessness or wantonness, but only when the context shows they were so intended.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 382.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3168-3173; vol. 8 p. 7675.]

Gary, A. J., and Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Fairfield County; Ernest Moore, Special Judge.

"To be officially reported."

Action by Hagar Wesley, by her guardian ad litem, against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

McDonald & McDonald and B. L. Abney, for appellant. Ragsdale & Dixon, for respondent.

JONES, C. J. On September 14, 1909, the plaintiff, a young, ignorant negro woman, who could not read or write, boarded defendant's train as a passenger from Dawkins to Shelton, a distance of 10 miles, having requested and purchased of the agent at Dawkins a full-fare ticket for 25 cents. There was one other passenger from Dawkins that day, Mag Black, a young negro woman, who purchased a half-fare ticket from Dawkins to Cedar Springs, a distance of 55 miles, for 65 cents. These two women were sitting, either on a seat together, or on adjoining seats. Before reaching the next station, Strothers, which was three miles from Dawkins, the ticket collector came

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

along and took up the tickets of these passengers about the same time. The collector testified positively that Mag Black gave him the full-fare ticket to Shelton, and that plaintiff gave him a half-fare ticket to Cedar Springs; that he informed plaintiff that she could not ride on a half ticket; that he demanded 83 cents additional fare, and upon her statement that she did not have the money he told her to get off the train at Strothers, and that plaintiff requested to be carried to Blairs, because she had some people there to stay with. Blairs was a station five miles from Dawkins. The collector testified that plaintiff did not state to him that her destination was Shelton; that he did not inquire, but assumed that her destination was Cedar Springs, from the ticket she presented; that he passed her to Blairs, because she had the half-fare ticket; and that if he had known her station was Shelton he would have passed her to that point on her ticket.

The plaintiff testified that she purchased a full-fare ticket to Shelton. This testimony was most positively corroborated by Jesse Morgan, who saw her purchase and pay for a ticket to Shelton, and saw it in her hand just before she boarded the train, and by S. T. Goodlet, defendant's agent at Dawkins, who declared that he sold and delivered to plaintiff a full-fare ticket to Shelton, for which he received 25 cents, and this was after he had sold to Mag Black the half-fare ticket to Cedar Springs.

Plaintiff testified that she gave to the ticket collector the same ticket that was given her by the defendant's agent at Dawkins; that when the collector told her that he could not carry her on a half-fare ticket she informed him that she could not read or write; that Mr. Goodlet gave her the ticket and told her it would take her to Shelton. The plaintiff got off the train at Blairs, because she had been ordered to do so by the ticket collector. The other passenger, Mag Black, went on to Cedar Springs, and was saved from ejection by the charity of fellow passengers, who made up the additional fare claimed.

I concur in the conclusion reached by Mr. Justice GARY upon all the exceptions, except the seventh and eighth. The charge complained of in these exceptions is as follows: "If you find from the evidence that the plaintiff purchased a full-fare ticket, as alleged, from Dawkins to Shelton, and if you find that plaintiff boarded the train, as alleged, as a passenger from Dawkins to Shelton, and delivered such ticket, or a paper supposed by her to be such ticket, to the agent, or ticket auditor, or conductor, or other officer demanding it on the train, and if you find that thereafter, before the arrival of the train to Shelton, the defendant's conductor or other officer on the train required the plaintiff to leave the train, or ejected plaintiff from the train, then the

plaintiff would be entitled to recover the damages actually and proximately resulting from the putting off of plaintiff, so far as such actual damages might have been reasonably expected so to result. Now, I charge you the proposition stated as to the delivery of the ticket delivered by the plaintiff, and supposed or believed by the plaintiff to be the ticket bought by her—I charge you the proposition with reference to that, for the reason that no contributory negligence is pleaded in this case; and therefore, if you conclude that the plaintiff had paid full fare for a ticket from Dawkins to Shelton, and had received such ticket from the agent of the defendant, no negligence by the plaintiff in failing to tender the right ticket can operate to defeat her right to recover damages for a wrongful ejection from the train, because it had not been pleaded, and it cannot be submitted to you where not pleaded."

It is contended that the charge made the defendant liable for ejection for failure to present a ticket entitling her to ride as a passenger, if she presented "a paper supposed by her to be such ticket." The charge should not be considered as an abstract proposition, to be generally applied, but as applicable to the concrete case, as made by the facts. It will be noticed that the charge is conditional on the jury finding that plaintiff purchased and received from defendant's agent a full-fare ticket to Shelton, and boarded defendant's train as a passenger for Shelton. It will be further noticed that plaintiff did not tender just any kind of a paper which she supposed was a proper ticket, but that she tendered, either a full-fare ticket, costing 25 cents, or a half-fare ticket, costing 65 cents. It will still further be remembered that the ticket collector treated the half-fare ticket as sufficient to pass plaintiff to Blairs, and that he would have treated it as sufficient to pass her to Shelton, if he had only known that was her station; and there was no testimony in the case tending to show a different rule of the company. The pivotal issue arising from the testimony of defendant was whether the ticket collector knew or ought to have known that plaintiff's station was Shelton; for, if plaintiff presented a half-fare ticket to Cedar Springs, and he had information that her destination was Shelton, an expulsion for failure to pay 83 cents additional would be unlawful, even if plaintiff had no right whatever under the half-fare ticket, since full fare to Shelton was only 25 cents.

In view of the foregoing circumstances, I cannot think there was any prejudicial error in the charge.

The judgment is affirmed.

HYDRICK, J., concurs.

GARY, A. J. (dissenting). This is an action for damages, alleged to have been sus-

tained by the plaintiff, through the wrongful acts of the defendant, in ejecting her while she was a passenger on its train of cars.

The allegations of the complaint, material to the questions involved, are as follows:

"That on the 14th day of September, 1909, the plaintiff went to Dawkins, a station on the defendant's railroad, and purchased from the defendant's agent at that place a passenger ticket for Shelton, another station on the defendant's said road, paying the full price therefor, which was demanded by the defendant's said station agent, and she thereby became a full first-class passenger on defendant's said road, and upon the arrival of the defendant's train for Shelton the plaintiff boarded same.

"That when the said train had gone a short distance towards Shelton the defendant's ticket auditor came to plaintiff, and took up her ticket, and after leaving plaintiff for a short time returned to her and accused her of having given him a half ticket, which she had not done; and when the said train had been stopped at the next station the defendant's said ticket auditor, and other agents and servants of the defendant, wrongfully, unlawfully, wilfully, and wantonly, and forcibly ejected the plaintiff from the said train. * * *

"That action of the defendant, its agents, and servants, in ejecting her from the said car, as aforesaid, was not only a gross violation of the obligation which they had, for value received, assumed, to carry the plaintiff, but was a willful, wanton, and malicious violation of the plaintiff's rights as a passenger, to her damage in the sum of two thousand dollars."

The defendant's answer to the complaint was a general denial.

His honor, the presiding judge, thus summarized the plaintiff's testimony: "The plaintiff's testimony impressed me as being truthful, and a correct statement of what took place. As already stated, she testified that she bought from S. T. Goodlet, a ticket agent of the defendant at Dawkins, a full-fare ticket from Dawkins to Shelton; that she boarded the train here in question, and tendered to the ticket collector the ticket so received from the agent at Dawkins; that the ticket collector, called by her 'conductor,' either at the time or shortly after receiving the ticket, claimed that it was a half-fare ticket to a point of destination at Cedar Springs, some 60 miles farther than Shelton; that he thereupon ordered her to get off at Strothers, a station short of her destination at Shelton; that she then commenced crying, and begged him to put her off at Blairs, and told him that the agent at Dawkins had sold her the ticket, and had told her that it was a full-fare ticket to Shelton, but that the ticket collector, refusing to credit her story, forced her to leave the train at Blairs, without investigating, so far as appears, the truth of her claims. As

already stated, the ticket agent at Dawkins, Mr. S. T. Goodlet, corroborated her story, in so far as the purchase of the ticket from Dawkins to Shelton by her on that day is concerned."

There was also testimony to the effect that, about the time the agent at Dawkins sold the plaintiff a ticket, he also sold a half-fare ticket to another woman, who was accompanied by a little girl, on the representation that it was for the girl who was going to Cedar Springs, which was about five times the distance to Shelton. That the two women boarded the train, but the girl was left behind. That when the auditor came to collect the tickets the two women were sitting near each other. That the plaintiff handed to the auditor a half-fare ticket, in the usual form, dated September 14, 1909, good for passage from Dawkins to Cedar Springs. That the auditor then and there returned this ticket to the plaintiff, with this indorsement: "Off at Blairs, Acct, grown person on this ticket and no funds. Party got off on own account. No. 13. 9-14-1909. G. B. Forbes, G. C." That the plaintiff was ejected at Blairs.

At the close of the plaintiff's testimony, the defendant made a motion for a nonsuit as to punitive damages, which was refused, and at the close of all the testimony renewed such motion, but it was again refused.

The jury rendered a verdict in favor of the plaintiff for \$500, and the defendant appealed upon exceptions, which will be reported. The first exception was abandoned.

Second and Third Exceptions:

The defendant made a motion for a new trial, and one of the grounds was that there was error in the refusal to sustain the motions for nonsuit. His honor, the Presiding Judge, in the order refusing the new trial, stated the reasons why the motions for nonsuit could not be sustained, and they are satisfactory to this court.

Fourth, Fifth, and Sixth Exceptions:

The allegations of the complaint that the action of the defendant in ejecting the plaintiff "was not only a gross violation of the obligation which it had assumed, to carry the plaintiff, but was a willful, wanton, and malicious violation of the plaintiff's rights as a passenger," do not confine the plaintiff to a recovery of punitive damages, as a gross violation of duty does not necessarily involve willful misconduct. The words "gross negligence" do not ordinarily import recklessness or wantonness, and it is only when the context shows that they were thus intended can they be so construed. *Boyd v. Railway*, 65 S. C. 326, 43 S. E. 817. In the present case, the context shows that the words "gross violation" and "willful, wanton, and malicious violation" were not used in the same sense; that the first had reference to negligence, and the second to intentional wrong. The complaint, therefore, states two causes of action—one for negligence, and the other

for wantonness or willfulness—and the plaintiff was entitled to recover both actual and punitive damages.

Seventh and Eighth Exceptions:

The charge set out in the seventh exception immediately precedes the charge in the eighth exception, and the two parts must be considered together, as they are dependent upon each other, for a proper construction. The allegation of the complaint is that the plaintiff, after boarding the train, delivered to the defendant's auditor the ticket which she had purchased from the agent at Dawkins, for which she had paid full price, and which entitled her to ride as a first-class passenger to Shelton, another station on defendant's line of road. The defendant's answer denied that she handed a ticket of that description to its auditor. His honor, in effect, charged that, even if the plaintiff did not deliver to the auditor such a ticket as is described in the complaint, but a paper supposed by her to be such ticket, and even though she may have been negligent in so supposing, nevertheless the defendant was liable for such damages as she may have sustained on account of being ejected from the train. The reason assigned by the Presiding Judge for this ruling was because the defense of contributory negligence was not interposed. It is true the defendant was not entitled to the benefit of the defense of contributory negligence, but it had the right to rely upon the issues made by the pleadings. Under the charge it was not necessary for the plaintiff to prove, as alleged, that she delivered to the auditor the ticket described in the complaint; and the instruction to the jury that damages were recoverable, if the ticket purchased was not presented, but a paper which she supposed was the ticket sold to her, materially changed the issue, and was unquestionably prejudicial to the rights of the appellant. These exceptions are therefore sustained.

Ninth and Tenth Exceptions:

What has already been said disposes of these exceptions.

WOODS, J., concurs.

(89 S. C. 234)

STATE v. MCKAY.

(Supreme Court of South Carolina. July 7, 1911.)

1. WITNESSES (§ 244*)—EXAMINATION—LEADING QUESTIONS.

The court may, in its discretion, allow a party to ask leading questions of his own witness because of his being hostile.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 848; Dec. Dig. § 244.*]

2. WITNESSES (§ 321*)—IMPEACHING ONE'S OWN WITNESS.

While one is not concluded by the testimony of his witness, but may prove the facts to be other than testified to by such witness, he

may not impeach him, either by testimony as to his general character, or by proof of his prior inconsistent statements.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1099, 1100; Dec. Dig. § 321.*]

3. CRIMINAL LAW (§ 658*)—APPEAL—HARMLESS ERROR.

Ordering the arrest for perjury of a witness for the state, in open court, immediately on his leaving the stand, because of testifying that what he testified to at the preliminary investigation was false and induced by prosecutrix, cannot be considered prejudicial to defendant as calculated to intimidate other witnesses from varying their testimony given at such examination; there being nothing in the record tending to show prejudice; but it being purely conjectural.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1534½; Dec. Dig. § 658.*]

Appeal from General Sessions Circuit Court of Marlboro County; J. W. De Vere, Judge.

"To be officially reported."

Thomas McKay appeals from a conviction. Reversed.

Townsend & Rogers, for appellant. J. Munroe Spears, for the State.

HYDRICK, J. At the trial below, the state put up Knox Purvis, a witness who had been examined before the committing magistrate. He said that he knew nothing about the case; that the prosecutrix and her sisters had persuaded him to tell what he had told at the preliminary investigation, and that what he had there sworn was false. The prosecuting attorney then stated to the court that he had been taken by surprise, and asked to be allowed to examine the witness by leading questions, on the ground that he was hostile. This was allowed, against defendant's objection. Against objection of defendant's attorney, the court also allowed the state to use the testimony of the witness which had been taken down by the magistrate for the purpose of contradicting him; the court ruling as follows: "It is alleged that this witness has made statements previous to this time that were contrary to the statements he makes here in open court. I do not think the rule allows a man to put up a witness and contradict him; but it does, if he is taken by surprise, and says he has made a different statement from that in court. That is how I rule this testimony is."

[1] The rule is that the court may, in its discretion, allow a party to propound leading questions to his own witness for the reason, among others, that the witness is hostile to him.

[2] While a party is not concluded by the testimony given by his own witness, but may prove the facts to be other than as testified to by such witness, he is not permitted to impeach the credibility of his own witness either by testimony as to his general character, or by contradicting him; that is, by

proving that, on some other occasion, he made inconsistent statements. *State v. Johnson*, 43 S. C. 126, 20 S. E. 988; *Bauskett v. Keltt*, 22 S. C. 199, and cases cited.

[3] When the witness Purvis came off the stand, the solicitor ordered the sheriff, in open court, to arrest him and take him to jail to answer an indictment for perjury. This was done against defendant's protest. It is alleged that this was prejudicial to defendant, because it was calculated to intimidate any other witness from varying the testimony which he had given at the preliminary investigation. There is nothing in the record tending to show any such prejudice. It is purely conjectural and barely possible, but highly improbable. Therefore it affords no ground for reversal. On the contrary, we are inclined to commend prompt action by those charged with the administration of the law, when it has been flagrantly violated; and we are of the opinion that if perjurers were more invariably and promptly and vigorously prosecuted and punished, there would be fewer miscarriages of justice in our courts.

The court erred in allowing the witness Hucksbee to testify that he employed counsel to assist the solicitor in prosecuting the case. It was clearly irrelevant. Standing alone, it might not be sufficient to call for a reversal, but, when taken in connection with the other errors which appear in the record, we are impelled to the conclusion that there should be a new trial.

Reversed.

JONES, C. J., and GARY, A. J., concur in the judgment on the first ground stated. WOODS, J., concurs.

(39 S. C. 280)

WADE v. SOUTHERN RY. CO. et al.

(Supreme Court of South Carolina. July 11, 1911.)

1. MASTER AND SERVANT (§ 282*)—DEATH OF SERVANT—RAILROADS—RECKLESS OPERATION—PUNITIVE DAMAGES.

Where there was evidence that the train that killed a bridge watchman ran past a block signal set against it, and onto the bridge, before it had been signaled to proceed, as required by the railroad company's rules, the evidence showed a reckless disregard of decedent's rights, authorizing the submission of plaintiff's right to recover punitive damages.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 998; Dec. Dig. § 282*]

2. EVIDENCE (§ 359*)—PHOTOGRAPHS—SUBORDINATING CONDITIONS—PRESUMPTION.

Photographs of the location of an accident, though taken long after it occurred, were not objectionable because there was no proof that the conditions were the same when they were taken as at the time of the accident; the presumption being that the conditions remained the same, in the absence of proof by defendant of any material change.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1511; Dec. Dig. § 359.*]

3. EVIDENCE (§ 359*)—PHOTOGRAPHS—EXPLANATORY MARKS.

It was no objection to the admission of photographs showing the scene of an accident that they bore explanatory marks, as, "Looking towards Cayce, 75 yards from river trestle;" each mark or notation on the photographs in any way material to the case having been verified by witnesses.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1509-1512; Dec. Dig. § 359.*]

4. WITNESSES (§ 405*)—CONTRADICTION—EVIDENCE.

In an action for death of a bridge watchman by being struck by a train which ran past a block signal set up against it, plaintiff proved that the agent in charge of the block ran out of his office as the train was passing, and signaled it to stop, but that defendant's trainmaster, who was on the rear platform, directed it to proceed. When the trainmaster was on the stand, he was asked if, in the presence of T., the agent at the semaphore station had not said to him that decedent would never have been killed if the trainmaster had not taken the train into the block. Held, that the trainmaster having denied the agent's statement, evidence of T. that the agent made such statement to the trainmaster was not objectionable because the agent had not testified, or because the railroad company would not be bound by any statement of the trainmaster.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1273; Dec. Dig. § 405.*]

5. RELEASE (§ 56*)—BY ALLEGED WIDOW—EVIDENCE—INVALIDITY OF MARRIAGE.

Where, in an action for death, defendant railroad pleaded a release from decedent's alleged widow, plaintiff could prove that defendant knew when the release was taken that she had been married to another before her marriage to decedent, and that her marriage to decedent was void.

[Ed. Note.—For other cases, see *Release*, Dec. Dig. § 56.*]

6. EVIDENCE (§ 265*)—EFFECT OF RELEASE—CONSCIOUSNESS OF LIABILITY.

While the taking of a release is not an admission of legal liability as a matter of law, consciousness of liability may be legally inferred therefrom; and hence the court properly charged that counsel were entitled to draw such inference from the release, and that the jury might accept or reject the same, as they might be convinced.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.*]

7. TRIAL (§ 194*)—INSTRUCTION—FACT.

In an action for death, the court, having explained negligence and contributory negligence and mentioned the specifications of negligence alleged in the complaint, charged that if a failure to do one of the things mentioned in the complaint which plaintiff alleged defendant should have done for decedent's protection was made out, and the jury found that in the exercise of due care they should have done some one or all of such things, then a case of negligence was made out against defendant, and the jury should consider the defense raised in the answer, was not objectionable as a charge on the facts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 465; Dec. Dig. § 194.* Negligence, Cent. Dig. §§ 356-360.]

Appeal from Common Pleas Circuit Court of Richland County; G. W. Gage, Judge.

"To be officially reported."

Action by J. P. Wade, as administrator of the estate of Theodore P. Wade, against the

Southern Railway Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

E. M. Thomson, for appellants. W. Boyd Evans, E. J. Best, Geo. R. Rembert, and L. D. Melton, for respondent.

HYDRICK, J. Plaintiff recovered judgment against defendant for \$3,500 for the death of his intestate, caused by the wrongful acts of defendant.

Theodore P. Wade was employed by defendant as watchman on the Congaree river bridge. The complaint alleges that, on March 26, 1904, he was struck by a passing train, thrown from the bridge, and killed, and that his death was caused by the negligent, reckless, and wanton conduct of defendant's servants who were in charge of the train, in failing to keep a proper lookout for Wade, or to give him any warning of the approach of the train, and in running it over the bridge at a reckless speed, in violation of the orders and bulletins issued by the defendant.

The defendant set up the following defenses: (1) A general denial; (2) assumption of risk; (3) contributory negligence; (4) a release from Lottie Wade, who, it alleges, is the widow of plaintiff's intestate, and the only person for whose benefit the action could have been brought.

The defendant's contention in evidence and argument, as to the manner of Wade's death, was that he attempted to get aboard a passenger coach which was attached to the end of an accommodation freight train, while the train was passing him on the bridge, between 5:30 and 6 o'clock in the afternoon of the day he was killed, and, while making that attempt, he either missed his footing and fell, or was thrown from the bridge to the ground, 40 feet below, and was killed. The reason assigned for his attempt to board this train, under the circumstances was that it passed within a few minutes of the time for him to go off duty, and by getting aboard he would have saved himself a long walk to his home in Columbia. There was some testimony tending to support this theory.

[1] On the other hand, plaintiff's testimony tended to show that at the time of the accident, the bridge was undergoing repairs, and a slow order or bulletin had been issued by defendant, limiting the speed of trains over it to six miles an hour; that according to the rules, before any train could go upon the bridge, it must be brought to a full stop, and the engineer must give a signal to the bridge watchman of four short blasts of the whistle, and remain stationary until he received a signal from the watchman to proceed, whereupon he gave two short blasts of the whistle to let the watchman know that he had received his signal to go forward; that between Cayce, a station several hundred yards south of the river, and Columbia, north of it, the road was operated under the block

system; that no train was allowed to enter the block without receiving orders, and that it was against the rules for a train to enter the block while the semaphore at Cayce was up. Plaintiff's testimony tended to show that the train by which Wade was killed violated each of these rules and orders. There was, therefore, testimony tending to show a reckless disregard of Wade's rights, and there was no error in refusing defendant's motion for nonsuit on the issue for punitive damages.

[2, 3] Photographs of the bridge and approaching trestle and surroundings were introduced, over defendant's objection that they were taken long after the accident, and there was no evidence that the conditions were the same, when they were taken, as at the time of the accident; and also because certain distances were indicated upon them, and certain remarks, explanatory of them, such as, "Looking towards Cayce, 75 yards from river trestle." As to the first ground of objection, the presumption is that the condition of the bridge and trestle and surroundings at the time of the accident continued. If there had been any material change, defendant could easily have proved it. As to the other ground of objection, the record shows that one or more witnesses verified every mark or notation on the photographs which was in any way material to the case.

[4] There was testimony that the train which killed Wade ran past Cayce while the semaphore was down, without stopping and without getting the block; that Mr. Frinck, the agent at Cayce, ran out as it was passing, and signaled it to stop; that Mr. Maxwell, defendant's trainmaster, who had authority to direct the movement of trains on that part of the road, was on the rear platform of the train and saw Frinck's effort to stop it, but "high-balled" it ahead. When Mr. Maxwell was on the stand, he was asked by plaintiff's attorney, if, on Tuesday after the accident, at Cayce, in the presence of Mr. Robert Thornton, he had not had some words with Mr. Frinck about the accident, and if Mr. Frinck had not then and there said to him: "Wade would never have been killed if you had not taken that train in there." He denied it. In reply, plaintiff was allowed to contradict him by Mr. Thornton. Defendant excepts to this ruling, on the ground that no foundation was laid for the contradiction; and on the further ground that Mr. Frinck had not himself been on the stand and testified as to that matter; and on the further ground that, if true, it was not shown that Mr. Maxwell could bind defendant by such statement.

In so far as it charges that the foundation for the contradiction was not laid, the exception was evidently taken without examining the record, which shows very clearly that the foundation was properly laid. We fail to see the force of the second ground of the objection—that the contradiction was improper.

er, because Mr. Frinck had not testified about the matter. If it was competent to contradict the witness at all as to what Mr. Frinck had said to him (as to which we make no ruling, because the exception does not raise that question), it was clearly immaterial whether Mr. Frinck had testified about the matter or not. The last ground of the exception is also without force, because no statement of Mr. Maxwell was given in evidence. The statement or declaration given in evidence was that of Mr. Frinck to Mr. Maxwell.

[5] The next exception imputes error to the circuit court in allowing the plaintiff to prove, in reply, that Lottie Wade had testified at a former trial of the case that she had been married to John Hunt. The error assigned is that it was incompetent, because Lottie Wade had not testified at this trial, and therefore could not be contradicted, or her testimony at the former trial be gotten before the jury in that way. The testimony was not offered to contradict Lottie Wade, for there was no evidence that she had ever denied so testifying. On the contrary, plaintiff was trying to prove that the fact was as she had testified, and had been proved, without objection, by similar declarations made by her to numerous persons on different occasions. Hence, in so far as the testimony in question tended to prove the mere fact of Lottie's marriage to Hunt, it could not have been prejudicial. But it was competent for this reason: Defendant had taken a release from her, as widow of plaintiff's intestate, and set it up in bar of plaintiff's action alleging that it was taken after plaintiff had admitted on the record in open court, at the former trial, that she had been married to plaintiff's intestate and in reliance upon that admission. It was therefore competent for plaintiff to show, in reply to that defense, that defendant knew, when the release was taken, that she had been married to Hunt before her marriage to Wade, and therefore her marriage to Wade was null and void, as it had not been shown that Hunt was dead or had been absent and not heard of for seven years.

[6] The record states that one of plaintiff's attorneys argued to the jury that, by taking the release, defendant had admitted liability. Upon that point, both sides preferred requests to charge, and in his general charge the judge said: "You cannot take it as plaintiff has requested me to charge you that the defendant has admitted liability for the killing of this man—liability therefor by taking the release set out in the answer. The answer may contain many inconsistent defenses. You have to take them and separate them, and as separate as though the other did not exist. As here you have the first defense of general denial, denial of all these alleged acts of negligence; so the plaintiff has to prove all this. For instance, as, if a man sued on a note, it was alleged he owed another one a certain

amount of money on a promissory note, he could come in and defend, and in his answer first claim he never executed any such note, and, secondly, claim the note had been paid; failing on one, he may fall back upon the other. You cannot take the pleadings and say because one defense seemed to involve the admission of liability, that apparent inference of liability may be argued from it; that that is a point-blank legal admission of liability. Those are matters counsel have the right to draw their inferences from, and argue them to the jury, and the jury may accept them or reject them, as they may be convinced." Appellant contends that taking the release was no admission of liability, and that the jury should have been so instructed. The charge upon that point was correct.

While it cannot be said, as matter of law, that taking a release is an admission of legal liability, neither can it be said, as matter of law, that consciousness of liability may not be reasonably inferred from doing so. Whether such inference should or should not be drawn depends upon all the circumstances, and is a question of fact which should ordinarily be left to the jury, as was properly done in this case. The case of *Rookard v. Railway*, 84 S. C. 192, 65 S. E. 1047, 27 L. R. A. (N. S.) 435, 137 Am. St. Rep. 839, cited and relied upon by appellant, does not sustain its contention upon this point. If defendant had not set up the release, that case would have been authority for the exclusion of evidence to prove that defendant had settled with Lottie Wade, or any other person, for any injury growing out of the same transaction. But the defendant itself brought the release into the case by pleading it in bar of the action. Being properly in the case, it was properly left to the jury to say whether it was taken by defendant merely for the purpose of buying its peace, without intending to admit liability, or whether it was obtained because of a consciousness of liability.

[7] Having defined and explained negligence and contributory negligence, and mentioned the specifications of negligence alleged in the complaint, the court continued: "If a failure to do one (that is, one of the things mentioned in the complaint which plaintiff alleged defendant should have done for Wade's protection) is made out, and you find that, in the exercise of due care, they should have done some one or all of these things, then the case of negligence is made out against the railroad, and you would have to consider then the question of the defense raised in the answer." Appellant alleges that the judge charged on the facts in the language quoted, in that he therein told the jury what facts would constitute negligence. We think not. Appellant has evidently overlooked the following sentence in that portion of the charge, "And (if) you find that, in the exercise of due care, they should have done some one or all of these things," which

shows clearly that it was left to the jury to say whether the failure to do any of the things specified was negligence.

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 252)

KIRBY v. MATHIS.

(Supreme Court of South Carolina. July 8, 1911.)

1. TRIAL (§ 165*)—TAKING CASE FROM JURY—EVIDENCE ERRONEOUSLY ADMITTED.

Where incompetent evidence was admitted without objection, it cannot be disregarded on a motion for a nonsuit, and its sufficiency should be determined by the jury.

Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 878, 374; Dec. Dig. § 165.*]

2. ANIMALS (§ 100*)—RUNNING AT LARGE—DUTIES OF OWNERS—STATUTES.

Civ. Code 1902, § 1497, provides that it shall be unlawful to permit cattle to run at large, and section 1498 provides that, when stock or animals shall be found upon the lands of any other person, the owner of the same shall be liable for the damages sustained, and that the stock shall be held liable for such damages in preference to all other liens. *Held*, that the first section imposed certain duties upon the owners and managers of stock, and that the law operating independently of the statute would hold them liable for failure to observe these duties, and that the second section, while giving certain specific remedies, did not limit the first section, under which relief could be obtained by an action for damages.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 100.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by John B. Kirby against Jerry Mathis. From a judgment for plaintiff, defendant appeals. Dismissed.

Simpson & Bomar, for appellant. Johnson & Nash, for respondent.

GARY, A. J. This is an action for damages, in which the complaint alleges that during the years of 1906 and 1907 the defendant controlled a pasture in which he kept a number of cows and other animals; that during the spring of those years the defendant carelessly and negligently allowed the animals in his pasture constantly to break out and trespass upon the plaintiff's field of oats, which they destroyed to the extent therein mentioned. The plaintiff also alleged a second cause of action, for damages to the land, but this was withdrawn. The jury rendered a verdict in favor of the plaintiff, for \$140, and the defendant appealed upon exceptions, the first of which is as follows:

[1] "Because, it is respectfully submitted, his honor the presiding judge committed error of law in not sustaining the motion for nonsuit, and the subsequent motion for a new trial, based upon the ground that plain-

tiff cannot maintain this action in his individual capacity, since the evidence shows that the land and the crops thereon alleged to have been damaged do not belong to plaintiff, but are the property of his imbecile sister."

The plaintiff testified as follows: "Q. Whose crop was that? A. That was my crop. Q. Anybody have any interest in that crop but you? A. Nobody but me. Q. How about the crop the year before? A. That was mine, too. Q. Anybody have any interest in that but you? A. Nobody."

Testimony was also elicited on cross-examination of the plaintiff by the defendant's attorney, tending to show that the plaintiff was the owner of the crops. If testimony is received without objection, which would otherwise be incompetent, it becomes competent, and cannot be disregarded upon a motion for nonsuit, but its sufficiency must be left to the jury. *Latimer v. Trowbridge*, 52 S. C. 193, 29 S. E. 634, 68 Am. St. Rep. 893; *Ashe v. Ry.*, 65 S. C. 134, 43 S. E. 393. "His honor allowed the defendants to introduce testimony to that effect. He did not change his ruling, or strike out such testimony. Therefore, in determining whether there was error in directing a verdict, the testimony which he ruled to be competent must be taken into consideration." *Holliday v. Pegram*, 71 S. E. 367. This exception is overruled.

The second exception is as follows:

[2] "Because, it is respectfully submitted, his honor erred further in not granting the motion for nonsuit and the subsequent motion for new trial, based upon the ground that plaintiff cannot recover, because his action is not brought under the statute law of this state, which changed the common law and prescribed a remedy which, it is respectfully submitted, is the exclusive remedy for damages caused by trespassing cattle."

Section 1497 of the Code of Laws contains this provision: "It shall not be lawful for the owner or manager of any cattle * * * or any other person, to permit the said animals * * * to run at large, beyond the limits of his own land, or the lands leased, occupied, or controlled by him."

Section 1498 is as follows: "Whenever any of said stock or animals shall be found upon the lands of any other person than the owner or manager of the same, the owner of such trespassing stock shall be liable for all damages sustained, and for the expenses of the seizure and maintenance; the said damages and expenses to be recovered, when necessary, by action in any court of competent jurisdiction; and the said trespassing stock shall be held liable for the same, in preference of all other liens, claims or incumbrances upon it." There are several other sections, but we do not deem it necessary to set them out.

We will first construe section 1497 of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Code of Laws. When the statute was enacted, providing that it should be unlawful for the owner or manager of any cattle to run at large beyond the limits of his own land, or the lands leased, occupied, or controlled by him, it thereby imposed upon the owner or manager the duty of using due care to prevent the cattle owned or managed by them from running at large. And when another person sustains damages, as the direct and proximate result of failure on the part of the owner or manager to discharge such duty, the law, operating independently of the statute, when it fails to provide an adequate remedy for the injured party, renders the owner or manager liable in damages. We thus see that, on the one hand, the statute imposes a duty on the owner or manager, and that correspondingly, when the statute fails to make proper provision for the party injured, the law, in order that they may not escape the consequences of their wrongful acts to others, renders them responsible for injuries inflicted by them.

We proceed to the consideration of section 1498. Unless there is some provision in this section which exempts the owner or manager from the liability, which is fixed upon them by law for failure to discharge the statutory duty imposed upon them by section 1497, then the ruling of his honor the presiding judge in this respect was free from error.

Section 1498 was not intended to conflict with the provisions of section 1497, but to state more specifically the rights and liabilities of the owner, when the stock is found trespassing upon the lands of another person.

Section 1498 contains no provision which, by necessary implication, can be construed as being in conflict with section 1497.

Appeal dismissed.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(39 S. C. 175)

FISHER v. FISHER.

(Supreme Court of South Carolina. July 7, 1911.)

1. DOWER (§ 49*)—ESTOPPEL TO CLAIM—WARRANTY IN DEED.

A widow who has joined with her husband in the execution of a deed containing a covenant of warranty is not thereby estopped from claiming dower in the lands conveyed by the deed.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 154-175; Dec. Dig. § 49.*]

2. DOWER (§ 49*)—RELEASE—MAKING AND REQUISITES OF CERTIFICATE.

Under Civ. Code 1902, § 2385, which provides that a certificate of release of dower shall be indorsed upon a deed in which a wife has joined with her husband, or that a separate written instrument to the same effect shall be executed and recorded, and which prescribes a form, the sufficiency of a certificate is to be determined solely by what is shown by it, and not by what the parties intended; and where a cer-

tificate is not under the "hand of the woman," nor under the seal of the officer, as provided by the section, it is invalid as a release of dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 154-175; Dec. Dig. § 49.*]

Appeal from Common Pleas Circuit Court of Greenville County; R. C. Watts, Judge.

"To be officially reported."

Action by Dicey Fisher against Warren A. Fisher for dower. Judgment for defendant, and plaintiff appeals. Affirmed.

Townes & Watson, for appellant. Julius H. Heyward, for respondent.

HYDRICK, J. This was an action for dower. The seisin of defendant's husband during coverture and his death in 1905, were admitted. In 1887, demandant joined her husband in the execution of a deed, conveying to defendant's grantor the land in which she now claims dower. That deed contained the following covenant: "And the said parties of the first part, for the consideration aforesaid, do hereby covenant and agree to warrant and defend the premises aforesaid to the party of the second part, her heirs, executors, administrators and assigns against the claim and entry of all persons whatsoever, and they do further covenant that they are seised of the premises in fee simple, and have power to make and convey such estate by this deed, and have done the same by these presents, to the said Mary L. Caruth, party of the second part." Appended to that deed was the following certificate: "State of South Carolina, _____ County. Be it known, that on the 27th day of April, A. D. 1888, personally came before me Dicey B. Fisher, the signer and sealer of the foregoing deed, and acknowledged the same to be her own free act and deed, and Dicey B. Fisher, wife of the said Francis M. Fisher, upon examination by me, separate and apart from her husband, acknowledged that she executed the same freely and of her own accord for the purpose and intent therein expressed, and without any fear or compulsion from any one. Therefore, let this deed, with this certificate be recorded. J. M. Whitmire, T. J. G. C." "T. J. G. C." is understood to denote the official title of the officer signing the certificate, and to mean "Trial Justice for Greenville County."

[1, 2] The circuit decree was in favor of plaintiff. The sole question is whether demandant is estopped by the deed. That question is answered in the negative by the decision in *Galney v. Anderson*, 87 S. C. 47, 68 S. E. 888. It is contended, however, by appellant that the certificate of a private and separate examination of the wife distinguishes that case from this. True there was no such certificate in that case. But that makes no difference, because the certificate on this deed is not a renunciation of dower, such as is required by the statute (1 Code 1902, § 2385);

and, though the certificate need not be in the exact form, if it is "to the same purport" as that prescribed by the statute (Vinson v. Nicholas, 28 S. C. 198, 5 S. E. 357), its sufficiency is to be determined solely by what appears upon the certificate, and not by what the parties intended. Brown v. Spand, 2 Mill, Const. 12; Mayo v. Feaster, 2 McCord Eq. 187; Williams v. Cudd, 26 S. C. 213, 2 S. E. 14, 4 Am. St. Rep. 714; Brown v. Pechman, 53 S. C. 1, 30 S. E. 586. Moreover, the statute requires the certificate to be "under the hand of the woman and the hand and seal of the officer." The certificate here relied upon is not under the "hand of the woman," nor is it under the seal of the officer, either of which defects would be fatal to its validity as a renunciation of dower. Vinson v. Nicholas, 28 S. C. 198, 5 S. E. 357; Bratton v. Burris, 51 S. C. 45, 28 S. E. 13.

The contention of appellant that the failure of the trial justice to affix his seal is cured by section 664, 1 Code 1902, cannot be sustained, because that section, by its express terms, refers only to the absence of a seal from instruments issued by a notary public.

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 179)

LANCASTER v. SOUTHERN LIFE INS. CO.
(Supreme Court of South Carolina. July 7, 1911.)

1. CORPORATIONS (§ 487*)—ULTRA VIRES CONTRACTS—LIABILITY.

An insurance corporation is liable as for tort for inducing one to part with money under contract to sell him stock known by the corporation to be ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893-1898; Dec. Dig. § 487.*]

2. CORPORATIONS (§ 487*)—ULTRA VIRES CONTRACTS—LIABILITY.

A corporation cannot plead ultra vires of a contract upon which it is sued without tendering return of benefits received under the contract.

Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893-1898; Dec. Dig. § 487.*]

3. PLEADING (§ 48*)—COMPLAINT—SUFFICIENCY.

A complaint is not demurrable if it states facts entitling plaintiff to legal or equitable relief.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 105, 106; Dec. Dig. § 48.*]

4. CORPORATIONS (§ 487*)—CONTRACT TO SELL STOCK—SUIT TO RESCIND—COMPLAINT—SUFFICIENCY.

A complaint stating that plaintiff innocently contracted with defendant corporation's agent to buy stock under an illegal agreement that notes taken for part of the price should be paid by crediting future dividends on the stock, that plaintiff complied with his contract, but that the corporation refused to perform its part, etc., and praying return of a payment made and can-

cellation of notes given for the remainder of the price, states a good cause of action.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 487.*]

Appeal from Common Pleas Circuit Court of Richland County; J. W. De Vore, Judge.

"To be officially reported."

Action by R. A. Lancaster against the Southern Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint and demurrer thereto read as follows, respectively:

"Complaint.

"(1) Upon information and belief that at the times hereafter mentioned and at the present time the defendant was and is a corporation organized and existing under and by virtue of the laws of the state of North Carolina, engaged in the business of writing and selling life insurance.

"(2) That the plaintiff at the times hereafter mentioned and at the present time was and is a resident of Richland county, state of South Carolina.

"(3) That during the summer of 1907 the plaintiff entered into the following contract with an agent of the defendant to purchase certain shares of the capital stock of the defendant company, to wit, the defendant company by its agent agreed to sell to the plaintiff capital stock in the defendant company of the par value of \$1,000 for \$1,250, the \$250 above the par value to be a premium upon the stock, for which amount the plaintiff was to give his promissory note to the defendant (which note he was to actually pay), the note to mature on January 1, 1908, and the plaintiff to give his five negotiable promissory notes of \$200 each, payable to the order of the defendant, in payment of the \$1,000, par value of said stock, the said notes to mature, one each year from the date of said contract. And it was agreed by the defendant's agent who made said contract that the plaintiff should not be called upon to pay either the principal of the said five notes or the interest thereon, but that the plaintiff would be credited upon the principal and interest of the said five notes with all profits and dividends arising from the operation of the company prorated to the said \$1,000 par value worth of stock. And that, if these profits and dividends did not amount to enough to pay the principal and interest of the said notes as they matured, then the notes would be renewed from time to time until both the principal and interest were paid in full by the profits and dividends, prorated as aforesaid. And the defendant by its agent agreed to issue said stock to the plaintiff upon the execution and delivery of the note for \$250 to mature on January 1, 1908 (which note was to be actually paid by the plaintiff), and upon the execution and

delivery by the plaintiff of his five negotiable and promissory notes, payable to the order of defendant for \$200 each, as aforesaid, and to hold said stock so issued as security for the payment of the said five notes by the profits and dividends prorated as aforesaid.

"(4) That plaintiff did execute and deliver to the defendant his negotiable promissory note, payable on January 1, 1908, to the order of the defendant, for \$250, and promptly paid the same upon the maturity thereof, and the plaintiff also duly executed and delivered to the defendant his five negotiable promissory notes payable to the order of the defendant, as aforesaid.

"(5) That defendant has absolutely refused to issue this capital stock of the par value of \$1,000 to the plaintiff, and has absolutely refused and failed to do any act on its part in pursuance of said agreement.

"(6) And plaintiff alleges upon information and belief that under the statutory and common law of the state of North Carolina it was and is illegal for the defendant to issue or to agree to issue this capital stock before the same was paid for in cash or its equivalent, and that it was and is illegal under said law for the defendant to agree to credit on said notes, given in payment for said stock, the profits and dividends prorated to this amount of stock arising from the operation of the company before the same had been paid for, and that this was equivalent to an agreement to issue said stock before the same had been paid for. And plaintiff further alleges, upon information and belief, that the said agreement would operate as a legal fraud upon the other stockholders of the defendant company who have paid for their stock, in that it would operate to deprive them of the profits arising from the operation of the company, and to which they were justly entitled.

"(7) That the plaintiff is a layman, and has no knowledge of law, and at the time of making of said contract had no idea that the same was in violation of law or that it would operate as legal fraud upon the other stockholders, as defendant well knew. And that the information upon which the allegations in the sixth paragraph are made is derived from his attorneys, given him a long time subsequent to the making of said agreement.

"(8) Upon information and belief that the said agent who made said contract for defendant company had no authority to make such an agreement, and was acting without the scope of his authority in making same. And the defendant has failed and refused to ratify said contract or to carry out the same according to its promise as made by the said agent, although the defendant accepted and received the \$250 paid by plaintiff, as alleged in paragraph 4, well knowing the agreement made with plaintiff by its agent, as aforesaid.

"Wherefore plaintiff demands judgment

against the defendant for \$250 with interest at the rate of 7 per cent. per annum from the date of which the said amount was paid to defendant, and that the said five notes be delivered up by defendant to the plaintiff and canceled, and for such other and further relief as may be just and equitable in the premises."

"Demurrer.

"To Messrs. Lyles & Lyles, Plaintiff's Attorneys: Please take notice that upon the call of this case defendant intends to demur to your complaint and your reply to the answer in this case, and to move for judgment on the pleadings for the amount set up in the affirmative defense in the answer of the defendant upon the following grounds, to wit: (1) Because it appears upon the face of the complaint and upon the face of the reply to the answer that sufficient facts are not alleged to constitute a cause of action, in that: (a) It appears that the contract alleged to have been made between plaintiff and defendant entitles defendant to judgment, unless certain agreements alleged to have been made by defendant's agent constitute a cause for rescinding said contract, and because the alleged agreements were made by said agent without authority from his principal. (b) Because it appears upon the face of the papers that the stock which plaintiff undertook to purchase was, in accordance with the terms of the agreement, not to be actually delivered to plaintiff until his notes should be paid, and it further appears that these notes have not been paid. (c) Because it appears upon the face of the papers that the defendant company is still in existence, and that there is no legal objection to the issuance of said stock immediately upon the payment of said notes. (d) Because it has not been alleged that any dividends or profits have been earned for which credit has not been allowed plaintiff. (e) Because want of knowledge of the laws of North Carolina, by reason of which plaintiff seeks to avoid the effect of his contract, is no legal cause or excuse for avoiding same. (f) Because it appears upon the face of the papers that the defendant company is about to go into liquidation, and the granting of the relief prayed for by plaintiff would amount to a fraud upon other stockholders and creditors of the defendant company. (2) Because it appears on the face of the complaint and of the reply (a) that the acts, conduct, and alleged agreements of the agent of defendant, upon the strength of which plaintiff seeks a rescission of his contract as alleged and indorsed by his notes, were not acts, conduct, or agreements in reference to existing facts, but they amounted to nothing more than promises or opinions as to future anticipated results, and therefore cannot be made the basis of a charge of fraud; (b) that the alleged acts, conduct, and agreements upon the strength of which a rescission of plaintiff's contract

is sought were unauthorized by the defendant company."

Willcox & Willcox and Henry E. Davis, for appellant. Lyles & Lyles, for respondent.

GARY, A. J. This is an action in which the plaintiff seeks a recovery of judgment against the defendant for \$250 and the cancellation of certain notes. There was a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, which was overruled. His honor, the presiding judge, after hearing the testimony, granted the relief for which the plaintiff prayed, and the defendant appealed.

The first question that will be considered is whether the circuit judge erred in overruling the demurrer to the complaint. In determining this question, it will be necessary to refer to the complaint and the grounds of the demurrer, which will be reported. There are allegations in the complaint appropriate to an action for damages arising out of the alleged breach of the contract by reason of the defendant's failure to perform its part thereof, although its agent may have exceeded his authority when he entered into the agreement with the plaintiff. The court in the case of *Vought v. Eastern B. & L. Ass'n*, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761, thus states the rule in such cases: "We deem it unnecessary at this time to determine whether the defendant was authorized by that statute to enter into such contracts, for, if we assume that the making of them was in excess of the express power conferred upon the corporation by that statute, still, as the contracts involved no moral turpitude, and did not offend any express statute, they were not illegal in a sense that would prevent the maintenance of an action thereon. It is now well settled that a corporation cannot avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party, and the corporation has had the benefit of the performance and of the contract. As has been said, corporations, like natural persons, have power and capacity to do wrong. They may in their contracts and dealings break over the restraints imposed upon them by their charters; and, when they do so, their exemption from liability cannot be claimed on the mere ground that they have no attributes or facilities, which render it possible for them to thus act. While they have no right to violate their charters, yet they have capacity to do so, and are bound by their acts, where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong, to avoid a just responsibility. It may be that, while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced; yet, when it becomes executed by the

other party, it is estopped from asserting its own wrong, and cannot be excused from payment upon the plea, that the contract was beyond its power." This language is quoted with approval in *Eastern B. & L. Ass'n v. Williamson*, 189 U. S. 122, 23 Sup. Ct. 527, 47 L. Ed. 735, and *Drewery v. Columbia Amusement Co.*, 87 S. C. 445, 69 S. E. 879, 1004, and is in harmony with the principle announced in *Williamson v. Eastern B. & L. Ass'n*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822. In the case of *B. B. Ry. Co. v. McDonald*, 17 Ind. App. 492, 46 N. E. 1022, 60 Am. St. Rep. 172, it is correctly said by the court: "The general rule is that where a private corporation has entered into a contract, not immoral in itself, and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of ultra vires." The principle is thus stated in the case of *Washington Gaslight Co. v. Landsden*, 172 U. S. 544, 19 Sup. Ct. 300 (43 L. Ed. 543): "The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation, and by the corporate agents, who were competent to employ the corporate powers, actually exercised."

[1, 2] But, as was said by the court in the case of *Williamson v. Association*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822: "If the agreement was ultra vires, and the association entered into it, knowing it could not perform its part thereof, and thereby induced the plaintiff to part with his money in the purchase of stock, then it was a tort, and the defendant would be liable therefor. Furthermore, even if the agreement was ultra vires, and the defendant could interpose this plea, it would not be allowed to retain the benefits, which it derived therefrom, and this would give the plaintiff a cause of action"—citing *North Hudson B. & L. Ass'n v. Bank*, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845. There are also allegations appropriate to an action for rescission of the alleged agreement on the ground that the defendant's agent was not authorized to enter into the agreement, and that the defendant refused to ratify his acts. The allegations of the complaint are therefore appropriate to an action, both on the law and the equity side of the court.

[3] A complaint is not subject to demurrer, if it contains allegations entitling the plaintiff to relief, either on the law or the equity side of the court. *Bank v. Dowling*, 45 S. C. 677, 23 S. E. 982; *Latham v. Harby*, 50 S. C. 428, 27 S. E. 862; *Simon v. Sabb*, 56 S. C. 38, 33 S. E. 799. The plaintiff's cause of action for rescission is based upon the theory that the agreement into which he entered with the defendant's agent was invalid in toto, and that there never was a binding contract between the parties. On the other hand, the grounds of demurrer

upon which the defendant relied rest upon the proposition that there was a binding contract between the parties, although certain parts thereof were without force and effect, by reason of the fact that the agent exceeded his authority, and that the defendant refused to ratify his acts to that extent. Conceding that there are allegations in the complaint giving rise to both theories, the court could not sustain the proposition for which the defendant contends without assuming that there was a binding contract between the parties, which, of course, it cannot do.

[4] As the allegations of the complaint are sufficient to show that the plaintiff has complied with the terms of the contract, but that the defendant has refused to perform its part thereof, also that the agreement was not only without force and effect in part, but in toto, the demurrer was properly overruled. The defendant appealed upon other exceptions, besides those assigning error in overruling the demurrer. It will not be necessary to consider them serialim, as several of the questions presented by them become merely speculative in the light of our conclusions upon the pivotal issues in the case. The defendant's answer to the complaint contained a denial of certain allegations; and by way of defense a counterclaim for \$1,000, based upon the five notes, each for \$200, described in the complaint. No other defenses were interposed. We have not undertaken to state in detail our review of the testimony, for the reason that both the plaintiff and the defendant concede that the agent exceeded his authority when he entered into the contract, and that the defendant refused to ratify his acts to that extent. If the plaintiff had seen fit, he might have proceeded against the defendant for refusing to comply with the terms of the contract, on the ground that he was induced by the defendant's agent to become a stockholder, and that the defendant was estopped from pleading that the acts of the agent were ultra vires.

But he also had the right to bring an action for rescission of the contract. And, as it is conceded by both parties that the agent was without authority, and that the defendant refused to ratify the transaction, the plaintiff was entitled to the relief granted in the decree.

Judgment affirmed.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(39 S. C. 178)

HAZARD v. SOUTHERN LIFE INS. CO.
(Supreme Court of South Carolina. July 7, 1911.)

Appeal from Common Pleas Circuit Court of Richland County; J. W. De Vore, Judge.

"To be officially reported."

Action by J. I. Hazard against the Southern Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Willcox & Willcox and Henry E. Davis, for appellant. Lyles & Lyles, for respondent.

GARY, A. J. The facts herein are similar to those in the case of Lancaster v. Southern Life Ins. Co., 71 S. E. 864, and the opinion which has just been filed in that case is conclusive of the questions raised by the appeal in this case. Judgment affirmed.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(136 Ga. 489)

LOUISVILLE & N. R. CO. v. ARP.

(Supreme Court of Georgia. June 22, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 344*)—CROSSING ACCIDENT—COMPLAINT—CONSTRUCTION.

In an action against a railroad company for an injury alleged to have been negligently inflicted upon a child of four years while on the railroad track at a place intersected by a private crossing maintained by the defendant, an allegation that the servants of the railroad company in charge of the train which inflicted the injury saw, or in the exercise of ordinary diligence could have seen, the child in time to have stopped the train and averted collision with the child by the use of proper care, is to be construed, not as charging a wanton act in deliberately running down the child, but as a negligent act in omitting proper precaution to avert striking the child in case such servants saw, or in the exercise of ordinary care could have seen, the child.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.*]

2. RAILROADS (§ 350*)—CROSSING ACCIDENT—PROBABILITY OF PERSONS ON CROSSING—QUESTION FOR JURY.

Where a private way crosses the track of a railroad company, and the crossing is maintained by the company, and such private way for more than 10 years has been in the constant and uninterrupted use by the people of the neighborhood, it is a question for the jury to say whether in the exercise of ordinary care the servants in charge of the train should anticipate that persons may be on the track at this point and take such precautions to prevent injury to such persons as would meet the requirement of ordinary care and diligence. Applying this rule to the petition, a cause of action was set out.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1153; Dec. Dig. § 350.*]

3. TRIAL (§ 193*)—RAILROADS (§ 351*)—CROSSING ACCIDENT—INSTRUCTIONS—OPINION OF JUDGE AS TO FACTS.

The charge excepted to was erroneous as an expression of opinion that certain facts constituted negligence and authorized a recovery by the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 430-438; Dec. Dig. § 193; Railroads, Cent. Dig. §§ 1193-1215; Dec. Dig. § 351.*]

(Additional Syllabus by Editorial Staff.)

4. NEGLIGENCE (§ 85*)—CONTRIBUTORY NEGLIGENCE—YOUNG CHILDREN.

A child of four years old cannot be held to be guilty of contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121-129; Dec. Dig. § 85.*]

Error from Superior Court, Fannin County; N. A. Morris, Judge.

Action by Tasker Arp, by next friend, against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

D. W. Blair and Wm. Butt, for plaintiff in error. Gober & Griffin, for defendant in error.

EVANS, P. J. This was a suit by Tasker Arp, by his next friend, against the Louisville & Nashville Railroad Company, to recover damages for a personal injury. In the petition it was alleged that a private way from a public road, which passed by the house of petitioner's father, intersected the track of the defendant company; that this private way had been in constant and uninterrupted use by the people in the neighborhood as a private road for more than 10 years; that it had been so recognized by the railroad company, which maintained the crossing at the point of intersection; that there was an unobstructed view of the crossing for more than half a mile up the track; that on August 8, 1907, the petitioner, a child of near four years of age, in attempting to cross the railroad track while proceeding upon this private way, was struck by a passenger train and seriously injured. It was alleged: That the agents in charge of the train had an unobstructed view of petitioner for half a mile, and either saw or in the exercise of ordinary care could have seen him, yet evinced "reckless disregard for the safety of your petitioner by wantonly, willfully, and negligently failing and refusing to give an alarm and check the train, although they saw or could have seen your petitioner in ample time by the exercise of ordinary care and diligence to have avoided the collision with your petitioner and the injury to him as aforesaid, by reversing their engine, using the air brake, and by stopping the train before it reached your petitioner." That it was the duty of the agents of the defendant to have kept a lookout and to have anticipated the presence of persons on the crossing, which they did not do. The character of the injuries were specifically described. The defendant demurred both generally and specially. The demurrers were overruled, and the case proceeded to trial, terminating in a verdict in favor of the plaintiff. The court refused to set the verdict aside on motion.

[1] 1. The demurrer was general and special. The special grounds of demurrer, because of indefiniteness, were cured by appropriate amendments. It was also urged that the allegations made as the basis of the defendant's liability, that the defendant's servants in charge of the train saw, or in the exercise of ordinary care could have seen, the petitioner, and yet omitted precautions to avoid striking him, were lacking

in certainty and left the defendant in doubt as to whether the plaintiff was seeking recovery upon the theory that the defendant's servants saw plaintiff's peril and willfully and wantonly ran their train against him, or whether they were negligent in not seeing him. We do not think the allegations of the petition show any purpose on the part of the pleader to charge that the defendant's servants wantonly ran their train against the child. The liability of the defendant is alleged to consist in certain acts of omission. The allegation that the servants saw, or in the exercise of ordinary care could have seen, the child in time to prevent striking him, were intended to simply state the measure of the defendant's duty both in case they actually saw the child or could have seen him in the exercise of proper diligence. The violation of that duty was alleged to consist in the failure to exercise proper care in discovering the plaintiff's presence on the track and in stopping the train.

[2] 2. The petition set out a cause of action. It alleged circumstances authorizing an inference of a duty on the part of the servants of the railroad company to anticipate the presence of a person on the track where crossed by the private way, which was in constant and uninterrupted use by the people of the neighborhood with the knowledge and consent of the railroad company, and the failure of the servants in charge of the defendant's train to observe that duty in detecting a person on the crossing and in stopping the train.

[4] The tender age of the plaintiff precludes any inference of contributory negligence on his part. *Crawford v. Southern Ry. Co.*, 106 Ga. 870, 33 S. E. 826; *Bullard v. Southern Railway Co.*, 116 Ga. 644, 43 S. E. 39.

[3] 3. The court charged: "If the plaintiff was on the track, and the engineer discovered him for some distance [before] he got to him, it was his duty to stop the train whenever the plaintiff was seen; and if he failed to do this, and the plaintiff was injured on account of such failure, the defendant would be liable." The error assigned is that this excerpt amounted to an expression by the court that the engineer was negligent; and that the charge was misleading, because of the indefiniteness of the time and place when and where the duty was upon the engineer to stop the train. The instruction in defining the duty of the engineer did not take into account the time when he discovered the child upon the track or his ability to stop the train when discovery was made; but the jury were told that if he discovered the child upon the track and failed to stop his train, and the plaintiff was injured on account of such failure, the defendant would be liable. It may be that, at the time the child's presence upon the track was discovered by the engineer, in the exercise of ordinary and proper care

it would have been impossible for him to stop the train soon enough to avoid the injury. Indeed, according to the evidence submitted by the defendant, several children, one of whom was the plaintiff, were playing near the railroad track, and the plaintiff ran within a few feet of the track and stopped, and, just as the engine reached a point near where the plaintiff was standing, he suddenly ran on the track and was struck by the pilot beam of the engine. A judge is forbidden to instruct a jury that certain enumerated facts constitute negligence, when the law does not declare such to be negligence. Because of this erroneous instruction, a new trial must be granted.

Judgment reversed. All the Justices concur.

(136 Ga. 581)

SMITH v. SMITH.

(Supreme Court of Georgia. June 23, 1911.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 279*)—SEPARATION—SUPPORT OF MINOR CHILDREN—ACTION BY WIFE.

The court below did not err in granting a nonsuit in this case.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 279.*]

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action by M. L. Smith against H. H. Smith. Judgment for defendant, and plaintiff brings error. Affirmed.

Mrs. M. L. Smith brought her petition against her husband, H. H. Smith, for permanent alimony for the support of herself and her four minor children. It was alleged that the petitioner and her husband were living in a bona fide state of separation, and that she had been abandoned by her husband against her will and without any fault on her part. No action for divorce was pending, but her husband had filed an action against her for divorce, and a verdict in her favor was rendered by the jury upon the trial of the case thus instituted. She prayed for the issuance of the writ of ne exeat, injunctive relief, a receiver, and that she recover of defendant a reasonable sum of money for her support and for the support of her four minor children. Attached to the petition was the following exhibit: "Georgia, Jackson County: This agreement, between H. H. Smith and Mrs. M. L. Smith: Mrs. M. L. Smith is to have her children, and two-thirds household and kitchen furniture, one cow, one hog, one buggy. The said contract relieves the said H. H. Smith from all claims of Mrs. M. L. Smith against him or his property now and forever. This 4th day of April, 1908." (Signed by the parties.) Subsequently the plaintiff amended her petition by adding "a bill of particulars," em-

bracing such articles as shoes, clothes, and other articles of necessity which it is alleged she had furnished their minor children, who were living with her, and the value of the board of three of the minor children; the account amounting in the aggregate to the sum of \$465. She alleged that she had furnished the articles and the board set forth in the bill of particulars, and other goods which are not charged; and she alleges, further, that "for the above and foregoing account and amount the defendant is justly indebted to petitioner up to the time of filing suit, for which sums plaintiff prays a judgment in her favor against the defendant."

Upon the trial the plaintiff testified that she was the wife of the defendant, that the account sued on was correct, that the items constituting the account were necessities furnished by her to the children, that she and her children worked together on a certain farm, and that "it was on the land that Smith made to me in settlement. My daughters worked on the land. I have had the labor of my daughters since the separation. * * * The money that paid for those things set out in the bill came from the cotton raised on the land. * * * My husband made a deed to me for 23½ acres of land and one small house. * * * I signed the agreement set out in the pleadings." There was other evidence, not material to be set out here, as to labor performed by the children and their attendance upon school. A certified copy of the record of the divorce proceedings instituted by H. H. Smith against plaintiff is also attached as an exhibit, as well as a deed from H. H. Smith to plaintiff; the same being a deed of gift, no consideration being named.

Johnson & Johnson, for plaintiff in error.
H. H. Dean, for defendant in error.

BECK, J. This case, which in its inception was a suit for alimony, was converted by the amendment filed at the trial term into a complaint upon account. No objection to the filing of the amendment, on the ground that it was a new cause of action, seems to have been interposed. Under the testimony of the plaintiff and the written agreement signed by Mrs. Smith, which was attached to her declaration, it must have become apparent that the suit could not be maintained for the allowance of alimony for herself. She had expressly, before the institution of this suit, relinquished, for a consideration, all claims of herself "against him [her husband] or his property now and forever"; but she contends that she should be allowed to recover on the account sued on for necessities furnished the minor children whom she took, and who were to remain with her under the agreement above referred to. We are of the opinion that when the amendment to the petition is considered in the light of

the writing by which Mrs. Smith relinquished all claims against her husband and his property, and which is attached as an exhibit to the declaration in this case, the court rightly concluded that the suit as it stood after the amendment was that of a wife against her husband for the board and maintenance of their minor children, and for articles of necessity furnished them by his wife; and, that being the case, she was not entitled to recover under the pleadings and evidence in this case. A wife cannot separate from her husband, or live in a state of separation from him, take charge of the minor children, and maintain a suit against the husband for necessities furnished them. If the husband had made no adequate provision for the support and maintenance of the children, and a stranger had furnished them the necessities of life, he could maintain a suit against the delinquent father for the cost and value of the necessities furnished; or a divorced wife, after dissolution of the bond of marriage between herself and her husband, where no provision has been made for the support of her minor children, might, just as a stranger (for after divorce she would be a stranger), maintain an action against her former husband for necessary expenses incurred in maintaining and nourishing their minor children. *Brown v. Brown*, 132 Ga. 712, 64 S. E. 1092, 131 Am. St. Rep. 229. But she cannot, while still a wife, though her husband be delinquent in the matter of furnishing his minor children with the means of sustenance, voluntarily undertake their care and nurture, and then from time to time sue the husband for the amount of money expended in that behalf. We think the provision made in our laws for alimony, temporary and permanent, affords a comprehensive scheme by which the liabilities of the husband for the support of the wife from whom he has separated, and their minor children, may be fixed, and that relatively to the wife this scheme of the law is an exclusive one, whatever might still be the rights of the children to compel the father to furnish means of support, or the rights of a stranger who has furnished to the minor children the necessities of life.

Judgment affirmed. All the Justices concur.

(136 Ga. 420)

BURTON et al. v. MEINERT & MILLER.
(Supreme Court of Georgia. June 15, 1911.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 271*)—ENFORCEMENT—PLEADING.

Certain materialmen brought suit to foreclose a lien on the premises on which was erected a house for which they furnished certain material, and for general judgment for the amount of the account for the material furnished, against the owner of the premises on which the house was erected and the contractor who built

the same for the owner. The petition alleged that the plaintiffs agreed to furnish the material to the defendants to build the house, and "the material was contracted for by the contractor for the owner, with the consent and by the direction of the latter, who authorized 'said builder to buy as his agent the said material.'" *Held*, the allegations of the petition showing that the material furnished was sold by the plaintiffs to the contractor as the agent of the owner of the premises, and there being no allegation that credit was extended to the contractor, or that he agreed to pay for the material furnished, the petition should have been dismissed as to the contractor on general demurrer thereto.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 494-513; Dec. Dig. § 271.*]

2. MECHANICS' LIENS (§ 281*)—EVIDENCE (§§ 158, 165*)—ENFORCEMENT OF LIEN—BEST AND SECONDARY EVIDENCE.

Proof by the plaintiffs that they furnished material to a contractor to be used in erecting a building on the premises of another, and that the contractor stated that it was so used, is insufficient to show, as against the owner of the premises, that such material was actually thus used; and the court erred in directing a verdict fixing a lien on such premises.

(a) Testimony that the contractor furnished the lumber with which to build the house, and testimony as to the amount which the owner paid the contractor for building the same, was not inadmissible on the ground that the contract between the owner and the contractor for the erection of the house by the latter was in writing.

(b) The contract between the owner and the contractor being in writing, it was error to admit testimony as to the stipulations in the contract as to the price to be paid for the erection of the building.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281;* *Evidence*, Cent. Dig. §§ 471-526, 548-555; Dec. Dig. §§ 158, 165.*]

Error from Superior Court, Cobb County; W. A. Morris, Judge.

Action by Meinert & Miller against S. R. Burton and another. From a judgment for plaintiffs, defendants bring error. Reversed.

Gober & Griffin and W. R. Power, for plaintiffs in error. R. N. Holland and D. W. Blair, for defendants in error.

HOLDEN, J. Meinert & Miller (hereinafter called the plaintiffs), alleging themselves to be "mechanics, contractors, and materialmen," brought suit against S. R. Burton and I. A. Reed, making in their petition substantially the following allegations: The plaintiffs agreed to furnish lumber and other material to the defendants to build a house upon certain described premises belonging to Reed. "Said material was contracted for by said S. R. Burton, the carpenter and contractor working for said Reed, and with the consent of the said Reed and by his direction. Said I. A. Reed fully knew that plaintiffs were furnishing material necessary for said buildings, and authorized and directed said Burton, his said builder, to buy as his agent the said material." The plaintiffs complied with their contract on the 20th of November, 1908,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and claim a lien upon the premises for the amount of the account for material furnished, an itemized statement of which was attached to the petition. Within 60 days from November 20, 1908, their claim of lien was duly recorded, and within 30 days from November 20, 1908, they served written notice of the amount due them and an itemized statement of the account upon Reed. The suit was brought within 12 months from the time the claim became due, and plaintiffs prayed "a general judgment against defendants and each of them for the amount of their said debt aforesaid, and a special judgment against said real estate," and for process. At the conclusion of the evidence, the court directed a verdict against Burton for the amount of the account, and "a special lien against the property of defendant I. A. Reed as alleged in plaintiffs' petition for said sum." The defendants filed exceptions, complaining that the court erred in so directing a verdict, and in other rulings made upon the trial of the case.

[1] 1. The general demurrer to the petition should have been sustained as to Burton. The allegations of the petition show the contract under which the plaintiffs furnished the material, and that this contract was made by Burton while acting as the agent of Reed. No individual contract with Burton is alleged, and no liability for the payment of the material furnished exists against Burton under the allegations of the petition. It appearing from the allegations of the petition that Burton, in contracting for the material, was acting as the agent of Reed, and the suit being against both Burton and Reed, in the absence of an allegation that the plaintiffs extended credit to Burton, the agent, and that the latter agreed individually to pay for the material furnished, the petition should have been dismissed as to Burton on general demurrer. As Burton should have been dismissed from the case as a party thereto, the question as to whether Burton's special plea of set-off should have been stricken becomes an immaterial one, and it is unnecessary for this question to be decided. See, in this connection, *Jellico v. Baillie*, 130 Ga. 447, 60 S. E. 998. There was no merit in the general demurrer by Reed, nor in any of the grounds of special demurrer, and the court committed no error in overruling them.

[2] 2. One of the plaintiffs testified that they furnished the material referred to in their petition to Burton, to be used in building a house on the premises of Reed, and that Burton stated that the material thus bought was to be used for this purpose. In testifying with reference to some of the material, he said that he did not know that it was used in the house on which a lien was claimed. We think a proper construction of his testimony is that he did not know that any of the material was used in constructing

the house. Proof that the material was furnished by the plaintiffs to Burton to be thus used, and proof that Burton stated that it was so used, would not be sufficient to bind Reed on the question as to whether the material was actually used in the building on his premises. Hearsay testimony is without probative value. *Miller v. McKenzie*, 126 Ga. 746, 55 S. E. 952. The evidence was not sufficient to authorize the court to direct a verdict fixing a lien on the property of Reed. The general verdict against Burton for the amount of the account will also have to be set aside because of the error of the court in not dismissing the petition as to him on general demurrer thereto. The error in overruling Burton's general demurrer rendered nugatory everything occurring thereafter in the case as to him. *General Supply, etc., Co. v. Lawton*, 131 Ga. 375, 62 S. E. 293. It appearing that the contract between Burton and Reed for the construction of the house was in writing, it was error to admit oral testimony as to the stipulations therein concerning the price at which Burton was to build the house. It was not error to admit testimony as to what Reed actually paid Burton for building the house, and testimony of the defendant Reed that Burton furnished the lumber with which he built the house, on the ground that the contract between Burton and Reed, for the building of the house was in writing. Regardless of the stipulations of the contract, testimony was admissible to show what was actually paid by Reed to Burton for building the house, and that Burton actually furnished the material which went into the house.

Judgment reversed. All the Justices concur.

(136 Ga. 541)

BAKER v. WHITE et al.

(Supreme Court of Georgia. July 11, 1911.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 97*)—EXTENT OF POSSESSION—COLOR OF TITLE.

"In order to acquire a prescriptive title by virtue of possession alone for 20 years, such possession must be actual, and the prescription will not extend beyond the *possessio pedis*. If one seeks to prescribe by virtue of actual possession alone, without color of title, he should show the extent of such possession." *Tillman v. Bomar*, 134 Ga. 660 (5), 68 S. E. 504.

(a) Tested by the rule of law above quoted, the evidence was insufficient to authorize the jury to find that the defendants in error, by actual adverse possession for 20 years in good faith, acquired a good prescriptive title to that portion of the land in dispute on which there was growing timber; and it was erroneous for the court to give to the jury the charges of which complaint is made, authorizing the jury to so find.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 537-541; Dec. Dig. § 97.*]

2. ADVERSE POSSESSION (§ 1*)—PRESUMPTION OF GRANT—SUFFICIENCY OF EVIDENCE.

It was error to charge: "The law on this subject is that when it appears from the evidence that a claimant of land has for a long period of time exercised proprietary rights thereover, which might have had a lawful origin from another, the exercise of which proprietary rights or acts of ownership might and naturally would have been prevented by the person or persons interested, if there had been no such grant, then a presumption may arise that such proprietary rights had a lawful origin, and that it was created by a proper instrument, which has been lost." It was also error to charge: "This defense stands upon a somewhat different basis from the defense of title by prescription, in this: That the defense of title by prescription must be established by proof of actual adverse possession of the land in dispute by the defendant for a period of 20 years, regardless of the proof of other facts or circumstances other than that of actual adverse possession for such period of time; on the other hand, the defense of title by presumption of a grant may be established partly by possession of the land by defendant for a long period of time, and partly by proof of other facts and circumstances cogently tending to establish the fact that there must have been a grant of title to the party in possession of those who would otherwise be adversely interested in the land, and who, with knowledge for a long period of time of the assertion of title to the land by the party in possession, have asserted no contrary interest or title, or who may have actually admitted the title to be in the party in possession." The other portions of the charge excepted to on the subject of the presumption of a grant, taken in connection with the context, were also erroneous.

(a) A grant of land from the true owner to another, not his child, cannot be presumed, where such other person has not been in actual adverse possession of the land under a claim of right in good faith for 20 years; and the evidence did not authorize a charge on the subject of the presumption of a grant to the land in dispute, on which there was growing timber.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 1.*]

3. ADVERSE POSSESSION (§ 27*)—EXTENT OF POSSESSION—COLOR OF TITLE—EVIDENCE.

The plaintiff in error held a deed from the heirs at law of Nancy Smith to a tract of land including the land in dispute, and introduced evidence tending to show that he had in good faith for seven years been in actual adverse possession of a part of the tract of land conveyed by this deed, and it was error to exclude evidence that Nancy Smith sold and cut timber from the land, and that he, after the deed to him was executed and delivered, and while he was in actual adverse possession of a part of the tract, cut timber on said land. The fact that those portions of the tract from which timber was thus sold and cut constituted no part of the land in dispute between the plaintiff and the defendant would not render the testimony inadmissible.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 27.*]

4. NO OTHER ERROR.

Except as pointed out in the preceding notes, there was no error requiring a new trial.

Error from Superior Court, Bartow County; A. M. Foute, Judge pro hac.

Action by Thomas H. Baker against N. A. White and others. From a judgment for defendants, plaintiff brings error. Reversed.

Thos. W. Milner & Son and Rosser & Brandon, for plaintiff in error. John H. Winkle and Neel & Neel, for defendants in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

(136 Ga. 447)

TIDWELL v. DUNBAR.

(Supreme Court of Georgia. June 17, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 167*)—RECOVERY OF POSSESSION BY LANDLORD—SUMMARY REMEDY—DISMISSAL OF ACTION.

A warrant was issued under Civil Code 1895, § 4513 et seq. (Civil Code 1910, § 5385 et seq.), to evict one as a tenant holding over. The defendant filed with the officer charged with the duty of executing the warrant a counter-affidavit and bond to prevent eviction. Thereafter, to wit, on August 20th, the officer delivered all the papers connected with the proceedings to the justice of the peace who issued the warrant. The papers were so delivered before the beginning of the September term of the superior court, which convened on September 20th, to which term the proceedings were by statute returnable. The justice of the peace, without fault upon the part of the plaintiff or his counsel, did not deliver the papers to the clerk of the superior court until September 30th, during the September term, at which time the clerk entered the case upon the docket to the November term. The record does not disclose that the plaintiff instituted proceedings in court to collect rent. Held, that it was not error at the next January term to overrule a motion of the defendant to dismiss the proceedings on the ground that the plaintiff withheld the papers and failed to return them to the "next term of the court, as required by law," but brought other and additional proceedings for rent for the premises against defendant, thereby evincing a disposition to abandon the dispossession-warrant proceeding, or upon the ground that the September term had passed without the warrant having been returned as required by law, but that it was returned to the November term "in violation of defendant's legal rights."

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 647-651; Dec. Dig. § 167.*]

2. JUSTICES OF THE PEACE (§ 161*)—DOCKETING CAUSE.

At the trial, during the January term, it was not error to enter an order directing the clerk to docket the case nunc pro tunc to the September term above mentioned.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 592-599; Dec. Dig. § 161.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Proceedings by W. M. Dunbar to evict G. W. Tidwell as a tenant holding over. From a judgment for the landlord, the tenant brings error. Affirmed.

B. B. McCowen, for plaintiff in error. C. E. Dunbar, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(136 Ga. 550)

HAWKINS v. DAVIE.

(Supreme Court of Georgia. July 12, 1911.)

*(Syllabus by the Court.)***1. REPLEVIN (§ 70*)—TRIAL (§ 234*)—BURDEN OF PROOF—INSTRUCTIONS.**

Where an action was brought to recover possession of personal property to which the plaintiff claimed title, and the defendant denied that it belonged to the plaintiff, but filed no affirmative plea, on the general case the plaintiff carried the burden of showing that he was entitled to recover; and there was no error in so charging.

(a) In such a case, it was not error that the presiding judge did not take up the particular points of contest made by the testimony, and charge in regard to the shifting of the burden of evidence as to such points. If such a charge on a particular point as to which evidence was introduced would have been appropriate, a request therefor should have been duly made.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 280-284; Dec. Dig. § 70;* Trial, Cent. Dig. § 537; Dec. Dig. § 234.*]

2. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Where one question in a case was whether, if a gift of personalty was made, the donor had sufficient capacity to make it, and the judge charged fully as favorably to the excepting party as such party could have asked, in regard to the measure of capacity necessary in such a case, the fact that he illustrated the subject of mental capacity by reading certain sections of the Civil Code touching testamentary capacity, also informing the jury that no will was involved, and that this portion of his charge was simply illustrative of the general subject, and did not furnish the standard applicable to the case in hand, furnishes no ground for a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

3. GIFTS (§ 51*)—GIFT TO CHILD—INSTRUCTION.

There was no error in charging Civ. Code, 1910, § 4150, which declares that "the delivery of personal property by a parent into the exclusive possession of a child living separate from the parent shall create a presumption of a gift to the child."

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 102; Dec. Dig. § 51.*]

4. REVIEW.

None of the other assignments of error furnish any ground for reversal.

Error from Superior Court, Oglethorpe County; D. W. Meadow, Judge.

Action by T. H. Hawkins against R. W. Davie. Judgment for defendant, and plaintiff brings error. Affirmed.

Sibley & McWhorter, for plaintiff in error.
J. J. Strickland, Paul Brown, and Geo. O. Thomas, for defendant in error.

LUMPKIN, J. This was an action to recover possession of a promissory note. The plaintiff was the administrator of the payee of the note. The issue made by the pleadings was under an allegation on the part of the plaintiff that the title to the note was in him, and a denial of such allegation by the defend-

ant. In the evidence it appeared that the defendant was the son of the payee of the note, and that he claimed that it had been indorsed by his mother and given to him during her lifetime. There was conflicting evidence both as to whether the indorsement appearing on the note was genuine, and as to whether the note had been given to the defendant or whether he had obtained possession of it improperly.

[1] The presiding judge charged, in substance, that the plaintiff brought the case and carried the burden of showing that he was entitled to recover. To this exception was taken on the ground that as it was conceded that the note originally belonged to the mother of the defendant, and so recognized in the charge, the burden was upon him to show a gift. The use of the expression "burden of proof" in a dual sense, sometimes as indicating the burden of establishing the case as a whole, and sometimes as indicating the burden of the evidence during the progress of the trial, or that certain evidence will make out a prima facie case or will serve prima facie to establish a given fact, if not rebutted, has created no little confusion. Generally the burden of proof in the sense first mentioned rests where the pleadings originally placed it. Thus, if the plaintiff alleges a right to recover, and the defendant denies his allegations without more, the plaintiff upon the case as a whole carries the burden of proof; that is, the burden of showing, by a preponderance of the evidence, that he is entitled to recover. If the defendant does not file a denial of the plaintiff's allegations, but admits in his pleadings a prima facie case in favor of the plaintiff, and sets up an affirmative plea, such as a plea of confession and avoidance, he assumes the burden. Civ. Code 1910, § 5746. During the progress of the case, the burden of introducing evidence as to particular facts or issues may be shifted one or more times. One party may introduce evidence touching a particular fact which would be sufficient prima facie to establish such fact, if not rebutted. In this sense the burden may shift from one party to the other in the progress of the trial; and it is this shifting to which reference is made in Civ. Code 1910, § 5747, which declares that "what amount of evidence will change the onus or burden of proof is a question to be decided in each case by the sound discretion of the court." It certainly did not intend to lay down the rule that whether under an affirmation and denial in pleadings upon the entire case one party or the other carried the burden of establishing his allegation was a matter of discretion in every case. Claim cases or other similar issues need not be discussed.

[2] Where the presiding judge in an ordinary action at law correctly charges the jury in regard to the general burden of proof, he

is not required as an essential part of his charge to discuss the shifting of the burden of introducing evidence on special points which may arise during the progress of the case; and it will not be held error that he omits to do so. *Martin v. Nichols*, 127 Ga. 705, 709, 56 S. E. 995. If a charge on such a subject would be appropriate in any particular case, it should be duly requested.

[3] 2. The plaintiff sought to show that, if his intestate made a gift of a note to her son, she did not have mental capacity to do so. The court charged the jury on this subject that they should inquire whether she had sufficient mental capacity to know that the instrument was a note, the amount for which it called, and its value, and to know that she was parting with its value and passing the title to it to her son, and to realize the fact that so much property was going from her to him, and to have a desire and purpose as to the nature of the transaction, and its real importance, and what she was doing. There was certainly no error against the plaintiff in this charge touching the mental capacity necessary in order to make a gift. In illustrating the meaning of mental capacity and its various shades, the judge read to the jury certain sections of the Civil Code defining testamentary capacity. He informed them that no will was involved in the present case, and that such portions of the charge were simply illustrative, and that the question was not whether the intestate had sufficient capacity to make a will, but to make a gift. There was no error harmful to the plaintiff in so charging.

3. The judge gave in charge to the jury Civ. Code 1910, § 4150, as follows: "The delivery of personal property by a parent into the exclusive possession of a child living separate from the parent shall create a presumption of a gift to the child. This presumption can be rebutted by evidence of an actual contract of lending, or from circumstances from which such a contract may be inferred." A promissory note is personal property, and this section is sufficient to cover it. *Harrell v. Nicholson*, 119 Ga. 458, 46 S. E. 623. It will be noticed that it is not every mere possession of the property of a parent by a child, or every delivery alone of such property, which will raise the presumption declared. These facts will always have evidential value on the subject of whether there was a gift; but, in order to raise the presumption of a gift of personal property by a parent to a child under that section of the Code, there must be a delivery of such property by the parent into the exclusive possession of a child living separate from such parent. Under the evidence, there was no error in giving this section in charge to the jury.

The decision in *Hill v. Shelby*, 64 Ga. 529, was cited by counsel for the plaintiff in

error. That case did not involve a claim of a gift of personalty by a parent to a child, which alone is dealt with in the section above quoted. Moreover, the testimony of the alleged donee was that a certain paper in the form of a receipt for money to be invested was given to him by his son, the alleged donor, "to collect the money on." He further testified: "I can't say whether my son gave it to me for my own use, or not, as he gave it without saying anything; but I think it was his intention to give it to me for my own use." In the light of these facts, there is no conflict between the ruling now made and the statement in the headnote of that decision that "delivery of a negotiable written instrument, without more, is not sufficient to prove a gift."

4. None of the other grounds of the motion for a new trial require either discussion or a reversal.

Judgment affirmed. All the Justices concur.

(136 Ga. 554)

JOHNSON v. DE LAPERRIERE.

(Supreme Court of Georgia. July 12, 1911.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 327*)—SALES UNDER ORDER OF COURT—EFFECT OF PROVISIONS OF WILL.

A testator directed that his debts should be paid out of his personal property, "as my executors can best spare, and if he [they] cannot spare a sufficiency of said property, then from the yearly income arising from the proceeds of my land," and, after giving specific legacies to two of his daughters, directed that all of his property should be kept together until his youngest child should become of age, "and, in case of my daughters, until they marry and my wife should die, and that my family be supported out of the proceeds of the same, and if there is any balance left after their support, that it be equally divided between my children." *Held*, that such testamentary disposition did not deprive the court of ordinary of jurisdiction to pass an order authorizing a sale of certain of the testator's real estate, after due citation, upon application of the executors, alleging that it was necessary to sell such real estate for the purpose of paying debts and defraying the expenses of administration.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1844; Dec. Dig. § 327.*]

2. ORDER FOR EXECUTOR'S SALE—FRAUD.

If there was fraud on the part of the executors in the procurement of the order, it was not apparent on the face of the proceeding.

3. ADMISSION OF EVIDENCE—NECESSITY FOR REVERSAL.

When considered in the light of the notes of the presiding judge appended to the motion for a new trial, and in the light of the other evidence, there was no error requiring a reversal because of the admission of certain evidence.

4. SUFFICIENCY OF EVIDENCE—DIRECTION OF VERDICT.

The evidence required a verdict in favor of the defendant, and there was no error in so directing. *Roberts v. Martin*, 70 Ga. 196; *Bullard v. Wynn*, 184 Ga. 636, 68 S. E. 439 (5).

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action by W. C. Johnson, administrator, against W. P. De Laperriere. From a judgment for defendant, plaintiff brings error. Affirmed:

P. Cooley and Ray & Ray, for plaintiff in error. J. S. Ayers and J. A. B. Mehaffey, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(9 Ga. App. 578)

JORDAN v. STATE. (No. 3,348.)

(Court of Appeals of Georgia. June 7, 1911. Rehearing Denied August 4, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 772, 824*)—TRIAL—INSTRUCTIONS—STATEMENT OF ACCUSED.

The trial court is not required, in the absence of a request, to charge a theory dependent alone upon the statement of the accused, made to the jury. *Gray v. State*, 6 Ga. App. 428, 65 S. E. 191. In this case, however, the trial judge did substantially present to the jury the issue made alone by the statement of the accused as to the intent with which he took the property alleged to have been stolen, in that he instructed the jury that the intent with which the property was taken by the accused must be determined by them from the evidence and from his statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1812-1817, 1996-2004; Dec. Dig. §§ 772, 824.*]

2. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—REQUESTS.

On the trial of an accusation for larceny from the house, the corpus delicti was clearly proved, and recently thereafter the property alleged to have been stolen was found in the possession of the accused, who admitted that he took the property from the house, but denied that he did so with intent to steal it. *Held*, in the absence of a request, it was not error for the trial judge to instruct the jury as to the law of circumstantial evidence as laid down in section 1010 of the Penal Code of 1910. *McElroy v. State*, 125 Ga. 37, 53 S. E. 759; *Smith v. State*, 125 Ga. 296, 54 S. E. 127.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

3. CRIMINAL LAW (§ 1159*)—REVIEW—SUFFICIENCY OF EVIDENCE.

Whether an explanation which the accused makes of his possession of property recently stolen is consistent with his innocence is exclusively a question of fact for the determination of the jury, and this court has no right to interfere with that determination, unless it is wholly unsupported by the evidence, or by any reasonable theory deducible therefrom. Under the facts of the present case, the jury were fully authorized to disregard the explanation of his possession made by the accused in his statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

4. REVIEW ON APPEAL.

No error of law was committed by the trial judge, and the judgment overruling the certiorari must be affirmed.

Error from Superior Court, Jasper County; J. B. Park, Judge.

Sam Jordan was convicted of larceny from a house, and brings error. Affirmed.

Doyle Campbell, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 577)

DANIEL v. STATE. (No. 3,347.)

(Court of Appeals of Georgia. June 7, 1911. Rehearing Denied August 4, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

There was no material error in the trial of the case. The evidence fully authorizes the verdict, and the judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Jasper County; J. B. Park, Judge.

Ike Daniel was convicted of crime, and brings error. Affirmed.

Doyle Campbell, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 559)

EDGE v. THOMAS. (No. 3,383.)

(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1012*)—REVIEW—SUFFICIENCY OF EVIDENCE.

This court, by the constitutional amendment creating it, was limited in jurisdiction to the correction of errors of law alone, and therefore has no power to grant a new trial because the verdict is strongly contrary to the weight of the evidence, if there is any evidence at all to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.*]

Error from City Court of Forsyth; T. B. Cabaniss, Judge.

Action between Tom Edge and J. M. Thomas. From the judgment, Edge brings error. Affirmed.

J. M. Fletcher and A. M. Zellner, for plaintiff in error. Persons & Persons, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 570)

GREEN v. STATE. (No. 3,496.)

(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The evidence fully authorizes the verdict, and the exception as to the judge's instructions to the jury is not well taken.

Error from Superior Court, Fulton County; L. S. Roan, Judge.

Will Green, alias Claude O'Shields, was convicted of crime, and brings error. Affirmed.

Jno. Y. Smith, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 570)

PHILPOT v. STATE (No. 3,498.)
(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No question of law is raised in the record, and the verdict is supported by the evidence.

Error from Superior Court, Heard County; R. W. Freeman, Judge.

Will Philpot was convicted of crime, and brings error. Affirmed.

M. U. Mooty, for plaintiff in error. J. R. Terrell, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 519)

AMERICAN AGRICULTURAL CHEMICAL CO. v. SHY. (No. 2,810.)
(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 837*)—PREMATURE APPEAL—DISMISSAL.

The exception is to the overruling of the demurrer to the defendant's plea. The case is still pending in the court below. The bill of exceptions is premature, and must be dismissed. *Turner v. Camp*, 110 Ga. 631, 36 S. E. 76; *Bell v. Stewart*, 118 Ga. 714, 43 S. E. 70; *Ox Breeches Co. v. Bird*, 1 Ga. App. 40, 57 S. E. 975.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1877; Dec. Dig. § 837.*]

Error from City Court of Dublin; K. J. Hawkins, Judge.

Action by P. R. Shy against the American Agricultural Chemical Company. From an order overruling the demurrer to its plea, defendant brings error. Dismissed.

Roger D. Flynt, for plaintiff in error. J. S. Adams, for defendant in error.

RUSSELL, J. Dismissed.

(9 Ga. App. 559)

HENDERSON v. HENDERSON. (No. 3,437.)
(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 206*)—CERTIORARI—QUESTIONS OF FACT.

In certiorari cases, brought upon possessory warrant proceedings, the judge of the superior

court has full jurisdiction over all issues of fact.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 807-817; Dec. Dig. § 208.*]

2. REVIEW ON APPEAL.

The judgment in this case is not contrary to law.

Error from Superior Court, Floyd County; John W. Maddox, Judge.

Action between Laura Henderson and Dave Henderson. From the judgment, Laura Henderson brings error. Affirmed.

Sharp & Sharp, for plaintiff in error. Maddox & Doyal, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 570)

APPLEBY v. STATE (No. 3,513.)
(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 169*)—ILLEGAL SALE.

The case on its facts is controlled by *Sessions v. State*, 6 Ga. App. 336 (3), 64 S. E. 1101, and *Plummer v. State*, 8 Ga. App. 379, 69 S. E. 28.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.*]

2. CRIMINAL LAW (§ 173*)—ANOTHER PROSECUTION PENDING—ABATEMENT.

It is no wise vitiates a trial for a criminal offense that there was at the same time another accusation, indictment, warrant, or other criminal proceeding pending against the accused in the same or in another court for the same transaction. *Cabaniss v. State*, 8 Ga. App. 129 (5), 68 S. E. 849.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 289; Dec. Dig. § 173.*]

Error from City Court of Jefferson; W. W. Stark, Judge.

Dock Appleby was convicted of crime, and brings error. Affirmed.

Ray & Ray, for plaintiff in error. W. H. Quarterman, Sol., and C. L. Bryson, for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 552)

SIMMONS v. STATE (No. 3,121.)
(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 757*)—INSTRUCTIONS—IMPEACHMENT.

It is not error for the court to charge the jury that, "when a witness has been attacked for the purpose of impeachment, you are to determine, under certain rules of law governing such cases, whether the witness has been impeached, and what credit you will give to the witness." This instruction does not tend to intimate that an unsuccessful effort has been made to impeach, nor does it authorize the jury to exclude from their consideration the necessity

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for corroboration in connection with the testimony of the witness sought to be impeached.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1772-1785; Dec. Dig. § 757.*]

2. CRIMINAL LAW (§ 553*)—APPEAL—EVIDENCE OF IMPEACHED WITNESS.

The effort to impeach does not always result in impeachment. A witness whom it is sought to impeach may be believed by the jury; and the credibility of testimony is so peculiarly a jury question that this court cannot set aside a verdict merely because it rests upon the testimony of such a witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. § 553.*]

3. QUESTIONS OF LAW.

No material error of law appears.

Error from City Court of Sandersville; E. W. Jordan, Judge.

Centennial Simmons was convicted of crime, and brings error. Affirmed.

W. M. Goodwin, for plaintiff in error. J. E. Hyman, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 555)

RANDOLPH v. STATE. (No. 3,119.)

(Court of Appeals of Georgia. July 25, 1911.)

(*Syllabus by the Court.*)

1. IMPEACHMENT OF WITNESS.

For the most part the case is controlled by Simmons v. State, 71 S. E. 876, this day decided.

2. INSTRUCTIONS.

The exception as to the charge of the court on the subject of alibi is without merit.

Error from City Court of Sandersville; E. W. Jordan, Judge.

William Randolph was convicted of crime, and brings error. Affirmed.

W. M. Goodwin, for plaintiff in error. J. E. Hyman, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 575)

BLOUNT v. STATE. (No. 3,531.)

(Court of Appeals of Georgia. July 25, 1911.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 955*)—MOTION FOR NEW TRIAL—BRIEF OF EVIDENCE—TIME OF FILING.

Where a motion for a new trial is made, the normal practice requires that the brief of the evidence should be filed either simultaneously with the filing of the motion, or at least at the same term of the court. If the motion is not heard during the term, the judge may allow additional time within which the movant may file the brief of the evidence; but the movant obtains such an extension as a matter of judicial grace, and not as a matter of legal right, and, if the privilege of filing the brief after the expiration of the term is granted conditionally or upon a limitation, the movant must comply with the condition or limitation set in the order, else

the judge may legally refuse to approve the brief of the evidence when tendered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2370; Dec. Dig. § 955.*]

2. CRIMINAL LAW (§ 955*)—NEW TRIAL—PRESENTATION OF BRIEF—EXTENSION OF TIME.

"When, by an order passed in term, a motion for new trial is set to be heard on a particular day, and the same order requires the movant to present a brief of evidence to the judge for approval in vacation on another named day prior to that set for the hearing, the judge is without jurisdiction, on the day fixed for the presentation of the brief, to lawfully extend the time for such presentation." *Blackburn v. Alabama Midland Railway Company*, 116 Ga. 936, 43 S. E. 866.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2370; Dec. Dig. § 955.*]

3. CRIMINAL LAW (§ 955*)—NEW TRIAL—DISMISSAL OF MOTION.

"It was not error to dismiss a motion for a new trial, where no brief of evidence was made out and tendered for approval within the time prescribed by the order of the judge." *Dublin Hame Works v. Ross-Mehan Foundry Company*, 128 Ga. 399, 57 S. E. 683.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2370; Dec. Dig. § 955.*]

Error from Superior Court, Talbot County; S. P. Gilbert, Judge.

Lucius Blount was convicted of crime, and brings error. Affirmed.

Bull & Smith, for plaintiff in error. Geo. C. Palmer, Sol. Gen., for the State.

POWELL, J. It will not be necessary to elaborate the propositions stated in the syllabus. They are well settled by statute and numerous decisions. However, it is deemed expedient to set forth the order of the judge in refusing to approve the brief of the evidence as it recites the facts. It is as follows: "Motion for new trial in the above-stated case was filed during the March term, 1911, of Talbot superior court, and provided that the same was to be heard in vacation, on the 8th day of April, 1911, and that the defendant's counsel have until the 1st day of April, 1911, to prepare and perfect a brief of evidence had on the trial of said case, subject to the approval of the court. By subsequent orders the hearing was postponed until May 6th, at which time the solicitor general moved, in writing, to dismiss said case on the ground that no brief of evidence had been filed and approved in the manner required by law, nor in that pointed out by the order granted to movant. It will be noted from the motion that the same was to be heard in a county other than Talbot, and it necessarily follows that the hearing was in vacation. It also appears that the date allowed for the preparing and perfecting of the brief of evidence was on a different and earlier day than that set for the hearing of the motion. Movant's counsel have submitted affidavits to the effect that they were not aware that a different and

earlier date was set for the preparation of the brief of evidence, and this affidavit has been considered. It is no excuse, however, for failing to file the brief as required under the order, that counsel failed to read the same. There having been no brief of evidence filed, as required under the law and by the order allowing further time for same, and the time allowed being an earlier and different date than that set for the trial itself, the motion to dismiss is sustained, and it is therefore considered, ordered and adjudged that said motion for new trial be and the same is hereby dismissed. See *Blackburn v. A. M. Railway Company*, 116 Ga. 936 [43 S. E. 366]; also, *Eady v. A. C. L. R. Co.*, 129 Ga. 363 [58 S. E. 895]. The rulings in *Napier v. Heilker*, 115 Ga. 168 [41 S. E. 689], and *Mutual Life Insurance Company v. Hamilton*, 119 Ga. 340 [46 S. E. 434], and *Broadway National Bank v. Kendricks*, 124 Ga. 1053 [53 S. E. 576], have all been thoroughly considered, and it appears that the three last-named were all based upon different orders, it appearing that they apply to cases where the date allowed in the order for the presentation and approval of the brief of evidence was not on a different and earlier date than that set for the hearing itself, and in vacation. If the dates named in these orders were in term time, the situation would be entirely different, and there would be a discretion resting in the court to accept and approve a brief of evidence. But in the case at bar all of the dates named for the hearing and for the presentation of brief of evidence were in vacation."

Additionally it may be stated that the attorneys for the movant made affidavits and presented them to the judge, stating that the practice as they had known it, had been to allow the movant until the time of the hearing in which to file the brief of the evidence; and that the attorneys in this case so prepared the order taken at the time the motion was originally continued, and did not notice that the judge had changed the order by the insertion of another date, until after the motion to dismiss was filed.

Judgment affirmed.

(9 Ga. App. 577)

MAHONE v. STATE (No. 3,532.)

(Court of Appeals of Georgia. July 25, 1911.)

(*Syllabus by the Court.*)

GRANT OF NEW TRIAL.

This case is fully controlled by *Blount v. State*, 71 S. E. 877, this day decided (No. 3,531).

Error from Superior Court, Talbot County; S. P. Gilbert, Judge.

Will Mahone was convicted of crime, and brings error. Affirmed.

Bull & Smith, for plaintiff in error. Geo. C. Palmer, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 523)

STANLEY v. LIVINGSTON. (No. 2,933.)

(Court of Appeals of Georgia. July 25, 1911.)

(*Syllabus by the Court.*)

1. **NEW TRIAL (§ 41*)—GROUNDS—HARMLESS ERROR—INSTRUCTIONS.**

The finding of the jury was authorized by the evidence, and it was not error to refuse a new trial even though the charge of the court upon one point in the case was inapplicable. It is clear that the charge of the court was not harmful to the plaintiff in error.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 67-71; Dec. Dig. § 41.*]

(*Additional Syllabus by Editorial Staff.*)

2. **WORDS AND PHRASES—"STUMPAGE VALUE."**

The "stumpage value" of a tree is merely the value of a tree of standing timber.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 7, p. 6703.]

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by Jordan Livingston against S. M. Stanley. Judgment for plaintiff, and defendant brings error. Affirmed.

Jas. M. Johnson, for plaintiff in error. Patterson & Copeland, for defendant in error.

RUSSELL, J. Livingston sued Stanley for the value of certain cross-ties which he alleged the latter had cut from a land lot of which he alleged he was the owner. It is plain from the record that the only issue of fact which the jury had to determine was what was the true boundary line between lots of land Nos. 194 and 195 in the Eleventh land district of Lowndes county. It was admitted in the pleadings that the plaintiff was the owner of the lot which he claimed, and it is not denied that the defendant cut some cross-ties. The only question, therefore, was whether the cross-ties which Stanley cut were north of the original land line between the two lots. The evidence upon this point was sufficient to authorize the jury to find that Stanley cut his cross-ties from Livingston's land, however innocent may have been his intentions, or no matter how strongly he may have previously been convinced that the land from which they were cut was his own.

A contrary finding upon this point, it is true, would also have been authorized by the evidence, but the prerogative of the jury to find the facts in cases of dispute cannot be questioned. The verdict in favor of the plaintiff was one for the proven value of the ties, so that it is plain that the jury did not add anything on account of the element of willfulness. There are several exceptions

to the charge of the court, and also an assignment of error based upon the fact that the court asked C. I. Shelton, one of the witnesses, what was the stumpage value of the ties in question. The question the court asked was a very natural one. The stumpage value of a tree is understood to be merely the value of a tree of standing timber, and if the jury only allowed the plaintiff the stumpage value of trees cut from the plaintiff's own land, certainly there could be no cause for complaint.

As to the exceptions to the instructions of the court to the jury, they are without merit unless it be that the evidence does not authorize the charge in regard to the establishment of the line between adjoining landholders by acquiescence and agreement for the period of seven years. We are not certain that the testimony does not so authorize the inference of acquiescence and agreement in a boundary line as to have authorized the charge, but even if it did not, the charge in question was not unfavorable to the defendant in the light of all the facts.

Judgment affirmed.

(9 Ga. App. 574)

MARTIN v. CITY OF ROME (No. 3,528.)
(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 188*)—PENALTIES—ACTION—EVIDENCE—SUFFICIENCY.

Proof merely that a person had "beer" in his possession for illegal sale is not sufficient to convict him of having intoxicating or malt liquor in his possession for illegal sale.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 207; Dec. Dig. § 188.*]

Error from Superior Court, Floyd County; John W. Maddox, Judge.

Action by the City of Rome against Will Martin for having in possession intoxicating or malt liquor for illegal sale. Judgment for plaintiff, and defendant brings error. Reversed.

Denny & Wright and Eubanks & Mebane, for plaintiff in error. Max Meyerhardt and Maddox & Doyal, for defendant in error.

POWELL, J. Only one reason appears for reversing the judgment. There is no proof that the beer which the defendant sold was either malt or intoxicating. It is proved that he sold "beer"; but as to what kind of beer it was the record is silent. From the eagerness with which the beer was sought by the crowds which hung around the place where it was sold, we strongly suspect that it was lager beer, which is both malt and intoxicating; but suspicion, even strong suspicion, does not and should not satisfy legal standards in any criminal case. The proposition that, when the alleged violation of a prohibition law consists in a sale of beer, the prosecution must prove directly or circumstantial-

ly that it was a malt or an intoxicating beer is too well settled to admit of any doubt. *Lumpkin v. Atlanta*, 9 Ga. App. —, 71 S. E. 755; *Cripe v. State*, 4 Ga. App. 832, 62 S. E. 567; *Du Vall v. Augusta*, 115 Ga. 813, 42 S. E. 265. It is true that among those who were found in the crowd near the place when the beer was being sold was a drunken man; but we deem this insufficient to prove that the beer was intoxicating, as there was no showing that this man had drunk any of the beer, or that he was not drunk when he came to the public place where the crowd had gathered.

Judgment reversed.

(9 Ga. App. 558)

WHITE v. STATE (No. 3,308.)
(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 176*)—EVIDENCE—DATE OF CRIME.

The state is not confined to the date alleged in the accusation in proving the crime, but may prove it as of any date within the period of limitations.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 548; Dec. Dig. § 176.*]

2. INDICTMENT AND INFORMATION (§ 171*)—EVIDENCE.

When the accusation charges the offense generally, the state need not rest its case on proof of a single transaction, but may prove or attempt to prove any number of transactions of the character charged in the accusation and included within its terms.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 536, 537; Dec. Dig. § 171.*]

Error from City Court of Lexington; Joel Cloud, Judge.

Jerry White was convicted of crime, and brings error. Affirmed.

E. P. Shull, for plaintiff in error. Hamilton McWhorter, Jr., Sol., for the State.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 553)

SCHUMPERT v. STATE (No. 3,120.)
(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. JURY (§ 118*)—CHALLENGE TO ARRAY.

The statement of counsel for the accused, in the trial of a criminal case, that the accused demanded all of his legal rights, and would not waive anything, except a copy of the indictment and a list of the witnesses, was not sufficient to constitute a challenge to the array.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 545; Dec. Dig. § 118.*]

2. CRIMINAL LAW (§ 631*)—TRIAL—LIST OF JURORS—WAIVER.

Upon the failure of the clerk of the court to furnish counsel for the defendant with a list of the jury, it is his duty to call the attention

of the court to that fact, and failure to call the attention of the court to the omission of the clerk must be construed as a waiver of the right to be supplied with a list of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1446; Dec. Dig. § 631.*]

8. SUFFICIENCY OF WAIVER.

The evidence authorized the verdict.

Error from City Court of Sandersville; E. W. Jordan, Judge.

Bill Schumpert was convicted of a criminal sale of liquor, and brings error. Affirmed.

W. M. Goodwin, for plaintiff in error. J. E. Hyman, for the State.

RUSSELL, J. [3] In regard to the general grounds of the motion for new trial, which were overruled, it is only necessary to say that according to the testimony for the state a witness testified that he gave the defendant \$1.25 and told him to go and get him some whisky. The witness went off and staid about 30 minutes, and when he came back the defendant had the liquor for him. There was an effort to impeach this witness, but evidently the jury believed him; and that is an end of the matter, where the verdict is approved by the trial judge.

The motion for new trial as amended, contains the following additional grounds:

"1st. Because the array of jurors in court, as movant contends, was not regularly and legally put upon the defendant; the following language, nor its equivalent, having been used in arraigning the defendant, nor after the arraignment of the defendant: 'These men, good and true, have been called to pass upon the question of your guilt or innocence in this case. If you have any objections to the array, make them now.' Movant had demanded at the beginning of the case and upon announcing ready for trial all his legal rights, and stated to the court that he would not waive anything, except a copy of the indictment and a list of the witnesses. Movant contends that the failure upon the part of the solicitor to use this language, or its equivalent in meaning, was a denial of his legal right to enter a challenge to the array of jurors in court.

"2d. Because counsel for the defendant, nor the defendant himself, were furnished with a list of jurors from which to strike a jury. Although the court ordered the list furnished, the fact that it was not furnished was a denial to the defendant of one of his legal rights, and of a trial by due process of law.

"3d. Because the defendant and his counsel, being without a list, were unable to strike a jury, as is the plain intent of the law that he should have opportunity to strike

in the most intelligent manner, and with an intelligence of those who were on the entire panel of jurors. When a single juror was called and passed upon separately, the defendant could not know just who would be called later, and in this way had no opportunity of estimating just what jurors he should strike with best advantage to himself, or of estimating the comparative value of the juror under consideration, without knowing the personnel of the entire panel. Under such circumstances, counsel for defendant could only say in response to what defendant did with the juror, 'We do not pass on this juror one way or another.'

[1] The presiding judge qualifies his approval of these grounds by the following statement: "Upon the call of the case for trial, counsel for the defendant stated to the court that he would waive nothing, save a copy of the accusation and a list of the witnesses. Thereupon the court ordered the defendant arraigned. In the arraignment of the defendant, the language, or its equivalent, the omission of which is complained of in the first ground of the amended motion, was not used. The court ordered the clerk to furnish counsel for the defendant with a list of the jury. The court then ordered that counsel strike the jury. Counsel stated that he did not wish to be placed in the attitude of either waiving any of his legal rights, or of acquiescing in the proceedings by striking the jury; whereupon the court ordered the jurors put upon their voir dire, and each juror put upon the defendant separately; counsel for defendant stating to the court that they would not pass upon the jurors so put upon him one way or the other. In this manner the jury was impaneled and sworn." As appears from the note of the court, each juror was put upon his voir dire, and this was all that the court was required to have done. The statement by counsel that he waived nothing was not specific enough to amount to a challenge to the array.

[2] The further statement in the judge's note that, "If counsel did not have a list of the jury, it was because he failed to call the attention of the court to the omission of the clerk to furnish the list," is self-explanatory. It was the duty of counsel to call the attention of the court to this omission, and the plaintiff in error can gain nothing by the fact that the court was not advised of the condition to which attention is called in the amended motion. The mere statement that the defendant waived nothing would not require the court to see that his order that a list of the jury should be furnished had been actually complied with, for he would have a right to presume that it had been obeyed. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(126 Ga. 386)

WICKHAM v. TORLEY.

(Supreme Court of Georgia. July 14, 1911.)

(Syllabus by the Court.)

1. INFANTS (§ 46*)—POWER TO CONTRACT.

The mere fact that a minor has neither parent nor guardian does not remove his disability and clothe him with the power to contract generally.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 98; Dec. Dig. § 46.*]

2. INFANTS (§ 46*)—CONTRACTS.

Nor does the fact that such a minor has been engaged as a workman in a shop and receiving his wages in such employment empower him to contract generally.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 98; Dec. Dig. § 46.*]

3. INFANTS (§ 57*)—CONTRACTS—RATIFICATION.

If a "minor receives property, or other valuable consideration, and, after arrival at age, retains possession of such property, or enjoys the proceeds of such valuable consideration, such a ratification of the contract shall bind him."

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 138-148; Dec. Dig. § 57.*]

4. REOPENING CASE.

Under the facts of this case, the court erred in refusing to allow the plaintiff to reopen the case, after the evidence for the plaintiff was closed, and to introduce the defendant as a witness in order to prove by him facts which would have prevented a nonsuit.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Marie Wickham against Arthur Torley. Judgment for defendant, and plaintiff brings error. Reversed.

Marie Wickham brought an action against Arthur Torley, the substance of the petition now material being as follows: Plaintiff in the early part of June, 1908, was living with S. S. Sollee. Shortly thereafter the defendant, her brother, entered with Sollee into the business of raising pigeons for market, and has continued in such business since that time. Soon after the defendant engaged in such business he requested the plaintiff to lend him \$1,000, stating at the time that it was to be used for the purpose of increasing and improving the business in which he had engaged with Sollee. Plaintiff thereupon loaned the defendant \$1,000, upon his agreement to repay such sum in April, 1909. Defendant expended a large portion of such borrowed money in improving and increasing the pigeon business in which he was engaged with Sollee, and the defendant failed and refused to repay the loan upon demand after its maturity. The defendant pleaded that he never borrowed the \$1,000 from the plaintiff, but he had received that sum from her as a gift; and he further pleaded, if it was not a gift but a loan, that he was a minor at the time he received the money, and was therefore not liable for its payment.

Upon the trial the plaintiff testified, in sub-

stance, as follows: "I loaned my brother, the defendant, \$1,000 in June, 1908. He was 20 years old at that time. Our father and mother were both dead, and neither of us has ever had a guardian." He "wanted to go into the pigeon business with Mr. Sollee, and asked me to loan him \$1,000. He then said that he would pay it back to me when he became 21 years old, on the 12th of April of the next year. This conversation took place in June of 1908, and I consented then to let him have the money. Mr. Sollee had my money, and he as well as my brother suggested that I make the loan, but my brother himself made the application for the loan. The latter subsequently informed me that Mr. Sollee had furnished him with the \$1,000, my money. No writing was given me by my brother for the loan. After the loan was due, I made a demand on him for the money, but he has never paid me any of it. After this money had been loaned to my brother, there were pigeons and a pigeon business at the residence of Sollee. He bought pigeons. They appeared to be making a lot of improvements around the place and building a new pigeon loft. This business of making improvements and building the pigeon house continued while I remained there, which was until August 1908. Mr. Sollee and my brother were in business together, and that's why my brother asked me to lend him the money. He wanted to go in business with Sollee. * * * I saw certain improvements going on around the place, and I understood from the way he asked me to lend him the money, I thought probably that was what it was for. He told me he wanted to go in business with Mr. Sollee, and I presumed that these improvements were made with that money. * * * After my brother came out to Mr. Sollee's, both Sollee and my brother told me that they were going into the business of raising pigeons. They said this before I loaned the money; and afterwards my brother said that he wanted to borrow the money to go into that business. I believe at one time while I was out there they had young pigeons. Before I loaned the money to my brother, he was working with the Seaboard Railway Company, learning to be a blacksmith, and was receiving \$15 a month for his services."

Helmy testified in behalf of the plaintiff that he worked on Butner's farm near Sollee's place, and was there frequently. He said: "I recall an occasion when pigeon roosts were hauled through Mr. Butner's place, but I don't remember the day. I saw them haul a wagonload of boxes, * * * some kind of crates. I understand they were pigeon nests. A darkey was doing the hauling, and he drove up through Mr. Butner's cow lane, leading out through the road. I objected to his going through there, when Mr. Torley came up and asked me to let

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the wagon cut through the lane up to the house, stating that it would ruin these boxes to get wet. Upon the request of Mr. Torley, I allowed the boxes to go through. * * * All that I have heard Torley say was that he was raising pigeons, and raising some to sell. He then told me he had made away with some of the pigeons, and only saved a few for his own use. This conversation occurred last fall or summer. [The trial was in April, 1910.] He did not say they were for the business, only for pigeon nests. * * * Mr. Torley did not tell me what his interest, if any, was, or whose pigeons they were. When he spoke about anything, it was about his doing so and so, and generally said 'we' did so and so. I don't know who 'we' was. I could not say who he had been talking about. Sometimes I would say, 'How are you getting along about the pigeon business?' and then he would say, 'We are doing nicely.' I could not pretend to say how long ago that was. I do not remember."

Upon the conclusion of the evidence for the plaintiff, the defendant moved for a nonsuit. "Before the judgment of the court was rendered upon said motion, plaintiff moved the court that she be permitted to introduce, for the purpose of avoiding the nonsuit, her brother, the said defendant, and then offered to show by said defendant the following facts: (1) That said defendant was now the owner of the property for which a large portion of said \$1,000 had been paid. (2) That he was now in the possession of that property. (3) That he was also in possession of a large portion of the money that had been loaned to him by plaintiff. (4) That he at the time the money was loaned was *sui juris*. The court, after argument, entered its judgment awarding a nonsuit, and then and there upon objection of defendant refused to allow plaintiff to introduce said defendant Torley for the purposes aforesaid." Plaintiff excepted to the judgment of nonsuit, on the ground that the evidence submitted in her behalf established a *prima facie* case against the defendant, and assigned error upon the refusal of the court to permit plaintiff to introduce the defendant as her witness for the purpose of proving by him the facts as above stated.

D. H. Clark, for plaintiff in error. C. V. Hohenstein and S. N. Gazan, for defendant in error.

FISH, C. J. (after stating the facts as above). 1. "The contracts of a minor under twenty-one years of age are void, except for necessities. If, however, the minor receives property, or other valuable consideration, and, after arrival at age, retains possession of such property, or enjoys the proceeds of such valuable consideration, such a ratification of the contract shall bind him." Civ. Code 1910, § 4233. "If a minor, by permission of his parent or guardian, or

by permission of law, practices any profession or trade, or engages in any business as an adult, he shall be bound by all contracts connected with such trade, profession, or business." *Ib.* § 4235.

[1] One of the contentions of counsel for the plaintiff is that as the defendant at the time he made the contract sued on had neither parent nor guardian, he was free to make the contract, and that it was therefore binding upon him, notwithstanding his infancy. This contention, however, will not hold. Until majority the child remains under the control of the father, who is entitled to his services and the proceeds of his labor. This parental power may be lost in several ways, and is prescribed in Civ. Code 1910, § 3021. But even emancipation of the minor from parental control only gives him a right to his own earnings and releases him from his parents' control from that time, but it does not remove his disability and clothe him with the power to contract. 2 Page on Contracts, § 852; Clark on Contracts, 150. It must follow that, if an infant after the loss of parental control has no capacity to make a binding contract, the mere fact that he had neither parent nor guardian would not operate to confer upon him the power to contract.

[2] Nor would the mere fact that the defendant, having neither parent nor guardian, was working for himself and receiving his own wages, prior to the time the contract sued on was entered into, render him capable of making such contract, which was entirely disconnected with the work for which he was receiving his earnings. Another contention of counsel for the plaintiff is that the evidence submitted in behalf of the plaintiff authorized the finding that the defendant at the time he borrowed the money was engaged as an adult in the business of raising pigeons for sale, and that the contract sued on was connected with such business. We cannot agree to this. According to the testimony of the plaintiff herself, the defendant was not engaged in such business at the time she loaned him the money, but he borrowed it for the purpose of embarking in such business, and there was no sufficient evidence to show that any of the money he borrowed was ever invested in such business. Our conclusion is that the plaintiff failed to make out a *prima facie* case.

2. Did the court err in refusing to permit the plaintiff, in order to save a nonsuit, to introduce the defendant and to prove by him that he was then in the possession of and owned the property in which a large portion of the money he had borrowed from the plaintiff had been invested, and that he was also then in possession of a large portion of the borrowed money? The rulings of this court relating to this question have been collated by Justice Lumpkin in *Penn v. Georgia Southern & Florida Railway Co.*,

129 Ga. 856, 60 S. E. 172, and, as was there said, "among those decisions there is no conflict, but, construed together, they are in harmony and make up a complete rule. It is common practice for the presiding judge, where counsel for the plaintiff in error has omitted evidence by accident, inadvertence, or even because of a mistake as to the necessity for offering a particular witness or particular evidence, to allow the case to be reopened and additional evidence introduced in order to prevent a nonsuit. But this is not a matter of arbitrary right on the part of the plaintiff or his counsel. The judge has a considerable discretion in the matter. It may be that counsel for a defendant has dismissed witnesses or changed his position, relying on a judge's announcement, so that it would be unjust to allow a reopening of the case. Or the judge may be of the opinion that counsel are needlessly consuming time and experimenting in the case rather than developing it; or other reasons may influence him, in the exercise of a sound discretion, in refusing a motion to reopen the case and allow additional testimony." In the present case it appears that counsel for the plaintiff might have well contended in good faith that the evidence for the plaintiff made out a prima facie case. In the present case there appears no reason why it would have been unjust to the defendant to have allowed the plaintiff to reopen the case. The plaintiff offered the defendant himself to prove additional facts to make out a case. Nothing appears to authorize the conclusion that counsel was needlessly consuming time and experimenting in the case rather than developing it. Certainly the plaintiff could not be expected to introduce the defendant as a witness in order to make out a case except in dire necessity. In the present case we think the plaintiff might well have rested the case on the evidence submitted on behalf of the plaintiff until the judge had intimated his intention to grant a nonsuit. On such intimation, then the necessity arose for the plaintiff to introduce her adversary as a witness. We are of opinion that the court erred in not allowing her to do so. This rule is not in conflict with the decisions in *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46, *Freyermuth v. South Bend R. Co.*, 107 Ga. 31, 32 S. E. 668, *Davis v. Chaplin*, 110 Ga. 322, 35 S. E. 312, and *Brooke v. Lowe*, 122 Ga. 358, 50 S. E. 146, when the facts of those cases are construed in connection with the rulings made.

[3] The plaintiff offered to show by the defendant that he was, even at the time of the trial, in possession of and the owner of the property in which a large portion of the borrowed money had been invested, and that he was in possession of a large part of the borrowed money. If this had been shown,

then without more it would have authorized a recovery under Civ. Code 1910, § 4233, which provides "if * * * the minor receives property, or other valuable consideration, and after arriving at age retains possession of such property or enjoys the proceeds of such valuable consideration, such a ratification of the contract shall bind him." *White v. Sikes*, 129 Ga. 508, 59 S. E. 228, 121 Am. St. Rep. 228.

[4] The court erred in refusing to allow the plaintiff to introduce the additional evidence offered in order to avert a nonsuit.

Judgment reversed. All the Justices concur.

(186 Ga. 589)

OXFORD et al. v. OXFORD.

(Supreme Court of Georgia. July 13, 1911.)

(Syllabus by the Court.)

1. WILLS (§§ 53, 164*)—PROBATE—CAVEAT—ADMISSIBILITY OF EVIDENCE.

Where children by a former marriage caveat at the probate of the will of their father, wherein the larger part of his estate is devised to his widow, on the ground of want of mental capacity and undue influence, it is proper to allow proof of the pecuniary condition of the caveators.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 129, 403, 405; Dec. Dig. §§ 53, 164.*]

2. WILLS (§§ 288, 321*)—PROBATE—BURDEN OF PROOF—RIGHT TO OPEN AND CLOSE.

Upon the trial of an issue arising upon the propounding of a will and a caveat thereto, the burden, in the first instance, is upon the propounder of the alleged will to make out a prima facie case, by showing the factum of the will, and that at the time of its execution the testator apparently had sufficient mental capacity to make it, and, in making it, acted freely and voluntarily. When this is done, the burden of proof shifts to the caveator.

(a) On a trial of the issue of *devisavit vel non*, where the caveator introduces proof, the propounder is entitled to open and conclude the argument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 651, 652, 662, 664, 761; Dec. Dig. §§ 288, 321.*]

3. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMPTIONS AS TO FACTS.

Where no issue is made as to the formal execution of the paper propounded as a will, and the evidence is undisputed that such paper was executed as required by law for wills, and the attesting witnesses were competent, it is not error for the court to assume such in his instructions to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

4. NO ERROR—EVIDENCE SUFFICIENT.

No substantial error of law occurred on the trial, and the evidence supports the verdict.

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Mrs. Kate Oxford filed a petition to probate in solemn form the will of her deceased husband, and J. M. Oxford and others enter a caveat thereto. From a judgment in favor of the propounder, the caveators bring error. Affirmed.

W. C. Martin and W. E. Mann, for plaintiffs in error. Maddox, McCamy & Shumate, for defendant in error.

EVANS, P. J. Mrs. Kate Oxford filed a petition to probate in solemn form the will of her deceased husband. By the terms of the will the larger portion of the property was devised to the propounder, who was the second wife of the decedent. The testator's children by a former marriage filed a caveat to the probate of the will, on the ground that the testator at the time of making the alleged will was of unsound mind, and that the will was executed by him because of the undue influence and false representations of the propounder. On appeal in the superior court a verdict was rendered in favor of the propounder, which the court refused to set aside on motion for new trial.

[1] 1. The first two grounds of the amended motion complain of the admission by the court of evidence showing the financial condition of the caveators. This testimony was admissible as illustrative of the reasonableness or unreasonableness of the testamentary scheme as bearing on the issue of undue influence alleged to have been exercised by the propounder. Indeed, the jury should be permitted to hear testimony of this character, that they might know of the facts and circumstances surrounding the testator at the time he executed the will, to better determine the state of his mind, whether he had made a rational disposition of his property, and whether or not undue influence was exercised over him at the time of its execution. *Rasdale v. Brush* (Ky.) 104 S. W. 749; *Henning v. Stevenson*, 118 Ky. 318, 80 S. W. 1185; *Johnson v. Armstrong*, 97 Ala. 731, 12 South. 72.

[2] 2. The charge on the burden of proof on the issue of *devisavit vel non* was in substantial accord with the rule laid down in *Slaughter v. Heath*, 127 Ga. 760, 57 S. E. 69, 27 L. R. A. (N. S.) 1, and not in conflict with *Mobley v. Lyon*, 134 Ga. 125, 67 S. E. 668, 187 Am. St. Rep. 213. Both sides introduced evidence, and the court properly allowed the propounder the right to open and conclude the argument.

[3] 3. The court charged the jury: "Some question was raised as to the execution of the instrument, or the alleged will, as to the competency of the witness, Judge Bogle, the ordinary. [The will was attested by that official.] I charge you that so far as the formal execution is concerned and the competency of the witnesses, the court holds that that they have been sufficiently established, and the court sustains the execution of the will and holds that Judge Bogle is a competent witness to the will." The criticism of this charge is that it was contrary to law, and is an expression of opinion on the

evidence by the court. It is especially insisted that the words, "the court holds that they have been sufficiently established," was an expression of opinion on the evidence to the effect that such evidence made out a *prima facie* case authorizing the probate of the will. The evidence was undisputed that the will was executed in legal form, in the presence of competent attesting witnesses. This excerpt, when considered in connection with its context, was but the statement of facts about which there was no issue, and was not harmful to the plaintiffs in error.

[4] 4. There is no merit in any of the other grounds of the motion. The charge substantially stated all the contentions of the parties, and the verdict was warranted by the evidence.

Judgment affirmed. All the Justices concur.

(136 Ga. 533)

LOUISVILLE & N. R. CO. v. SOUTHERN FLOUR & GRAIN CO.

(Supreme Court of Georgia. July 11, 1911.)

(Syllabus by the Court.)

1. CARRIERS (§ 174*)—BILL OF LADING—CONSTRUCTION.

Where a carrier accepts a shipment of freight to a place on its own line of railroad, and stipulates in its bill of lading that "the company agrees to carry said property to destination if on its road," and enters on the bill of lading, after the designation of the property, "C/O W. & A.," which characters when indorsed on the bill of lading are proved to mean "in care of the Western & Atlantic Railroad Company," such bill of lading will be construed to mean that the receiving carrier obligates to transport the shipment over its own road to destination and there to deliver it to the Western & Atlantic Railroad Company for the benefit of the consignee, and not to mean a delivery of the shipment at a junction point outside of the place of destination to the Western & Atlantic Railroad Company to be transported to destination by the latter company.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 174.*]

2. EVIDENCE (§ 457*)—PAROL EVIDENCE—ABBREVIATIONS—EXPLANATIONS.

Abbreviations and technical terms in written instruments create such an ambiguity that they may be explained by parol testimony.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2104, 2107, 2108; Dec. Dig. § 457.*]

3. CARRIERS (§ 188*)—TROVER BY CONSIGNEE—REFUSAL TO PAY CHARGES.

A carrier who promptly transports goods according to his contract is entitled to his reasonable carriage charges, and the consignee is not entitled to recover the goods in an action of trover, where he refuses to pay such charges.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 853-858; Dec. Dig. § 188.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Southern Flour & Grain Company against the Louisville & Nashville Rail-

road Company. Judgment for plaintiff, and defendant brings error. Reversed.

Tye, Peeples & Jordan, for plaintiff in error. Walter McElreath, for defendant in error.

EVANS, P. J. The Louisville & Nashville Railroad Company operates a continuous line of railway between Lexington, Ky., and Atlanta, Ga. On January 1, 1909, W. Z. Thompson turned over to the railway company at Lexington a car load of hay, and the railway company issued a bill of lading for the shipment. By the terms of the bill of lading the shipment was consigned to the shipper's order, with direction to notify Southern Flour & Grain Company, Atlanta, Ga. After the designation of the articles shipped in the bill of lading appears the following: "c/o W. & A." The bill of lading issued to the consignor contained the following covenant: "The company agrees to carry said property to destination, if on its road; if said destination is not on its road and the company guarantees a through rate to destination, then it agrees to deliver said property to such other carrier on the route to destination as the company may select, but it does not agree to carry to any point beyond its own line, or be responsible beyond its own line in any manner under any circumstances." The hay was duly transported by the Louisville & Nashville Railroad Company, and the Southern Flour & Grain Company was notified on its arrival at Atlanta, Ga. The Southern Flour & Grain Company refused to pay the freight charges, because the shipment did not arrive in Atlanta over the Western & Atlantic Railroad Company, and demanded possession of the hay. The Louisville & Nashville Railroad Company offered to turn the shipment over to the Western & Atlantic Railroad Company. The Southern Flour & Grain Company refused to accept delivery in this way, and brought an action in trover to recover the hay. Under the stipulations made on the trial of the case, the only issue between the parties was whether there had been a conversion of the hay by the railway company because of an alleged diversion in the routing of the shipment. The plaintiff contended that, according to the bill of lading, the defendant contracted to deliver the shipment to the Western & Atlantic Railroad Company at a point outside of Atlanta, and in support of this contention offered the testimony of its president as follows: "'C/O W. & A.' on the bill of lading, I know what they stand for. In the trade of shipping business of shipping over railroads, in making out bills of lading, I would say that the term would mean that the shipment should arrive by the 'W. & A. Railroad.' I know in railroad parlance, as such words are used on bills of lading, what the words 'C/O' mean. They mean 'care of' and 'via.' 'Via' means in railroad parlance 'by way of.' 'By way of' indicates, as to the routing of the

shipment, that the routing shall be designated after the character and shall arrive over the road mentioned after the character. There is a railroad coming into Atlanta known as the 'Western & Atlantic Railroad.' The words 'W. & A.' on bills of lading mean Western & Atlantic Railroad. It is usually abbreviated just like that." On cross-examination he testified: "I should say from experience that 'C/O' meant care of." No witness, other than the president of the plaintiff company, testified concerning the meaning of the symbols "C/O W. & A." The contract of shipment provided that the carrier should deliver the hay at destination if on its road; and this stipulation must govern the contract, unless it is modified by the indorsement of these characters on it. The theory upon which parol testimony is allowed in such cases is that symbols of trade having a definite meaning may be interpreted, and the interpretation becomes a part of the writing. The interpretation given to these characters by the plaintiff is that they mean "in care of." It is true that he also indicates that they may sometimes be employed in a different sense. Ordinarily a plaintiff's testimony in his own favor, where the same is of uncertain intentment, should be taken most strongly against him. And this rule should not be relaxed where the purpose of the testimony is to define certain trade symbols in their bearing and effect on the written contract which contains them, and the definition is so dubious and ambiguous as to deprive the characters of any certain and definite effect.

[1] We therefore construe the testimony of the plaintiff in harmony with, rather than repugnant to, the provisions of the contract respecting delivery at destination, and that the characters mean "in care of the Western & Atlantic Railroad Company," and a delivery at Atlanta to the Western & Atlantic Railroad for the benefit of the consignee would have been a good delivery. If the testimony of other witnesses had been introduced as to the meaning of these trade symbols, and there had been a conflict as to their meaning, then it would have been for the jury to determine their proper signification. We are all the more disposed to construe the plaintiff's testimony as we have, in view of the failure of the record to affirmatively disclose that the Western & Atlantic Railroad Company connects with the initial carrier. This case is altogether unlike the case of *Bird v. Georgia Railroad Company*, 72 Ga. 655. In that case the line of railroad of the initial and receiving carrier did not extend to the place to which the shipment was destined. The shipper routed the shipment over a certain line of railroad, and it was so stipulated in the bill of lading. The receiving carrier, instead of delivering it to the connecting carrier designated in the bill of lading, delivered it to another carrier, who transported it to its destination; and the court held that the

latter carrier, when it received the shipment with a knowledge that it was routed over a different road, was guilty of a conversion, and was not entitled to charge for transportation over its own line, and that the owner could maintain a trover action to recover his goods without tendering or paying the transportation charges claimed by it.

[2] 2. Error is assigned upon the admission of parol evidence to interpret the character "C/O W. & A." on the bill of lading. Parol evidence is admissible to explain the meaning of abbreviations and technical expressions in written instruments. *Daniel v. Maddox-Rucker Banking Co.*, 124 Ga. 1063, 53 S. E. 573; 1 Enc. 82.

[3] 3. The evidence showing no conversion on the part of the carrier, the plaintiff was not entitled to recover possession of the freight without paying or tendering the freight charges.

Judgment reversed. All the Justices concur.

(136 Ga. 453)

WILLIAMS v. PERRY.

(Supreme Court of Georgia. June 19, 1911.)

(Syllabus by the Court.)

1. EJECTMENT (§ 64*)—PLEADING—SUFFICIENCY.

It is essential to the maintenance of an action for the recovery of land that the premises sued for be described with such certainty as that, in the event of a recovery by the plaintiff, a writ of possession issued upon the judgment, and describing the premises as laid in the petition, shall so identify the premises sued for as that the sheriff in the execution of the writ can deliver the possession in accordance with its mandate. *Harwell v. Foster*, 97 Ga. 264, 22 S. E. 994; *Hollywood Cemetery Corporation v. Hudson*, 133 Ga. 271, 65 S. E. 777.

(a) Although the petition was amended relatively to the description of the premises sued for, as amended it failed to furnish such a description of the premises as to bring it within the rule above announced.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 158-164; Dec. Dig. § 64.*]

2. TRIAL (§ 170*)—DISMISSAL AND NONSUIT (§ 58*)—APPEAL AND ERROR (§ 1203*)—TAKING QUESTIONS FROM JURY—DIRECTION OF VERDICT—DISPOSITION OF CAUSE.

The defendant did not introduce evidence, and accordingly a verdict should not have been directed for her. *Zipperer v. Savannah*, 128 Ga. 135, 57 S. E. 311; *Equitable Mfg. Co. v. Davis*, 130 Ga. 67, 60 S. E. 262.

(a) Inasmuch as the petition, under the rule announced in the first headnote, was insufficient to form the basis of a recovery, a nonsuit, under the authority of *Harwell v. Foster*, supra, and *Barnes v. Carter*, 120 Ga. 895, 48 S. E. 387, and *Zipperer v. Savannah*, supra, should have been granted.

(b) Accordingly the judgment will be affirmed, with direction that, when the remittitur is offered to be made the judgment of the court below, if the plaintiff in the action so desires, the verdict may on his motion be vacated, and a judgment of nonsuit be entered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 390-394; Dec. Dig. § 170.* Dismissal and Nonsuit, Cent. Dig. §§ 134-139; Dec. Dig. § 58.* Appeal and Error, Dec. Dig. § 1203.*]

Error from Superior Court, Baker County; Frank Park, Judge.

Action by J. H. Williams against L. B. Perry. From a judgment for defendant, plaintiff brings error. Affirmed, with direction.

J. W. Walters & Son and Cox & Peacock, for plaintiff in error. A. S. Johnson, Benton Odom, and Pope & Bennet, for defendant in error.

FISH, C. J. Judgment affirmed, with direction. All the Justices concur.

(136 Ga. 519)

IVEY v. PAYNE.

(Supreme Court of Georgia. June 23, 1911.)

(Syllabus by the Court.)

1. COURTS (§ 480*)—COSTS (§ 212*)—RESTRAINING OTHER ACTION—ERRONEOUS TAXATION OF COSTS.

An owner of realty sold the same, took from the purchaser notes for the purchase money, and gave the latter bond to make titles upon payment of the notes. The vendor brought suit on the notes to the July term, 1910, of the city court, and had issued against the purchaser a dispossessionary warrant. Upon the petition of the purchaser for an injunction against the prosecution of the suit on the notes and the execution of the dispossessionary warrant, against the vendor and the constable charged with the duty of executing the warrant, being presented to the presiding judge, a restraining order was granted on July 22, 1910, enjoining the execution of the warrant; but no restraining order was granted enjoining the prosecution of the suit on the notes. The petition and restraining order which were filed on July 23, 1910, were served on the constable on July 23, 1910, and on the vendor on September 15, 1910. The dispossessionary warrant proceedings were dismissed. No defense was filed to the suit on the notes, and on September 6, 1910, a verdict therein was rendered and judgment entered thereon. A motion for a new trial, filed by the purchaser on September 13, 1910, was overruled September 24, 1910. To the order overruling the motion a bill of exceptions, certified October 13, 1910, was filed by the purchaser. No steps were taken to cause the filing of the bill of exceptions to operate as a supersedeas. On September 6, 1910, an execution was issued for the amount of the judgment, \$1,135 principal, \$279.80 interest, and \$141 attorney's fees. This execution was levied upon the land on September 9, 1910, which was sold thereunder on the first Tuesday in October, 1910, and deeded by the sheriff to the vendor, who was the purchaser at the sheriff's sale. The original vendee amended her petition, and prayed for an injunction against her being evicted by the sheriff by reason of the sale by the latter to her vendor. *Held*, the verdict and judgment rendered in the city court were not void, and the sale under a levy of the execution issued upon the judgment was not invalid, because the verdict and judgment were rendered pending the application for an injunction to restrain the prosecution of the suit in which the verdict and judgment were rendered.

(a) This is true, though the plaintiff in that suit may have known of the pendency of the application for injunction at the time the verdict and judgment were rendered.

(b) Even if the fact that the plaintiff was a member of the firm in whose behalf attorney's fees were recovered and embraced in the judg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment would affect the right to a recovery of such fees (see *Vanduzer v. McMillan*, 37 Ga. 299, note 3), this would not render the judgment and sale thereunder invalid. *Jones v. Findley*, 84 Ga. 52, 10 S. E. 541.

[Ed. Note.—For other cases, see *Courts, Cent. Dig. §§ 1270-1278*; *Dec. Dig. § 480*; * *Costs, Dec. Dig. § 212*.*]

2. NEW TRIAL (§ 12*)—APPEAL AND ERROR (§ 480*)—PROCEEDINGS TO PROCURE—SUPERSEDEAS—EFFECT.

The provision, in the rule nisi issued upon the motion for a new trial, that "this order act as a supersedeas until the further order of the court," did not have effect as a supersedeas after the order of the court overruling the motion. *Parker-Hensel Engineering Co. v. Schuler*, 133 Ga. 696, 66 S. E. 800.

(a) Where an execution was issued and levied before the motion for a new trial was made and supersedeas granted pending its determination, the sale under such levy, made after the motion for a new trial was overruled, was not void because the publication of some of the advertisements thereof were made while the supersedeas was in force.

(b) The filing of a bill of exceptions to the order overruling the motion for a new trial did not serve to render the sale void, or furnish grounds upon which an injunction should have been granted restraining the sheriff from placing the purchaser at the sheriff's sale in possession of the property sold.

[Ed. Note.—For other cases, see *New Trial, Cent. Dig. § 17*; *Dec. Dig. § 12*; * *Appeal and Error, Dec. Dig. § 480*.*]

3. REFUSAL OF INJUNCTION.

The court committed no error in refusing the injunction.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Mrs. C. A. Ivey against J. O. Payne. From a judgment for defendant, plaintiff brings error. Affirmed.

See, also, 8 Ga. App. 760, 70 S. E. 140.

J. S. James and Scott & Davis, for plaintiff in error. Payne, Little & Jones and M. F. Goldstein, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(138 Ga. 505)

SEABOARD AIR LINE RY. v. RANDOLPH.
(Supreme Court of Georgia. May 11, 1911.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

In the present case, there was sufficient evidence to authorize a finding by the jury of liability for the homicide of plaintiff's husband.

2. APPEAL AND ERROR (§ 854*)—REVIEW—REFUSAL OF NEW TRIAL.

Although the trial judge was of the opinion, as shown by his order, that he was without discretion to grant a new trial, after two concurrent verdicts in favor of the plaintiff, where there was any evidence to support the second verdict, yet, where his order showed that the second verdict failed to receive his approval only because of the amount of the finding, and there was ample evidence to support the jury's finding in regard to the amount the judgment refusing a new trial will not be disturbed by this court; there being, as ruled above, sufficient evi-

dence to authorize the jury's finding against the defendant upon the question of liability.

[Ed. Note.—For other cases, see *Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3430*; *Dec. Dig. § 854*.*]

3. APPEAL AND ERROR (§ 730*)—REVIEW—ASSIGNMENT OF ERROR.

An exception to a correct charge, because of failure to give, in the same connection, some other pertinent legal proposition, is not a good assignment of error.

[Ed. Note.—For other cases, see *Appeal and Error, Cent. Dig. §§ 3013-3016*; *Dec. Dig. § 730*.*]

4. TRIAL (§ 237*)—INSTRUCTIONS.

Failure of the court to instruct the jury as to the meaning of the expression, "a preponderance of the evidence," furnishes no ground for a new trial.

[Ed. Note.—For other cases, see *Trial, Cent. Dig. §§ 542, 548-551*; *Dec. Dig. § 237*.*]

5. APPEAL AND ERROR (§ 730*)—ASSIGNMENTS OF ERROR—INDEFINITENESS.

An assignment of error, complaining that the charge delivered by the court did not correctly state the contentions of the parties, nor the "issues arising under the law thereupon," without specifying what contentions of the parties were omitted, or upon what issues the court failed to charge the jury, is too general to permit of consideration. *Tarver v. Deppen*, 132 Ga. 798, 65 S. E. 177, 24 L. R. A. (N. S.) 1161.

[Ed. Note.—For other cases, see *Appeal and Error, Cent. Dig. §§ 3013-3016*; *Dec. Dig. § 730*.*]

6. TRIAL (§ 339*)—VERDICT—CORRECTION.

The jury returned a verdict in the following form: "We, the jury, find for the plaintiff \$6,200, with interest at 7 per cent. to date." Upon the reading of that verdict in open court, the judge instructed the jury to retire and put the verdict in shape, and "either say from what date the interest is, or you can calculate the interest and compute it in a lump sum." One of the jurors then said to the court that there was a difference of opinion among the jurors about that, whereupon the judge said to the jury, "You can just find that verdict for a lump sum." After retiring as directed by the judge, the jury returned a verdict in favor of the plaintiff for \$9,826.31. *Held*, that the judge did not err in directing the jury to retire to their room and state the amount which they should find for the plaintiff "in a lump sum," nor in receiving the verdict after the jury had retired and put their verdict in shape.

[Ed. Note.—For other cases, see *Trial, Cent. Dig. §§ 791-794*; *Dec. Dig. § 339*.*]

Fish, C. J., and Holden, J., dissenting.

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by H. B. Randolph against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 134 Ga. 352, 67 S. E. 933.

Mrs. H. B. Randolph brought suit against the Seaboard Air Line Railway and the Brunswick & Birmingham Railroad Company, alleging that the defendants had damaged petitioner in a certain sum, by reason of the negligent running of an engine and train of cars, which, in consequence of being operated negligently as set forth in the petition, on the 3d day of February, 1902, struck and

*For other cases see same topic and section NUMBER in *Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes*

killed her husband; that this was in consequence of the defendant's negligence, and the deceased could not have avoided the consequence of such negligence by the exercise of ordinary care; that he was crossing the tracks at a place where he had a right to be, and where the public had a right to be, and the defendants were charged with knowledge of the fact that some one might be upon the track at any time; that after the defendants became aware of the deceased's presence upon the track they negligently failed to stop their engine; that the deceased was killed near a public crossing, and the defendants failed to check and continue to check, and failed to blow and continue to blow on approaching the crossing. The defendant answered, denying all the allegations material to a recovery. Upon the trial the jury returned a verdict in favor of the plaintiff for the sum of \$9,826.31 against the Seaboard Air Line Railway, and the defendant made a motion for a new trial.

Upon the hearing of the motion, the trial judge passed the following order: "Upon hearing and considering the within and foregoing motion it appears to the court that the amount of the verdict is excessive, although there is evidence upon which the amount as found might be based; for this reason the court does not approve the verdict; one new trial having been had in the case, however, and, this being a second verdict, the court understands that he has not the discretion to grant a new trial upon the facts, where there is sufficient evidence to support the verdict; and it is thereupon ordered and adjudged that the motion be denied and a new trial refused." The defendant excepted to the order denying a new trial.

Crovatt & Whitfield, for plaintiff in error.
Burton Smith and D. W. Krauss, for defendant in error.

BECK, J. [1] 1. This is the fifth appearance of this case here, and it is reported in 120 Ga. 969, 48 S. E. 396; 126 Ga. 238, 55 S. E. 47; 129 Ga. 796, 59 S. E. 1110; and 134 Ga. 353, 67 S. E. 933. By the decision in 129 Ga. 796, 59 S. E. 1110, the judgment of the trial court was reversed, on the ground that the court erred in directing a verdict for the defendant, and it was held that the question of the liability of the defendant was one for determination by the jury; and we do not think that the additional evidence adduced on the last trial was such as to remove the question of liability from the province of the jury, which must settle all questions of fact, even in cases where the trial court and the reviewing court might reach an entirely different conclusion from that reached by the jury as to the party in whose favor there was a preponderance of evidence.

[2] 2. Upon the hearing of the motion for a new trial, the judge below passed the or-

der set forth in the statement of facts. We cannot approve of the practice of passing orders of this character; that is, of rendering a judgment denying the defendant's right to a new trial, and at the same time disapproving of a part of the jury's finding in the case. It will be observed that the court below, in the order referred to, does not expressly or impliedly disapprove of the finding of the jury upon the question of the defendant's liability, but does not approve the verdict, on the ground that it appeared that the amount found for the plaintiff was too great. If it had appeared from the order of the court that it refused its approval of the verdict generally, but denied the motion for a new trial on the ground that the court had no discretion, upon a second finding for the same party, where there was sufficient evidence to support it, we might feel constrained in this case to set aside this verdict, although it is a second finding in favor of the plaintiff, and for an amount substantially the same as the amount awarded in the first verdict, allowing interest on that amount to date of last verdict, because a trial court is not without discretion relative to the grant of a new trial after a second verdict in favor of the same party. In dealing with the second verdict, his discretion may not be as ample as is that of a court hearing a motion for a first new trial. But certainly, under the decisions of this court, the first grant of a new trial does not exhaust the discretion of the court relatively to the grant or denial of another trial.

It is said, in the case of *Dethrage v. City of Rome*, 125 Ga. 802, 54 S. E. 654, that, "after the first grant of a new trial, if the matter in controversy be one of fact for the jury, and for a second time in passing upon the same facts the verdict upon the question at issue be concurrent with the first, the mere discretion of the court can play but little part in the second motion for a new trial. It is true that it may sometimes be exercised, but only in cases where it is palpably apparent, from the entire evidence, that the verdict was strongly and decidedly against the weight of the evidence and manifestly wrong." But even here there is no holding that the trial court is entirely divested of his discretion in the matter of granting a second new trial, and the language which we have just quoted should be considered in connection with the cases cited to support the proposition laid down. One of these is *Taylor v. Central Railroad Co.*, 79 Ga. 330, 340, 5 S. E. 114, 119. There it was said:

"From all that has been said and shown, we conclude that the power of the superior courts to grant new trials, being expressly conferred by statute, as well as arising from common-law principles (vide Code, §§ 3711-3718), is not limited by any absolute and invariable rule as to the number of times of its allowable exercise, but that the pre-

sumption of the legality of such grant, generally speaking, weakens upon each additional concurrent verdict; and that a third, or even a second, grant of a rehearing, on the ground of the evidence being decidedly and strongly against the verdict, will be carefully reviewed to see that the discretion to grant it has been justly, wisely, and prudently exercised, letting each case stand as to this question upon its peculiar issues and facts, and allowing due weight to the general considerations of the fitness of juries to find the facts, and of the necessity that there shall be some end to litigation."

Another of the cases cited in the Dethrage Case is that of *Davis v. Chaplin*, 102 Ga. 587, 27 S. E. 726, where it was said: "This court will not reverse a judgment granting a second new trial on the ground that the verdict is contrary to evidence, when it appears from the record that the evidence in support of the verdict was at best weak and unsatisfactory, and the decided preponderance of the testimony was on the side of the losing party." See, also, the case of *Daniels v. Leonard*, 105 Ga. 841, 32 S. E. 122, cited in the Dethrage Case.

But in the case at bar the court below refused the new trial, there having been two concurrent verdicts for the plaintiff; and in one respect only did the judge fail to approve the finding of the jury, and that was in regard to the amount recovered by the plaintiff, which appeared to the court below to be excessive. But, after examination of the evidence contained in the record, we are of the opinion that there was ample evidence to authorize the jury to find the amount which they determined she was entitled to recover. That being true, there is no ground for disturbing the judgment refusing a new trial; for, touching the matter of the amount of the verdict, it cannot be said that it was supported by "weak and unsatisfactory" evidence, or that it was contrary to the weight of the evidence.

3, 4. It is complained that the court erred in charging the jury as follows: "Among other things that you will consider is the place where the accident or killing occurred, with reference to its use or nonuse by the public, and in explanation of the rights of the plaintiff's husband to be where he was at the time he was, and the duty of the railroad company to expect him to be there or not to be there. In that connection you will not consider any of the evidence as to its being a public road, with reference to any duty upon the part of the railroad company to enforce the law as to public road crossings—that is, with reference to the blowing of the whistle and ringing of the bell and checking and keep checking of its speed; but you may consider all the facts and circumstances as to the relative rights of the parties and as to what may be negligence under the particular circumstances of this case."

[3] This charge is excepted to, not as being

an incorrect statement of the law relatively to the question dealt with therein, but because it failed to instruct the jury "as to the law applicable to the place at which the killing is alleged to have occurred, the use or non-use of the locality by the public, and the respective rights with respect thereto of the deceased and the defendant." As has been ruled more than once by this court, failure to charge some other rule or principle of law is not a valid ground of criticism upon a portion of the charge complete and sound in itself. See 1 *Michie's Dig.* 639.

What we have said above is applicable to one of the exceptions to the charge complained of in the sixteenth ground of the motion for a new trial, which is in the following language: "In this case, gentlemen, it is undisputed in the evidence that the railroad company killed the plaintiff's husband. That being true, the law raises the presumption that the railroad company is liable, and you will find a verdict for the plaintiff, unless it appears to your satisfaction by a preponderance of the evidence that the railroad company was not liable."

[4] The other exception to the charge last quoted is upon the ground that the court failed to state to the jury "what is meant by preponderance of the evidence," and this latter exception is without merit; no apt and correct request to charge as to the meaning of the expression "preponderance of evidence" having been made to the court.

5, 6. The rulings made in headnotes 5 and 6 require no elaboration. There were other criticisms upon the charge of the court not specifically noticed in what we have said above; but, after a careful consideration of the portions of the charge criticised and the complaints made, we are satisfied that no errors of sufficient materiality to require the grant of a new trial are pointed out in the assignments of error.

Judgment affirmed.

FISH, C. J., and HOLDEN, J., dissent. ATKINSON, J., disqualified. The other Justices concur.

HOLDEN, J. I cannot concur with the majority of the members of the court in the ruling made in the second headnote. The order of the judge shows that he has not exercised any discretion in passing on the motion for a new trial. He states in the order that, while there is sufficient evidence to support the verdict, he has no discretion to set aside a second verdict in favor of the plaintiff. Though there is evidence to support a second verdict, the court is not for this reason deprived of the right to set the same aside. The evidence in this case would have authorized the court to set the verdict aside. It does not appear that the court has approved the verdict, but the recitals in his order show that the verdict is not approved by him as to the amount thereof.

I am authorized by the Chief Justice to state that he concurs with me in the views above expressed.

(136 Ga. 492)

GEORGIA STEEL CO. et al. v. WHITE.
(Supreme Court of Georgia. June 22, 1911.)

(Syllabus by the Court.)

1. EVIDENCE (§ 378*)—DOCUMENTARY EVIDENCE—AUTHENTICATION.

T. C. White brought a suit to recover of the Georgia Steel Company and the Southern Steel Company on an account for the price of lumber delivered to the Southern Steel Company, and for the foreclosure of a lien on the real estate of the Georgia Steel Company in the improvement of which the lumber was used by the Southern Steel Company (a claim of such lien having been recorded within three months from the time the lumber was so furnished), and for other purposes. It was claimed by White, who was the owner of a sawmill, that a contract was made by him with the Georgia Steel Company to saw lumber from its timber, and that certain lumber was sawed thereunder and delivered to this company, all of which was paid for, and that the lumber thereafter sawed was delivered by him to the Southern Steel Company, who used the same in the improvement of the real estate of the Georgia Steel Company, on the property of which the lien was claimed. The only witness introduced upon the trial of the case was White, who testified that under a letter to him (introduced in evidence), written on the letterhead of the Georgia Iron & Coal Company and signed by "J. Farmer, Supt.," ordering the plaintiff to cut lumber, he sawed from timber on the lands of the Georgia Steel Company 17,000 feet of lumber and delivered it to Farmer, who said he was the superintendent of this company, and afterwards delivered the lumber for the price of which the suit is brought to the Southern Steel Company. He testified that he understood the Southern Steel Company "bought out" the Georgia Steel Company. There was no legal testimony to show any connection between the two companies, and there was no testimony sufficient to require a finding that the Georgia Steel Company authorized a delivery of the lumber to the other company, or ratified such delivery. *Held*, the following letter: "Georgia Iron & Coal Company. Cole City, Georgia, Sept. 5, 1906. Mr. T. C. White, Pisgah, Ala.—Dear Sir: In line with our conversation regarding sawmill and bill of lumber, I am pleased to advise you that I am in position to offer you a bill of lumber of 100,000 feet to begin on. We will no doubt need more lumber than above amount, but the 100,000 feet will justify you putting your mill up here. As a matter of fact, and in line with our agreement, we will expect you to cut and deliver on our railroad this bill, and all other bills, for \$9 per 1,000 feet. Also expect you to begin cutting this bill 15 days from date of this letter. Please acknowledge receipt of this letter, and advise whether or not you will be able to do this. Yours very truly, J. Farmer, Supt."—was inadmissible in behalf of the plaintiff to bind the Georgia Steel Company to pay for any lumber cut in pursuance of such letter; it not appearing that Farmer, whose name was signed thereto, was the superintendent or other agent or officer of the Georgia Steel Company, or that the latter authorized any one to write such letter, or afterwards ratified the same.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1651; Dec. Dig. § 378.*]

2. EVIDENCE (§ 378*)—DOCUMENTARY EVIDENCE—AUTHENTICATION.

It was error to admit in evidence the following letter: "Gadsden, Ala. 3/17/1908. T. C. White, Esq., Trenton, Georgia—Dear Sir: Yours 5th received while I was away from home. I would advise you to hold on to your lumber, ready to sell it to the new company. I don't think it will be long before you will be called on for it. Respy, E. T. Shuler"—it not appearing by any legal evidence that the one whose name was signed thereto was authorized to write such letter by either of the companies, or that he was an agent or officer of either of such companies.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1651; Dec. Dig. § 378.*]

3. EVIDENCE (§ 471*)—OPINION EVIDENCE—ADMISSIBILITY.

It was error to admit, over objection of the defendants, evidence of White "that I supposed J. Farmer was the superintendent of the Georgia Steel Company, or the Southern Steel Company." Such evidence merely expressed the opinion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

4. PRINCIPAL AND AGENT (§ 22*)—EVIDENCE OF AGENCY—AGENT'S DECLARATION.

It was error to admit, over objection of the defendants, testimony of White that J. Farmer had stated to him that he was superintendent of and represented the Georgia Steel Company. Agency cannot be proved by the declarations of the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

5. APPEAL AND ERROR (§ 1078*)—REVIEW—WAIVER OF ERROR IN APPELLATE COURT.

Error was assigned on the order of the court overruling the demurrer of the defendants to the petition of the plaintiff; but no reference to this point was made in the brief of counsel for the plaintiffs in error, and it will be considered as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

6. CONTRACTS (§ 352*)—QUESTION FOR JURY—PARTIES—PRIVITY.

Regardless of whether there was a contract between White and the Georgia Steel Company, as claimed by the former, the evidence was not such as to require a finding that the Georgia Steel Company was liable to pay for the lumber delivered by White to the Southern Steel Company, there being no legal testimony showing what, if any, connection this company had with the other company, nor any testimony requiring a finding that the Georgia Steel Company originally authorized a delivery of the lumber to the other company, or ratified such delivery, and the accounts being made out against the Southern Steel Company by White, who testified that he supposed that it was the company which owed him the account. The court erred in directing a verdict against the Georgia Steel Company for the price of the lumber so delivered.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 352.*]

7. MECHANICS' LIENS (§ 45*)—SERVICES AND MATERIALS FURNISHED.

Where the owner of a mill saws lumber from timber of another under contract with the latter to be paid therefor a named sum per 1,000 feet, and he delivers the lumber to the owner of the land or his agent, and the latter uses it in the improvement of the owner's real estate, the owner of the mill does not occupy the position of a materialman furnishing material

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for the improvement of real estate, and cannot, as such, assert a lien for the amount contracted to be paid for the sawing of the lumber against such property in the improvement of which the lumber is used.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 45.*]

8. MECHANICS' LIENS (§ 132*)—PROCEEDINGS TO PERFECT—FILING CLAIM.

If the proprietor of a sawmill, under Civil Code 1910, § 3356, seeks to assert a lien under section 3354, after surrender of the lumber sawed, he must record his lien within 10 days, as required by the latter section.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190-207; Dec. Dig. § 132.*]

9. MECHANICS' LIENS (§ 281*)—ENFORCEMENT—SUFFICIENCY OF EVIDENCE.

Where facts exist under which the proprietor of a sawmill can have a materialman's lien on real estate for lumber sawed for the owner from timber belonging to the latter and furnished to improve his real estate, no such lien is shown to exist by merely proving that the former furnished the lumber to another, who used it in improving such real estate. *Pittsburg Plate Glass Co. v. Peters Land Co.*, 123 Ga. 723, 51 S. E. 725; *Central of Georgia Ry. Co. v. Shiver*, 125 Ga. 218, 53 S. E. 610. If lumber thus sawn is furnished to a contractor, in a proceeding to foreclose a materialman's lien, a prima facie case is not made out by proving merely the value of the material furnished and that it was used in the improvement of the real estate, in view of the provisions of Civil Code 1910, § 3352, that "in no event shall the aggregate amount of liens set up hereby exceed the contract price of the improvements made." *Stevens v. Georgia Land Co.*, 122 Ga. 317, 50 S. E. 100.

(a) The court erred in directing a verdict fixing a lien on the property of the Georgia Steel Company. The entire verdict and judgment in favor of the defendant in error is directed to be set aside.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by T. C. White against the Georgia Steel Company and another. From a judgment for plaintiff, defendants bring error Reversed.

Chambliss & Chambliss and Payne, Foust & Tatum, for plaintiffs in error. W. P. McClatchey, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

(138 Ga. 448)

JOHNSON v. SAMS.

(Supreme Court of Georgia. June 17, 1911.)

(Syllabus by the Court.)

1. EASEMENTS (§ 61*)—OBSTRUCTIONS—REMOVAL.

The ordinary of McIntosh county has jurisdiction of a proceeding to remove obstructions from an alleged private way existing by prescription over the lands of another within the limits of the town of Darien. Civil Code

1910, § 825; *Duggan v. Cox*, 78 Ga. 158, 1 S. E. 428.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 134-137; Dec. Dig. § 61.*]

2. EASEMENTS (§ 61*)—ACQUISITION OF RIGHT—PRESCRIPTION.

To sustain an application for the removal of obstructions from an alleged private way, the right to which is based upon prescription by seven years' user, it is essential that he show, not only that he has been in the uninterrupted use thereof for seven years or more, that it does not exceed 15 feet in width, and that it is the same 15 feet originally appropriated, but that he had kept it open and in repair during such period. *Collier v. Farr*, 81 Ga. 749, 7 S. E. 860, and cases cited; *Nashville, etc., Ry. Co. v. Coats*, 133 Ga. 820, 66 S. E. 1085.

(a) In the present case there was evidence that the defendant had kept the alleged private way open, and had permitted the applicant for the removal of the obstructions to use it, but there was no evidence tending to show that the applicant had kept it open and made repairs on it; and hence the evidence was insufficient to authorize the ordinary to pass an order requiring the removal of the obstructions. Accordingly the judge of the superior court erred in sustaining, on certiorari, the judgment of the ordinary ordering such removal.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 134-137; Dec. Dig. § 61.*]

Error from Superior Court, McIntosh County; P. E. Seabrook, Judge.

Petition by Lewis Sams against Mary Johnson for removal of obstructions of private road. From an order for such removal, defendant brings error. Reversed.

Wm. De R. Barclay, for plaintiff in error. Chas. M. Tyson, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(136 Ga. 593)

ALDRIDGE v. COLE.

(Supreme Court of Georgia. July 14, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 133*)—PROCEDURE—DORMANCY OF JUDGMENT—ISSUANCE OF EXECUTION.

On the trial of a claim case it appeared that the judgment, upon which the execution issued, was rendered against the defendants in a justice's court of Coffee county, May 4, 1896; the execution was issued on May 10, 1896; an entry of "backing" on the execution was made by a justice of the peace of Appling county July 30, 1896; a judgment was rendered January 20, 1906, establishing a copy of the lost original execution, by the justice of the peace in Coffee county who rendered the original judgment; and an entry on such established copy execution of a levy on land situated in Appling county was made by the sheriff of the last-named county July 11, 1906 (the levy reciting that the defendants were then in possession), to which land the claim was interposed. Held, that the court properly dismissed the levy on the ground of the dormancy of the judgment. Civ. Code 1910, § 4355.

(a) An entry of the execution as follows: "Entered on general execution docket, this October 25, 1900"—signed by the clerk of the superior court of Appling county, did not prevent

the dormancy of the judgment, as Civil Code 1910, § 4356 provides that, "If execution issues from a court having no execution docket, said record [the record of the execution] shall be made upon the execution docket [not the general execution docket] of the superior court of the county where the defendant resides." *Nowell v. Haire*, 116 Ga. 386, 42 S. E. 719; *Smith v. Bearden*, 117 Ga. 822, 45 S. E. 59; *Columbus Fertilizer Co. v. Hanks*, 119 Ga. 950, 47 S. E. 222; *Rountree v. Jones*, 124 Ga. 395, 52 S. E. 325; *Palmer v. Inman*, 126 Ga. 519, 55 S. E. 229.

(b) A levy of the execution made by the sheriff of Appling county on June 2, 1896, prior to the "backing" of the execution by a justice of the peace of that county, entered July 30, 1896, was unauthorized. *Formby v. Shackelford*, 94 Ga. 670, 21 S. E. 711; *Wilcher v. Pool*, 121 Ga. 305, 48 S. E. 956. Therefore neither such levy, nor the pendency of claims filed to the property so levied on, by persons other than the claimants in the present case, prevented the dormancy of the judgment.

(c) Nor was the dormancy of the judgment prevented by a levy of the execution made by the sheriff of Appling county on July 31, 1906, and the pendency of a claim, filed to the property so levied upon, by one other than the claimants in the present case, as this levy was not made within seven years either from the issuance of the execution or the "backing" of the same by the justice of the peace of Appling county.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 413-417; Dec. Dig. § 133.*]

2. ADMISSIBILITY OF EVIDENCE.

It follows that the court did not err in rejecting the evidence tending to show the facts referred to in the subdivisions (a), (b), and (c) of the foregoing headnote.

Error from Superior Court, Appling County; C. B. Conyers, Judge.

Claim case between William Aldridge and L. B. Cole. From a judgment dismissing the levy, Aldridge brings error. Affirmed.

V. E. Padgett, for plaintiff in error. Alvin V. Sellars, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur; LUMPKIN, J., specially.

(136 Ga. 584)

ATHENS MUT. INS. CO. v. EVANS.

(Supreme Court of Georgia. July 13, 1911.)

(Syllabus by the Court.)

1. INSURANCE (§ 643*)—ACTION ON POLICY—PLEADING.

Evans brought suit on a policy of fire insurance, making, among others, substantially the following allegations in the original petition and the amendment thereto: The house insured was erected for him by a firm of contractors, with the understanding they were to have deed to the same to secure the amount due them for building it. This deed, which was made after the policy was issued, was void because the debt to secure which it was given was infected with usury. Pending the suit, Evans assigned the policy to the contractors, and the suit was amended so as to proceed in the name of Evans, for their use. The plaintiff prayed for a recovery of the amount of the policy, and in an amendment prayed for a reformation of it, so that its provisions would conform to an

alleged agreement between Evans and the agent issuing the policy, made when the policy was issued, as to what its provisions should be. The insurer pleaded, among other things, that the policy was void because of the execution of the deed, by reason of certain stipulations in the policy. The jury rendered the following verdict, "We, the jury, find for the plaintiff, principal \$500, interest \$80.69, making a total of \$580.69," upon which a judgment was rendered, providing that the plaintiff recover of the defendant the amounts named in the verdict and costs. *Held*, there was no error in overruling the demurrer.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 643.*]

2. USURY (§ 111*)—ACTIONS—DEFENSES.

The fact that pending the suit the policy was transferred to the contractors to secure the debt to secure which the deed was given, and that the suit proceeded by amendment in the name of Evans, for their use, did not prevent the plaintiff from showing the deed to be void for usury.

[Ed. Note.—For other cases, see *Usury*, Dec. Dig. § 111.*]

3. USURY (§ 117*)—TRANSACTIONS INVALID—SUFFICIENCY OF EVIDENCE.

The testimony of a member of the firm of contractors above referred to was as follows: They agreed to build the house "for the actual costs of materials and labor, with no charge for our services. We delivered the house to Evans December 1, 1906, when he owed us \$698.52 for cost of labor and material" less a credit of \$50. \$8.48 was added as interest from December 1 to December 31, 1906, when Evans gave his note for \$655 and the deed to secure it. "We charged 1 per cent. for December 1st to December 31st. Evans and we agreed that \$655 was the cost of building the house, and was the amount due us. We had no written contract. The verbal agreement was that he was to have us build him a house, and he be allowed to pay for it in monthly installments of \$10. Closed this agreement by taking a note for the whole amount; made no new agreement. I told him he owed \$655, and he agreed to pay it, and gave his note for it. These are the original figures on which the settlement was made December 31st. They show the settlement." There was introduced in evidence an itemized statement of an account for labor and material in favor of the contractors, showing amount due December 1, 1906 (after deducting a credit of \$50, paid October 16, 1906), to be \$648.52, and showing that there was added to this amount \$6.48 as interest for one month, and that the amount due December 31, 1906, was \$655. *Held*, that this testimony was sufficient to authorize the jury to find that the note to secure which the deed was given contained usury, and that the deed was void.

[Ed. Note.—For other cases, see *Usury*, Dec. Dig. § 117.*]

4. INSURANCE (§ 328*)—FORFEITURE OF CONTRACT—CHANGE OF OWNERSHIP—INVALIDITY OF DEED.

Where a policy of fire insurance provides that, "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, * * * if any change, other than by death of an insured, take place in the interest, title, or possession of the subject of the insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured or otherwise," and after the issuance of the policy a deed is made by the insurer to his creditor to secure a debt, without the agreement referred to above being indorsed on or added to the policy, such deed does not vitiate

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the policy, if the deed is void for usury. *Phoenix Ins. Co. v. Asbury*, 102 Ga. 565, 27 S. E. 667.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 802; Dec. Dig. § 328.*]

5. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict.

Error from Superior Court, Taliaferro County; D. W. Meadow, Judge.

Action by O. L. Evans, for use, etc., against the Athens Mutual Insurance Company. From a judgment for plaintiff, defendant brings error. Affirmed.

T. S. Mell, for plaintiff in error. Saml. H. Siple, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 543)

MARSHALL et al. v. PIERCE et al.

(Supreme Court of Georgia, July 12, 1911.)

(Syllabus by the Court.)

1. MORTGAGES (§ 188*)—RIGHTS OF PARTIES—ACTION FOR POSSESSION.

If the grantee in a security deed goes into possession of the land thereby conveyed under no other claim than such a deed, he is in possession simply for the purpose of applying the rents, issues, and profits to the satisfaction of his debt; and, when the net amount received by him from the proceeds of the land is equal to or greater than the amount of his debt, his right of possession ceases, and the grantor, or his legal representative, and, if none, his heirs, may bring an action to recover the land.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 471-475; Dec. Dig. § 188.*]

2. EJECTMENT (§ 127*)—RENTS AND PROFITS—RECOVERY.

In a suit to recover land and cancel the deeds of the defendant as clouds on the plaintiff's title, the plaintiff, if entitled to recover the land, may also recover the rents, issues, and profits while possession of the land was wrongfully withheld by the defendant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 433-443; Dec. Dig. § 127.*]

3. EVIDENCE (§ 471*)—OPINION EVIDENCE—IMPRESSION OF WITNESS.

A witness will be allowed to testify to his "impression" if derived from recollection; but if it be merely his belief founded on hearsay, or his own deduction or inference from the facts, the testimony is incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

4. VENDOR AND PURCHASER (§ 242*)—BONA FIDE PURCHASERS—EVIDENCE.

In an action by the holder of an equity against a purchaser for value from the former's grantee upon proof of purchase and payment, and in the absence of circumstances sufficient to put the purchaser on notice of the plaintiff's equity, the burden is on the plaintiff to show actual or imputable notice of his equity to the purchaser at the time of his purchase. The mere fact that the purchaser took a quitclaim deed is insufficient of itself to negative the purchaser's good faith, so as to cast upon him the burden of establishing the fact that he bought without notice of the plaintiff's equity.

(a) In view of the indefiniteness of the evi-

dence relating to the time and manner of acquiring possession by the grantee of an absolute deed, no ruling is made as to the applicability of section 3258 of the Civil Code (1910), inhibitive of parol proof (except in cases of fraud), to show an absolute deed to be a mortgage as between the parties.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. § 242.*]

Error from Superior Court, Taylor County; S. P. Gilbert, Judge.

Action by E. C. Pierce and others against the executors of T. J. Marshall and others. From a judgment for plaintiffs, the defendants bring error. Reversed.

Hardeman, Jones, Callaway & Johnston, and C. B. Marshall, for plaintiffs in error. Jerre M. Moore, W. E. Steed, and Jos. E. Pottle, for defendants in error.

EVANS, P. J. E. C. Pierce and his nine children brought suit against the executors of T. J. Marshall, Gorman & Huggins and the Middle Georgia Land & Lumber Company to recover a certain tract of land and to cancel certain deeds as a cloud upon their title. On demurrer it was held that the plaintiffs' petition set forth a cause of action. *Pierce v. Middle Georgia Land & Lumber Co.*, 131 Ga. 99, 61 S. E. 1114. In substance, the plaintiffs, suing as heirs at law of Mrs. Pierce, alleged, as a basis of recovery, that Mrs. Pierce, being a married woman, conveyed the premises in dispute to T. J. Marshall; that the consideration of the conveyance was to secure the debt of the grantor's husband; that the debt was infected with usury, and had since been paid; that Marshall conveyed the land by quitclaim deed to Gorman and Huggins, who at the time of their alleged purchase had notice of the facts and circumstances under which Marshall acquired title. Upon the remand of the case for trial certain amendments were submitted, and demurrers filed to the petition as amended. Some of the demurrers were sustained and some were overruled, and the case proceeded to trial, resulting in a verdict for the plaintiffs. The court refused to set aside the verdict on motion, and the defendants excepted.

[1] 1. When the case was considered on demurrer, it was held that the allegations of the original petition respecting the payment of the debts alleged to have been the consideration of the deeds from Mrs. Pierce to Marshall were defective by reason of a failure to allege the time of payment or to give sufficient reasons for the pleader's inability to give the exact dates of payment. An amendment was allowed wherein it was alleged that one J. A. Steed, as the agent of T. J. Marshall, had collected the rents from the land during the years from 1890 to 1903, inclusive, and had paid the same to Marshall during these years as credits upon the debt,

and that the rents so received were sufficient in amount to fully discharge the debt, but that petitioners were unable from lack of information to give the exact dates and amounts of the various payments; that J. A. Steed kept no record of his payments, and petitioners were unable to allege more accurately the time of Marshall's receiving the payments. Though these allegations may not measure up to the requirements of a technical plea of payment, yet they are sufficient as alleging, in connection with other parts of the petition, that the alleged creditor while in possession of the land, through his agent collected the rents for the specific years, which were sufficient to discharge the debt. "If the grantee in a security deed goes into possession of the land thereby conveyed under no other claim than such a deed, he is in possession simply for the purpose of applying the rents, issues, and profits to the satisfaction of his debt; and, when the net amount received by him from the proceeds of the land is equal to or greater than the amount of his debt, his right of possession ceases, and the grantor, or his legal representatives, and, if none, his heirs, may bring an action to recover the land." *Gunter v. Smith*, 113 Ga. 18, 38 S. E. 374.

[2] 2. An amendment to the petition was allowed wherein the plaintiffs alleged that the defendants had cut from the land 700,000 feet of lumber of the value of \$3,500, had gathered and sold turpentine extracted from the trees of the value of \$1,000, and had received \$3,000 from the use of the water power and water privileges on the land; and judgment was prayed for these sums. These allegations were attacked by demurrer, because it was alleged that in the doing of the acts complained of the defendants were trespassers and the subject-matter of the recovery was damages, and an improper standard of measuring damages was averred. We do not deem it necessary to set out in extenso these allegations. Their tenor was to charge the defendants with having received certain issues and profits in the land, and the allegations were germane to the original cause of action, which was to recover the land and cancel the defendants' deeds as clouds on the plaintiffs' title. If the plaintiffs are entitled to recover the land, they are likewise entitled to recover the rents, issues, and profits.

[3] 3. The following evidence was allowed over the defendants' objection: "It [the deed] was given to secure money borrowed. I knew from the conversation that passed there that that deed was given to secure money; that was the object. It wasn't a sale. I wouldn't undertake to say now definitely that Mr. Marshall said this is a security deed, but I knew it was. I knew it from the conversation that passed. I don't recollect what the conversation was, but I knew very well it was a security deed. All I undertake to testify is that the impression left on my mind from what was said was

that it was a security deed. I couldn't undertake to tell the jury anything that Mr. Marshall said, or Mrs. Pierce said, or Mr. Pierce said. I don't know as I can recollect anything that was said about it; but, when I was called in to witness it, I knew it was a security deed. The only way I know it was a security deed is by what I heard, and I can't tell you what I heard, because I don't recollect. * * * I couldn't recollect that Mr. Marshall said that it was a security deed. I don't recollect any conversation hardly that took place at all. I didn't read it." This testimony was offered in support of the allegation that the deed from Mrs. Pierce to Marshall was a deed to secure a debt, and its rejection was moved on the ground that it was but an expression of a conclusion of the witness. A witness who is unable to recollect the exact words of a conversation will be permitted to relate their substance. If in doing so he says that his impression is as he purposes to narrate, the testimony is not necessarily objectionable on the ground that the witness' impression is but an inference from the facts. The rule is that the "impression" of a witness, if derived from recollection, is competent. *Franklin v. City of Macon*, 12 Ga. 257; *Moody v. Davis*, 10 Ga. 403. But if it be merely his belief founded upon hearsay, or his own deduction or inference from the facts, it is incompetent. *Peterson v. State*, 47 Ga. 524. The witness in the present case is the clerk of the superior court, and in his official capacity was called upon to attest the deed from Mrs. Pierce to Mr. Marshall. There was a conversation between the parties in the presence of the witness as to the character of the transaction. The occurrence was many years ago, and the witness candidly confesses his inability to recall the words of the parties. But there is one thing he does remember about the transaction, and that is the deed which Mrs. Pierce executed to Mr. Marshall was given to secure a debt. We think the witness' statement that it was his impression that the transaction was of that character is more a cautious mode of expressing his recollection of what the parties themselves pronounced that transaction to be, rather than his own deduction as to its nature. In *Franklin v. City of Macon*, supra, a bill was filed to restrain the municipality from selling a certain lot of land in the city, which was alleged to have been perpetually set apart and dedicated to the use of the public when the lots in that part of the city were originally surveyed and sold. The plaintiff introduced a witness who stated that he had been several times a member of council, though he could not recall the exact years, that he knew of the lot in dispute, and that "the impression resting on his mind was that it was to remain a perpetual reservation, or such was, as he conceived, the implied understanding at the time of the lease of some of the surrounding

grounds." In holding that the testimony was competent the court said: "Every witness must swear according to the impressions on his mind. They are the materials of his knowledge. It is usually only a more cautious mode of expressing their belief. They mean to state the substance of what they hear and recollect, and not the exact words. The impressions of Mr. Roland were made from the consultations of the council chamber, and we think were sufficiently certain and positive as to be admissible."

[4] 4. The court charged: "Where the defendants rely upon a quitclaim deed as title, the presumption of good faith applicable to a warranty title does not arise, but the presumption is that they knew they were getting only what they actually got; and it is, under such circumstances, incumbent upon the defendants to show by proof that they bought in good faith, believing that they were getting a good title." Did this charge correctly present the rule respecting the burden of proof in a suit by the holders of a prior equity to recover land from a purchaser from their grantee? In such cases the burden is on the purchaser to show that he is a purchaser for value; and when this is made to appear, and no circumstances are developed tending to put him on notice of the plaintiffs' equity, the burden is shifted to the plaintiffs to bring home notice of their equity to the purchaser. *Williams v. Smith*, 128 Ga. 306, 57 S. E. 801. In the instant case the plaintiffs made no charge in their petition that the expressed consideration of the quitclaim deed from Marshall to Gorman and Huggins was an undervaluation of the land. Mr. Gorman testified that he paid \$600 for the land, which was more than its full value, and that he was influenced to pay this amount because of consequential benefits which would accrue to his other property from the ownership of this land. One of the plaintiffs testified that the timber on the land at the time of Gorman and Huggins' purchase was worth between \$800 and \$1,000, but he gave no estimate of the value of the land. The essential point was whether Gorman and Huggins were purchasers without notice. The court in his instruction made that largely turn upon the effect of taking a quitclaim deed. While the jury were instructed that the taking of a quitclaim title did not necessarily negative good faith, they were also instructed that it put the burden upon the defendants to sustain their contention that they purchased in good faith without notice of the plaintiffs' equity. We think this was stating the rule too strongly against the defendants. It has been held that the receipt of a quitclaim deed does not of itself prevent the party from becoming a bona fide purchaser. *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350. And that a quitclaim does not of itself negative the pre-

sumption of good faith in one who holds under it. *Hammond v. Crosby*, 68 Ga. 767. An instruction to the effect that the taking of a quitclaim deed put the burden upon the defendant to prove that he is ignorant of the plaintiff's equity reverses the rule. The Code declares that a bona fide purchaser for value and without notice of an equity will not be interfered with by a court of equity. Civil Code (1910) § 4531. The plaintiffs are in a court of equity, asserting that though the apparent legal title is in Gorman and Huggins, yet at the time they acquired such title they had notice of their equity. The mere fact of taking a quitclaim title was not sufficient to change the rule respecting the burden of proof, and the court's contrary instruction was harmful error to the plaintiff.

The deed from Mrs. Pierce to Mr. Marshall was absolute in form. The evidence does not show with clearness how Mr. Marshall got possession of the land or the time when he entered into possession. Hence, we do not feel called upon in the present state of the record to decide the applicability of Civil Code (1910) § 3258, providing that a deed absolute on its face and accompanied by possession shall not be proved at the instance of the parties by parol evidence to be a mortgage only, unless fraud in its procurement is the issue to be tried.

Judgment reversed. All the Justices concur.

(136 Ga. 558)

MOORE v. STATE.

(Supreme Court of Georgia. July 12, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 922*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESS.

Upon the trial of one charged with murder, the court charged the jury, regarding the testimony of a witness who testified for the state, as follows: "If you believe, previously to this trial, Strickland did go before the grand jury of this county, made sworn statements before them as to matters relevant to this issue, contradicting himself as to such matters even before that body, first swearing before them he knew nothing at all about this transaction, afterwards telling them that he did, then comes before you and swears to matters relevant to the issue in this case, in contradiction of some parts, or all, of the relevant matters he swore to before that body concerning this transaction, and you believe that whatever he said before that body was voluntarily, knowingly, and willfully said by him, then you should disregard his testimony in your investigation of this case. On the other hand, if you believe, although he may have sworn differently before that body to what he has in the trial of this case as to such relevant matters, contradicted himself in that way, he was influenced to make such statements before that body through fear either that his life might be taken or bodily harm might come to him, and that was the cause of his statements or testimony before that body, then I charge you, gentlemen, if you find his testimony, as delivered in this case, is corroborated by other competent and credible evidence, or is corroborated by the proven circumstances, in this case,

you would still consider it in arriving at your verdict in this case." *Held*, that this charge was not error requiring a new trial for any reason assigned by movant, in view of the entire charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.*]

2. MOTION FOR NEW TRIAL—AMENDMENT—GROUNDS.

There is no merit in the ground of the amendment to the motion for a new trial that the court "failed to leave to the jury the question of veracity of the witness Strickland [the witness referred to in the preceding note], under proper, full, legal charge on that subject."

3. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict.

Error from Superior Court, Chattooga County; J. W. Maddox, Judge.

Hiram Moore was convicted of murder, and brings error. Affirmed.

C. D. Rivers and F. W. Copeland, for plaintiff in error. Jno. W. Bale, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 550)

ALLEN v. CLARE et al.

(Supreme Court of Georgia. July 12, 1911.)

(Syllabus by the Court.)

EXECUTION (§§ 194, 196*)—CLAIM BY THIRD PERSON—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE—DIRECTION OF VERDICT.

Where a claim was interposed to property levied on under an execution issued upon a judgment for costs rendered against the plaintiffs upon the dismissal of their petition, it was, in order to change the burden of proof from the plaintiffs in *fi. fa.* to the claimant, incumbent upon the former to show title in the defendant, or that subsequently to the rendition of the judgment he was in possession of the property. *Thompson v. American Mortgage Co.*, 107 Ga. 832, 33 S. E. 659.

(a) Accordingly, where upon the trial of a claim interposed by C. C. Allen to land levied upon under such an execution as the property of Lewis J. Allen, one of the defendants, the plaintiffs introduced in evidence a certified copy of a deed executed by him subsequently to the rendition of the judgment conveying the land to the claimant, such copies being admitted because of the failure of the claimant to produce the originals upon notice and order of the court to do so, it was error for the court to direct a verdict finding the land subject; it not appearing that the defendant had ever at any time been in possession of the same. *McConnell v. Rhodes*, 14 Ga. 313; *Wimberly v. Collier*, 50 Ga. 144; *Knowles v. Jourdan*, 61 Ga. 300.

(b) The ruling of the court cannot be sustained by reason of the fact that, when the copy of the deed from the defendant to the claimant was offered in evidence by counsel for the plaintiffs in *fi. fa.*, the judge inquired of him "if that was the deed under which the claimant claims," and the plaintiffs' counsel replied, "Yes, sir; that bears date of September 21, 1908, subsequent to the date of the *fi. fa.*"

[Ed. Note.—For other cases, see Execution, Dec. Dig. §§ 194, 196.*]

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Claim by C. C. Allen to property levied on under execution in favor of Sidney Clare and others as the property of Lewis J. Allen. From a judgment holding the land subject to the execution, claimant brings error. Reversed.

Haygood & Cutts, for plaintiff in error. L. Kennedy, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(136 Ga. 520)

PHINIZY et al. v. WALLACE et al.

(Supreme Court of Georgia. June 23, 1911.)

(Syllabus by the Court.)

1. WILLS (§ 801*)—CONSTRUCTION—ESTATE CONVEYED.

A testator, after providing for the payment of his debts, made certain special bequests. He then made the following provision as to the residue: "Now, all the rest and residue of my estate, including the principal of the legacy left to Miss Mary Richardson for her life, I give and bequeath and devise to the following nieces: Annie Martin Phinizy, daughter of Leonard Phinizy of Augusta; Eliza Pickens Phinizy, daughter of Stewart Phinizy of Augusta; Susan Welborn Calhoun, daughter of Dr. A. W. Calhoun of Atlanta; and Annie Barrett Phinizy, daughter of Billups Phinizy of Athens, share and share alike and I appoint Leonard Phinizy the trustee of his daughter Annie Martin Phinizy; Stewart Phinizy the trustee of his daughter Eliza Pickens Phinizy; Dr. A. W. Calhoun the trustee of his daughter Susan Welborn Calhoun; and Billups Phinizy the trustee of his daughter Annie Barrett Phinizy. Should any of these named trustees refuse to act, he is empowered to name his successor from among the other trustees. Should all refuse to serve, then I appoint my brother, Jacob Phinizy, as the sole representative of the trust, he to serve without being responsible to any of the beneficiaries for his management of the trust. Should any of the legatees or beneficiaries be deceased at the time of the decease of this testator, then her share is to go to her father, if he is living, or, if he is dead, to go to his children in the same manner as provided for in his will, or, if he died without will, in the manner the law directs. I direct the trustee of each beneficiary to invest the amount said beneficiary receives under the provisions of this will for the sole benefit of the beneficiary, the interest said amount brings annually to be added to the principal; this plan to be followed until said beneficiary attains the age of nineteen (19) years, when said trustee shall turn over to the beneficiary the entire income from said trust, she to do with the same as she thinks proper and best. When each beneficiary attains the age of nineteen (19) years, said trustee shall settle the full principal upon her and her children, male and female. Should any of the beneficiaries die before reaching the age of nineteen (19) years, then her share together with the accumulated interest shall go as provided for in the case of a beneficiary being deceased at the death of this testator. If, after the marriage of any of the beneficiaries, a child is born and survives its mother, and then also dies leaving no issue, the share it obtained from its mother shall revert to the living brothers and sisters of the mother, or, in case of the death

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the mothers, brothers and sisters, to their natural heirs. Should any of the beneficiaries after marriage die without issue, then her share to go in the manner provided for a beneficiary dying before attaining the age of nineteen (19) years." At the time of the testator's death the four nieces named were young girls. All of them lived to be of age. One of them married and had a child born to her. They filed an equitable petition, alleging that they took in fee simple the property covered by the residuary clause, and seeking to have a partition by sale and division of the proceeds. *Held* that, under the common law as modified by the statutes of this state, the four nieces of the testator, under the item of the will above quoted, did not take a fee-simple estate, but each took a beneficial interest covering the entire fee in one share, subject to be reduced to a life estate with remainder over to her children, if she should marry and have a child or children, and subject to certain other limitations over, by way of executory devises, upon the happening of other contingencies specified.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340-1350, 1608; Dec. Dig. § 601.*]

2. PERPETUITIES (§ 4*)—FUTURE ESTATES.

Relatively to the rule against perpetuities, as it is declared in the Civil Code of 1910, § 3678, the limitation over, after the death of each niece, in favor of her child or children, was valid.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

3. PERPETUITIES (§ 4*)—FUTURE ESTATES.

The limitation over in favor of the brothers and sisters of each niece, should she have a child and it should survive her and then die without issue, is invalid, because the condition may not happen, if at all, within the time limited by the rule.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

4. PERPETUITIES (§ 4*)—FUTURE ESTATES.

The limitation over in favor of the father of a niece, if she should marry and die without issue (treating "issue" as meaning issue at the time of her death, in accordance with the statute of this state), is valid.

[Ed. Note.—For other cases, see Perpetuities, Dec. Dig. § 4.*]

5. PERPETUITIES (§ 4*)—FUTURE ESTATES.

The limitation over in favor of brothers and sisters of a niece, in the event the niece should survive her father, is valid, as the persons who should take would be determined at the time of the death of the niece.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

6. WILLS (§ 684*)—TRUSTS—DISTRIBUTION OF ESTATE.

It was error for the presiding judge to decree that the four nieces of the testator took a fee-simple estate, and that the property should be sold by commissioners, and the proceeds be divided among them. He should have required a reinvestment of each share in accordance with the valid provisions of the fifth item of the will of the testator.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 684.*]

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action by A. P. Wallace and others against Billups Phinzy and others. From a decree for plaintiffs, defendants bring error. Reversed.

Harry H. Phinzy died testate on May 1, 1890. The first four items of his will, after providing for the payment of debts, made certain specific legacies. The fifth item was as set out in the first headnote. The four nieces of the testator survived him and became of age. Two of them married, and one of them had a child born to her. The fathers, who were named as trustees, were in life. There were also brothers and sisters of the nieces. The four nieces filed an equitable petition, claiming that they were joint tenants with fee-simple interests, and praying for a sale of the property and a distribution of the proceeds among them. The fathers of the plaintiffs were made defendants, individually and as trustees. By interventions various persons were made parties, alleging that they were the brothers and sisters of the plaintiffs, and the only child of one of them. The minors appeared by guardians ad litem. The case was submitted to the presiding judge without a jury. He held that the nieces were owners of the property in fee simple, and directed a sale and division of the proceeds among them. The other parties excepted.

Leonard Phinzy, Max Michael, Carlisle Cobb, King & Spalding, and E. Marvin Underwood, for plaintiffs in error. Cobb & Erwin and J. L. Hopkins & Sons, for defendants in error.

LUMPKIN, J. (after stating the facts as above). We have rarely seen so many perplexing provisions crowded into a single item of a will. We have found no will sufficiently like it to derive much aid from authorities in its construction. After certain special bequests had been made in other items, the fifth item dealt with the residue of the testator's property. Its provisions, in the order in which they occur, may be thus summarized: (1) A devise and bequest to four named nieces of the testator, daughters of his three brothers and a sister, share and share alike. (2) The appointment of the father of each niece as her trustee. (3) A provision in case any or all of the trustees should refuse to act. (4) If any niece should die before the testator, her share should go to her father, if living; or, if he should be dead, "to go to his children in the same manner as provided for in his will, or, if he died without will, in the manner the law directs." (5) A direction to the trustee of each beneficiary to invest the amount the "beneficiary receives" under the provisions of the will "for the sole benefit of the beneficiary"; that the interest should be added to the principal annually, and this plan should be followed until the beneficiary should reach the age of 19 years, when the trustee should turn over to her the entire income from the trust. (6) "When each beneficiary attains

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the age of nineteen (19) years, said trustee shall settle the full principal upon her and her children, male and female." (7) If any beneficiary should die before reaching the age of 19 years, then her share, together with the accumulated interest, should go as provided in case of her death before the testator. (8) "If after the marriage of any of these beneficiaries, a child is born and survives its mother, and then also dies leaving no issue, then the share it obtained from its mother shall revert to the living brothers and sisters of the mother, or in case of the death of the mothers, brothers and sisters, to their natural heirs." (9) "Should any of the beneficiaries after marriage die without issue, then her share is to go in the manner provided for a beneficiary dying before attaining the age of nineteen (19) years," which was the same as the provision if she should die before the testator. The presiding judge held that the nieces took a fee-simple estate.

It does not appear on what grounds he based his decision. Most probably it rested on one or more of the following grounds: (1) That all words of survivorship and limitation over in the will were to be referred to the time of the testator's death or the time when each niece became 19 years of age, and that as all of the nieces survived the testator and became 19 years of age without being married, these provisions were at an end and a fee-simple estate vested in the nieces. (2) That the testator attempted to create an estate tail in each of his nieces, and, under our Code, a fee-simple estate resulted. (3) That the children of the nieces being thus eliminated, the other limitations over were violative of the rule against perpetuities, and could be disregarded.

[1] 1. The first ground suggested which was urged by counsel for defendants in error would furnish an easy solution, if we could adopt it. But we are unable to do so. It is undoubtedly the rule declared by our Code, that, "in construing wills, words of survivorship shall refer to the death of the testator in order to vest remainders, unless a manifest intention to the contrary appears." Civil Code 1910, § 3680. The trouble in this case is that we think a manifest intent to the contrary appears. The testator expressly provided for the devolution of the estate, if a niece should die before he did. If the other provisions as to the death of a niece, with or without issue, should be held to provide for such death before that of the testator, they would be mere surplusage. Nor can it be declared that the testator limited all such provisions to the occurrence of the death of a niece before reaching the age of 19. In one instance, he distinctly provided for that contingency. In another he provided for a case where a niece should die leaving a child, and that child should also die "leaving no issue." He could hardly have contemplated that such possibilities would all be solved before the niece reached 19 years of age.

Did the testator intend to create an estate tail in each of his nieces, so that, under our Code, a fee-simple estate in them resulted? Civil Code 1910, § 3661. Whom did the testator have in mind as objects of his bounty, as indicated by mentioning them in this item of the will? First, his four nieces; second, the children of his four nieces; third, the fathers of his four nieces; and, fourth, the brothers and sisters of such nieces. It is evident that he contemplated the children of nieces as persons who might take some character of interest. Shall it be held that the interest which he thus sought to confer was an entailment, and therefore illegal, under the law of this state?

If the clause which provided that when each beneficiary should attain the age of 19 years the trustee should settle the full principal "upon her and her children, male and female," stood alone, and were treated as a gift to the niece and her children, she having no children either at the time when the testator died, or upon the arrival at the age of 19 years, under the common law an estate tail would doubtless have been created. This would have been enlarged by our statute into a fee-simple estate. *Wiley, Parish & Co. v. Smith*, 3 Ga. 551. But this clause does not stand alone. If it created a fee-simple estate in the nieces, it was nevertheless followed by limitations over upon certain contingencies. If those contingencies were such as would, at common law, have created an estate tail by implication, then by section 3661 of the Code of 1910 it is declared that "Limitations which, by the English rules of construction, would create an estate tail by implication in this state shall give a life estate to the first taker, with remainder over in fee to his children and their descendants, as above provided; and if none are living at the time of his death, remainder over in fee to the beneficiaries intended by the maker of the instrument." If the will does not exhibit an intention to create a life estate, with remainder over, and the limitations over are not such as would have created an estate tail by implication at common law, nevertheless a base fee would result from later provisions, unless they can be rejected as invalid. The various clauses of this item should be construed together. If there should be an unavoidable inconsistency between a prior and a later clause, the last expression of the testator's will would control.

While there were some expressions in the opinion in *Burton v. Black*, 30 Ga. 638, which went beyond the necessities of the case decided, it is now the well-settled rule of construction in this court that, unless there be something to indicate a contrary intent on the part of the testator, a devise or bequest to a named person, followed by a provision that if he should die childless the property shall pass to some other person, conveys to him a fee, subject to be divested upon his

dying childless, and does not of itself confer upon any child which he may have any interest or estate in remainder. *Hill v. Terrell*, 123 Ga. 49, 51 S. E. 81. The testator, however, may indicate a contrary intent; and if there are words in the will, in addition to the mere devise to one with limitation over upon condition of dying without children or issue surviving him, showing a different intention, such intention will be given effect. We must look to the will to see whether there are such words. The devise or bequest is not directly to each niece and her children upon the death of the testator or upon her arrival at nineteen years of age. The testator directed that the trustee of each niece, upon her reaching that age, should settle "the full principal upon her and her children, male and female." This expression indicated that the testator had in mind her children as objects of his bounty. He could hardly have anticipated that all four of his nieces (then little girls) would have children, male and female, before reaching the age of 19. The settlement which he intended must have been an entailment, or a settlement upon her, with remainder or devise over to her children, should she marry and have a child or children (not mentioning for the present the other limitations). A settlement of the latter character would not, under the circumstances, appear to do violence to the testator's intent. In 25 Am. & Eng. Enc. Law (2d Ed.) 628, it is said: "In conveyancing, settlement is the limitation of real or personal property or the enjoyment thereof to several persons in succession, prescribing the mode of holding, enjoying, and disposing of it." In *Micklethwait v. Micklethwait*, 4 C. B. (N. S.) 858, it is said that "the meaning of a 'settled' estate, whether in legal or popular language, as contradistinguished from an estate in fee simple, is understood to be one in which the powers of alienation, of devising, and of transmission, according to the ordinary rules of descent, are restrained by the limitations of the settlement; it would be a perversion of language to apply the term 'settled' to an estate taken out of settlement, and brought back to the condition of a fee simple." See, also, *Bouv. Law Dict.* "Settlement, Deed of."

Estates tail are prohibited and abolished in this state. Gifts or grants to one and his children, he having no children when the estate vests, convey an absolute fee. But "estates tail being illegal, the law will never presume or imply such an estate." *Civil Code* 1910, § 3661. Again, in declaring a limitation over if a niece should marry and die leaving a child surviving, and such child should then also die, leaving no issue, it was by the will directed that "the share it obtained from its mother shall revert," etc. Thus we have on the part of the testator a direction that the trustee shall settle the property upon the niece and her children, and a reference to a share which a child of a

niece will obtain from its mother. While it must be conceded that the will is not free from doubt, in view of the rules of construction laid down by our Code (which modify the common law and make a material change in the rule in *Shelley's Case*), it should be held that the intention of the testator was to direct a settlement which he could lawfully make, rather than to create a fee tail, which he could not lawfully do. A fee may be limited upon a fee in this state. *Civil Code* 1910, § 3658. The care with which the testator made provisions to cover various possibilities renders highly improbable the idea that he intended an incomplete scheme of disposition and the creation of an intestacy as to the share devised and bequeathed to any one of his nieces, should she survive him and live to be more than 19 years of age, but die without marrying, no express provision being made for such a case. It is much more probable that he intended to give to each niece one share in fee, but subject to be reduced or divested on certain contingencies. In the light of the entire fifth item of the will, we think the proper construction to be put upon it is that each of his four nieces took a beneficial interest amounting to the entire fee in one share, but subject to be reduced to a life estate, with remainder over to the child or children of such niece, if she should marry and have such child or children; and with limitations over to others, by way of executory devises upon the contingencies set forth.

In *Holt v. Bowman*, 33 Ga. Supp. 129, a testator by one item of his will devised and bequeathed to his daughter certain negroes and a half interest in certain land, and then proceeded: "All of which said property herein given I will and direct to be vested and given in proper and legal manner to my said daughter, and to her children, free from the debts or disposition of her present or any future husband." By another item the testator directed that certain other property should be given to his daughters, of which the legatee under the previous item was one, and then added: "The shares coming to my several daughters and their children to be secured to them in legal manner and form, as heretofore directed and specified in this will." The daughter then had three children. It was held that the daughter named took an estate for life in the property bequeathed to her, with remainder to her children born or to be born. In the opinion it was said: "What does the testator mean when he wills and directs the property to be given in proper and legal form to his daughter Julia, and to her children, free from the debts or disposition of her present and any future husband? And then again, the shares coming to my daughters and their children to be secured to them in legal manner and form as heretofore directed and specified in this will? He means what the words plainly indicate—not that the daugh-

ter and children should take as joint tenants; such a disposition requires no such terms. He intended a 'settlement,' which word of itself imports the settlement of the property upon the mother for life, remainder to her children, born or to be born."

[2-5] 2-5. Having determined what was the character of the estates created, the next question which presents itself is whether any of the limitations over are invalid as violating the rule against perpetuities. "Limitations of estates may extend through any number of lives in being at the time when the limitations commence, and 21 years, and the usual period of gestation, added thereafter. A limitation beyond that period the law terms a perpetuity, and forbids its creation. When an attempt is made to create a perpetuity, the law gives effect to the limitations not too remote, declaring the others void, and thereby vests the fee in the last taker under the legal limitations." Civil Code 1910, § 3678. In Gray's Rule against Perpetuities, § 201, it is said that "No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest."

Let us apply this test, as modified by our Code, to the limitations over provided by the item of the will under consideration. The provisions in case of the death of a niece before that of the testator, or before arriving at the age of 19, may be omitted from consideration, except in so far as they are embodied by reference in other provisions, because none of the nieces died before the testator or before reaching nineteen years of age. The limitations over after the death of each niece were as follows: (1) In favor of her child or children. (2) In favor of her brothers and sisters, if after being married and having a child born such child should survive her but die without issue. (3) In favor of the father of the niece, if she should marry and die without issue, if the father should be living. (4) In favor of the children of the father if she should marry and die without issue, and the father should be dead when the niece dies. As to this contingency it was declared that the shares should go to the children of the niece's father in the same manner as provided for in his will, or if he should die without a will, in the manner the law directs.

Relatively to the rule against perpetuities, the limitation over to children of nieces is of course good. The limitations over in favor of the brothers and sisters, should a niece have a child and it should survive her and die without issue, is bad. This deals with a child not in being when the will took effect by the death of the testator, and which might never be born, or if born, might not die within 21 years. So that the limitation over to the brothers and sisters might not be determinable within the time limited by

the rule. The limitation over in favor of the father of a niece, if she should marry and die without issue (treating issue used in this connection as meaning issue at the time of her death, as provided in Civil Code 1910, § 3662), is valid. The limitation in favor of children of the father, in the event the niece should survive her father, and die without issue, is valid, because the person to take would be determined upon the death of the niece. The power in the niece's father by will to discriminate among such children, if he should die before she did, was one which essentially had to be exercised before his own death, and hence before the death of the niece. If he did not exercise it, the law would determine the distribution.

[§] 6. There is no exception to that part of the decree directing a sale to be made, but the plaintiffs in error contend that the proceeds should be reinvested upon the terms and limitations contained in the fifth item of the will. This collaterally involves the power to make a sale and reinvestment. In regard to the ability to render a valid decree of sale binding upon parties who may not now be in existence, there is some difficulty of determination. But the general trend of modern authority is not favorable to tying up property and preventing sales, especially where necessary for the protection and preservation of the corpus, if they can be legitimately made. Here it appears to be conceded that on account of the character of the property, the expensiveness of keeping in repair a brick building on a portion of it, the necessity for further heavy expenses in the near future, and its indivisible character, it is for the advantage of all parties that it should be sold. The fifth item of the will, in the first part thereof, stated that the testator gave, bequeathed, and devised the residue of his property to his four nieces, naming them, and appointed the father of each niece as her trustee. Later it directed each trustee, as the niece should become of age, to settle the full principal upon her and her children. This power included something more than merely acting as trustee for the niece for life. A settlement generally involves a conveyance of the property. So that the testator evidently contemplated that the trustees should have an added authority beyond that of simply acting as trustees of life tenants. The testator evidently intended a division of the property so that each share should be held in severalty, and that the settlement directed should be made as to each share separately by the respective trustees. It was not his intention that the four nieces or the trustees should be bound together permanently as tenants in common. The estate was not divided, nor was the settlement made when the nieces arrived at the age of nineteen, as directed by the testator. The executors made a deed to the four trustees, and the shares have remained in common. In order to carry out the direction of the testator, it is

necessary to have a division. Owing to the character of the property, partition cannot be made in kind. A sale is necessary. To hold that no sale can be made would, in effect be to prevent the testamentary scheme from being fully carried into effect. Under the facts, equity has jurisdiction, and may give a complete remedy. It was alleged that there were before the court, as plaintiffs or defendants, or by intervention, the nieces, their fathers individually and as trustees, the only child of one of the nieces who had married, and the brothers and sisters of the nieces. Under the terms of the will and with all these parties in interest before the court, we think that a valid decree of sale can be made, although it may be possible for other children, or brothers and sisters of nieces, to be born. We deem it unnecessary to enter into a discussion as to when unborn persons may be bound by a decree for the sale of property generally. It is sufficient to deal with the present case on its facts. Those who may desire to pursue the general subject will find interesting discussions of it in the following cases: *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 331, 32 Am. St. Rep. 693; *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776; *Bofl v. Fisher*, 3 Rich. Eq. (S. C.) 1, 55 Am. Dec. 627; *Faulkner v. Davis*, 18 Grat. (Va.) 551, 98 Am. Dec. 698; *Richards v. East Tenn., Va. & Ga. Ry. Co.*, 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712; *Brown v. Brown*, 97 Ga. 531, 25 S. E. 353, 33 L. R. A. 816.

From the above discussion it will be seen that in our opinion the presiding judge erred in decreeing that, upon a sale by the commissioners appointed by him, the proceeds (after paying costs and expenses) should be divided among the nieces, who should take as owners in fee simple. He should have required a reinvestment of each share of the proceeds in accordance with the valid provisions of the will of the testator as above set forth.

Judgment reversed. All the Justices concur.

(136 Ga. 537)

HALL et al. v. EDWARDS.

(Supreme Court of Georgia. July 11, 1911.)

(Syllabus by the Court.)

1. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

The suit was to recover a tract of land which the plaintiff alleged had been conveyed to her by the mother of the defendants. The defendants admitted the conveyance from their mother to the plaintiff, but pleaded that their mother was non compos mentis at the time of making it, and that the plaintiff, in recognition of the mental incapacity of their mother to make a deed, had reconveyed the land to her, and further pleaded that one of the defendants

took possession of the land upon the death of his mother as her administrator, and that the other defendant was in possession as tenant of the administrator. Without objection the administrator testified that his mother had made a parol gift to him of 50 acres of land, part of which was included in the premises in dispute, and that he had cultivated some of it for 80 years; but he gave no definition of the boundaries of the land claimed to be included in the alleged gift or of that part included in the premises in dispute. Held, that inasmuch as the evidence was wholly insufficient to establish a parol gift, and the alleged donee claimed the land in his pleadings as administrator of the alleged donor, it was not erroneous for the court to omit an instruction presenting the law relative to a parol gift of land by a parent to a child. *Cordele Sash, Door & Lumber Co. v. Wilson*, 129 Ga. 290, 58 S. E. 860.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict, and no error of law appears.

Error from Superior Court, Applying County; C. B. Conyers, Judge.

Action by Corina Edwards against P. H. Hall, administrator, and another. From a judgment for plaintiff, defendants bring error. Affirmed.

W. W. Bennett, for plaintiffs in error.
Parker & Highsmith and J. B. Moore, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(136 Ga. 496)

WHEELER et al. v. HORNE.

(Supreme Court of Georgia. June 22, 1911.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 314*)
—ACTION—RIGHT OF ACTION—ACCOUNTING.

Florence Horne filed a petition against the administrators of Charles Wheeler, deceased, making, among others, substantially the following allegations: Wheeler died intestate, owning an estate of a named value, an inventory and appraisal of which was attached and made a part of the petition. The defendants became administrators of the estate more than a year ago, and took possession of the estate and converted it into cash, but have never made any returns, and the plaintiff is unable to state the exact amount of cash of the estate which the defendants have or should have. Plaintiff is the sole heir of the deceased and entitled to his entire estate. Plaintiff was the only issue of the marriage of her father and mother. Her father and mother were married in 1861. Her mother died in 1882. Her father obtained in 1860 a decree of divorce from her mother, but the same was void (for specified reasons). After this decree was granted, there were born to her father, as a result of two later marriages contracted while the mother of plaintiff was in life, certain children, who are not his lawful heirs, because the decree for divorce was void. If the plaintiff is not the sole heir of her father, she is one of his heirs, and entitled to a share of his estate. Defendants deny that the plaintiff is entitled to a share in the estate. The plaintiff prayed that she "be declared by the decree of this court to be the child and heir at law of said Charles

Wheeler, deceased," and for an accounting. The defendants filed an answer, wherein, among other things, it was alleged that the plaintiff was not the legitimate child of Charles Wheeler, and not entitled to any interest in his estate; that the estate had been partially converted into cash and distributed but that the timber on about 200 acres of land and all the notes and accounts due the estate had not been converted into cash. Upon the trial the following verdict was rendered: "We, the jury, find that plaintiff, Mrs. Florence Horne, is a child of Charles Wheeler, and entitled to an equal share of the Charles Wheeler estate." *Held*, that an heir at law may bring an action in the superior court for her distributive share of an estate against the administrator thereof, and pray for an accounting and settlement, at any time after the expiration of one year from the time of his qualification. If there are debts due by the estate, the administrator can plead and prove them, and thus protect himself and creditors of the estate. *Williams v. Lancaster*, 113 Ga. 1020, 39 S. E. 471.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*]

2. PARTIES (§ 53*)—BRINGING IN NEW PARTIES—PROCEDURE.

Plaintiff filed a written motion, stating that in the suit she was setting up an adverse claim against a named person (the reputed widow of Charles Wheeler) and other named persons (reputed children of Charles Wheeler), who claimed an interest and share in his estate, and prayed that they be made parties defendant to the case. On September 17, 1908, the court passed an order requiring that the persons referred to show cause on September 25, 1908, "why they should not be made parties defendant to the case stated at the head of the foregoing petition, and that said parties be each served by the sheriff of their respective counties with copies of the foregoing petition and this order." On September 21, 1909, the court passed an order reciting that the persons above referred to had been duly served "with rules returnable before me on September 25, 1908, calling on them to show cause why they should not be made parties defendant in the above-stated case, and no cause having been shown by them, or any of them, why they should not be made parties defendant to said case, it is ordered that all of the above-named parties are hereby made parties defendant to the said case." *Held*, that there is no merit in the contention of the administrators that the reputed widow and reputed children of the deceased were not properly made parties defendant in the case, on the ground that they were not served with a copy of the proceedings therein.

(a) In order to make new parties defendant to a pending proceeding, it is not necessary to serve them with a copy of the proceedings in the case prior to the time they are made parties; it only being necessary to serve them with a copy of the order of the court requiring them to show cause why they should not be made parties. *Berryman v. Haden*, 112 Ga. 752, 38 S. E. 53.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 53.*]

3. JUDGMENT (§ 248*)—ON TRIAL OF ISSUES—CONFORMITY TO PLEADING AND VERDICT.

A decree was rendered, providing, among other things, that the plaintiff was declared to be a child of the intestate and entitled to an equal share with the other heirs of his estate, that the case be kept open for the purpose of determining the number of heirs and the amount to which the plaintiff was entitled, and to give the administrators time to reduce the remaining assets of the estate to cash, that the administrators advance to the plaintiff an

amount equal to advances made by them to the other children of the intestate and charge the same to her distributive share, that they proceed at once to reduce the outstanding estate to cash and account to and pay over to the plaintiff a child's part of the estate, that they file to the next term of the court a report showing the true condition of the estate, and that the case be kept open for a full and proper accounting by the administrators to the plaintiff as to her share in the estate. *Held*, that the granting of this decree was not error "because the same is not warranted by the pleading or the verdict in said case, and leaves said case still open for further trial after a full and final trial on all the issues involved in the pleadings in said case."

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 248.*]

4. EXECUTORS AND ADMINISTRATORS (§ 314*)—ACTION—PLEADING—INSTRUCTIONS—EVIDENCE.

No error requiring a new trial appears in overruling the demurrers, or in any of the rulings on the admission or rejection of evidence, or in the charges of the court of which complaint is made. The evidence was amply sufficient to support the verdict, and the court committed no error in refusing a new trial.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*]

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Action by Florence Horne against J. S. Wheeler and others, administrators of Charles Wheeler. From a judgment for plaintiff, defendants bring error. Affirmed.

Daley & Daley, for plaintiffs in error. J. L. Kent, Hines & Jordan, and J. J. Forehand, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(126 Ga. 592)

ATLANTA HOME INS. CO. v. SMITH et al. (Supreme Court of Georgia. June 19, 1911.)

(Syllabus by the Court.)

INSURANCE (§ 378*)—ESTOPPEL TO AVOID POLICY—KNOWLEDGE OF AGENT.

The defendants in error applied to one who was the agent of an insurance company for a policy of fire insurance on their plant, fixtures, etc., stating to the agent that the insured premises were located on leased ground, owned by a third person. The agent applied to stated that he would be glad "to write the insurance," and, after examining the property, stated that "any policy he issued would be all right." This agent, after "consulting" the agent of the company issuing the policy, "made out slips for this particular policy." The latter agent countersigned and issued the policy and delivered it to the first-named agent, who in turn delivered it to the assured and received from them payment of the premium, commissions on which were divided between the two agents. The agent dealing directly with the assured did not communicate to the agent issuing the policy the information given by the assured with respect to the title of the land on which the insured property was located. The member of the firm, who in behalf of the firm made the application for insurance, paid the premium, and received the policy, testified he did not know until the fire occurred that the latter agent was

the agent of the company issuing the policy, or had any connection with the issuance of the policy. The policy, when delivered, had on it a "paster," on which was printed the name and address of the agent to whom the assured made application, and the words, "Insurance, Fire," etc., though such paster was not on the policy when it was delivered to such agent. The commission allowed agents on the policy was divided between the agents countersigning it and the agent of the other company, to whom it was delivered, who delivered it to the assured. It was usual between the agents representing the defendant and the other agent to do so. This practice was confined to the two agents doing business in Savannah, they not being members of the local board, which prohibited its members from dividing commissions on policies thus issued. No agent of the company issuing the policy inspected the property. The agent of this company, after the fire, offered to return to the assured the premium paid by the latter, and it was refused. After loss, the assured brought suit on the policy, which the insurer defended on the ground that there had been a breach of the stipulation of the policy that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, * * * if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." Held that, under the facts stated, the agent who received the application and delivered the policy was an agent of the insurer, and the knowledge of such agent, at the time of the issuance of the policy, of the status of the title to the ground on which the insured building was located, was imputable to the insurer, and estopped it from claiming a forfeiture of the policy on account of a breach of its conditions respecting the ownership of the assured above quoted. 3 Cooley's Briefs on Ins. 2529-2530, 2491; Springfield Fire, etc., Ins. Co. v. Price, 132 Ga. 687, 64 S. E. 1074; Athens Mutual Ins. Co. v. Ledford, 134 Ga. 500, 68 S. E. 91; Mesterman v. Home Mutual Ins. Co., 5 Wash. 524, 32 Pac. 458, 34 Am. St. Rep. 877.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968-974; Dec. Dig. § 378.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by L. H. Smith and others against the Atlanta Home Insurance Company. From a judgment for plaintiffs, defendant brings error. Affirmed.

Payne, Little & Jones, M. F. Goldstein, and Lawton & Cunningham, for plaintiff in error. Travis & Travis and Adams & Adams, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(136 Ga. 456)

GATE CITY TERMINAL CO. v. THROWER.

(Supreme Court of Georgia. June 20, 1911.)

(Syllabus by the Court.)

1. RECEIVERS (§ 80*)—PENDING ACTIONS—SUBSTITUTION OF RECEIVER—WRIT OF ERROR.

The motion to dismiss the writ of error is denied for the reasons set forth in the opinion.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 149; Dec. Dig. § 80.*]

2. EMINENT DOMAIN (§ 124*)—AWARD—APPEAL—MEASURE OF DAMAGES.

Where on the day the award of assessors selected in condemnation proceedings was made, the condemning party pays or tenders the amount of the award to the owner of the property sought to be condemned and takes possession of the property, on the trial of the case before a jury in the superior court on appeal from the award, the compensation the jury should find for the owner is the value of the property on the day of the award and interest thereon from that date.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 343; Dec. Dig. § 124.*]

3. EMINENT DOMAIN (§ 131*)—COMPENSATION—ANTICIPATED IMPROVEMENTS.

If, at the time the market value of the property sought to be condemned was to be estimated, it was known or anticipated that certain improvements would be made in the locality where the property was situated, and this fact served to enhance the market value of the property, the owner would be entitled to the actual market value as affected by reason of the fact that it was known or anticipated that such improvements would thus be made. This is true, though the projected improvements were to be made by the condemning party.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 353; Dec. Dig. § 131.*]

4. APPEAL AND ERROR (§ 1050*)—EMINENT DOMAIN (§§ 262, 219, 222, 224*)—EVIDENCE (§ 113*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

There was no error requiring a new trial, and the evidence was sufficient to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4166; Dec. Dig. § 1050; Eminent Domain, Cent. Dig. §§ 686, 562-567, 574-579; Dec. Dig. §§ 262, 219, 222, 224; Evidence, Dec. Dig. § 113.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Condemnation proceedings by the Gate City Terminal Company against M. L. Thrower. From the award of damages Thrower appeals to the superior court, and from an order refusing a new trial after verdict, the Gate City Terminal Company brings error. Affirmed.

On August 14, 1906, the Gate City Terminal Company gave proper notice and began proceedings to condemn certain property. On September 1, 1906, the defendant in error, M. L. Thrower, obtained a temporary restraining order enjoining these proceedings. One Bridwell also sought to enjoin proceedings by the same company to condemn his property. Both injunction proceedings involved the question as to whether the company had the right of eminent domain, and it was agreed that the injunction case begun by Thrower should abide the final judgment rendered in the case begun by Bridwell. It being finally decided by this court, on March 14, 1907, that the company had the right of condemnation, the restraining order obtained by Thrower was dissolved, after which the condemnation proceedings were carried on; and on April 20, 1907, an award was made by the assessors, valuing

the property at \$8,000, which the company tendered or paid on April 20, 1907, and on that day took possession of the property. Thrower entered an appeal from the award, and on the trial in the superior court the jury rendered a verdict valuing the property at \$8,500. To the order of the court refusing a new trial, the company excepted. The plaintiff in error (hereinafter called the plaintiff) introduced upon the trial of the case before the jury testimony in part substantially as follows: Miss Flynn sold the property to Mr. Crockett for \$1,800. The deed from the former to the latter, dated April 15, 1905, reciting a consideration of \$1,800, was introduced in evidence. Several witnesses testified that they examined the property after the condemnation proceedings were begun. One of them testified that he estimated its market value to be \$3,645, and in making the estimate he "made an allowance of 100 per cent. on account of the prospect of the railroad terminals being located in that locality." Another witness testified that the market value of the property was \$3,750. Another witness testified that its market value was between \$3,500 and \$5,000.

Thrower testified, in part, as follows: He bought the property in 1906 from Mr. Crockett. "At the time I bought the property, the railroad had graded out alongside of the property, and they had practically bought everything in the block, with the exception of this and the Volberg property, and I agreed to pay Mr. Crockett \$14,000 for the property. It was my estimate it was railroad property when I bought it. I bought it as such. * * * I agreed with Mr. Crockett, along the 1st of August or the latter part of July to give him \$14,000 for it. I had the titles examined, and it was closed up some time the latter part of August, 1906. I bought the property before I knew of the condemnation proceedings. The agreement was made in July. * * * When I bought the property from Mr. Crockett it was graded along the side, the 200-foot side, down to a depth of some 20 feet, up to the line of this property. After I bought the property I tried to sell it. In April, 1907, the market value of this property was \$16,000 or \$17,000, considering the railroad there. Excluding the railroad purposes makes a difference in the value of that property of about one-half, possibly a little more. The house rented for \$25 a month. Putting it on a 4 per cent. basis it would be worth about \$7,500; you have got to pay taxes out of that. * * * He deeded me the property that is sought to be condemned after the condemnation proceedings about the latter part of August, the 27th I believe, 13 days after the condemnation proceedings started. * * * At the time I bought the property I didn't think the Gate City Terminal Company could condemn it. I thought I could

get a little profit from it, like I would on any other piece of property I bought. I had a notion that I could get a little more for it than I gave for it. I didn't have a notion that I could get my own price for it. * * * When I bought I didn't know what they were going to do there. I know property went mighty high around the terminal station. * * * If the railroad had not taken the property—if they had built freight or passenger terminals in there—you could have used it for manufacturing sites close to it, or for warehouse or hotel property; it is closer to the center of the city than the Aragon Hotel. If the railroad had come up to my property, but had not taken it, it would have been worth about \$10,000."

E. Y. Crockett testified: "I bought the property from Miss Flynn something like three years before April 15, 1905. I got my deed July or August of that year. I spent about \$1,400 in improvements. * * * I considered the market price was what I got for it—\$14,000. * * * I told Thrower that Adair was trying to buy this for the railroad." Geo. B. Saunders testified: In March, 1907, he thought the market value of the property was \$15,000 or \$16,000. It was worth \$3,000 or \$4,000 "before the contemplation of the railroad." John W. Alexander testified: "The depot is, I think, on a part of that lot now. * * * Before the excitement about the railroad, I don't think this lot would have been worth over four or five thousand dollars. About the middle of August, 1906, I considered the lot worth twenty or twenty-five thousand dollars. I considered the lot worth twenty to twenty-five thousand dollars because it was there on the railroad—that near in town; it was expected to have a railroad front at that time. We knew pretty well where they were going to locate the railroad. The whole of my valuation is if it had a railroad front. If it didn't have a railroad front, it would not be that valuable; if the road was right near it it would be worth \$10,000." Fred J. Cooledge testified: "I think I knew what property was worth about August, 1906, that was after the railroad had bought nearly all of that property. The market value of the Thrower lot in August, 1906, was something like sixteen to eighteen thousand dollars. I got at that valuation by reason of the fact that the railroad owned right up to it, it had an alley coming up to the rear, and that was the key to the situation. I mean that the railroad had to have the alley to get into the property from back behind it. If the railroad didn't want that alley, they wouldn't have to take it. I should think that that property, before any railroad was contemplated there, would have brought in the neighborhood of \$5,000." J. A. Bondurant testified: "In April, 1907, that property was worth sixteen or eighteen thousand dollars. Before the railroad entered that property was worth about \$4,500, I think. Property went up as soon as

they commenced building a terminal station around there, but it didn't go up like the property the railroad didn't take; it all went up pretty high. If the railroad had not built there, although the terminal station was built there, it would be worth \$16,000. The terminal station has been built about five years. Property commenced going up from the time it was built. That piece of property was worth eight or ten thousand dollars after the terminal station went up. It was worth \$4,500 before 1906." R. Blair Armstrong testified: "I was familiar with this piece of property owned by Mr. Thrower, formerly by Mr. Crockett, and with its market value in August, 1906. I think that piece was worth eight or nine thousand dollars. In the next twelve months the railroad had done a lot of grading, and I think they owned all but one piece of property around there, and that piece, and by that time I would say that piece was worth about \$15,000, for Mr. Thrower held the key to the situation. That the railroad had to have that piece of property is one reason why it was the key to the situation; but it could have been used for a warehouse." Dr. De Los Hill testified: "I was familiar with my estimate of its market value in 1906, which is from \$15,000 to \$20,000. * * * There was an excavation going on in the same block, I can't say just how close to that lot, but all around the lot on one side at least there was a hole in the ground, on one side of the lot, some feet away, leaving room to hold up the bank, and some feet between that bank and that lot. I thought it possible that the railroad might have to have that property; that entered into the valuation of it; that was one of the points putting a valuation on it. The market value of the property in case the railroad did not take it, but made it a railroad front, was \$15,000 to \$20,000."

Rosser & Brandon and Colquitt & Conyers, for plaintiff in error. Westmoreland Bros., for defendant in error.

HOLDEN, J. (after stating the facts as above). 1. The Gate City Terminal Company instituted condemnation proceedings to condemn certain property in the city of Atlanta belonging to M. L. Thrower. Written notice by the former was given to the latter on August 14, 1906, of its intention to condemn the property, and therein a request was made that Thrower appoint an assessor to meet the named assessor selected by the company on the premises on September 3, 1906. On April 16, 1907, the two assessors selected appointed the third assessor, and on April 20, 1907, an award was made that the company pay Thrower \$6,000 for the property. On April 25, 1907, Thrower entered an appeal from this award to the superior court, and on April 3, 1909, the jury upon the trial of the court rendered a ver-

dict as follows: "We, the jury, assess the value of the defendant's property taken at the sum of eighty-five hundred dollars (\$8,500)." A motion for new trial was made and overruled, and, to the refusal of a new trial, a bill of exceptions was filed by the Gate City Terminal Company. Thrower has made a motion to dismiss the writ of error upon the following grounds, to wit: "First, because there was no such case tried in the court below as is brought up in the bill of exceptions in this case; second, because the case tried in the court below was in the name of Henry M. Atkinson and Samuel F. Parrott, receivers of the Georgia Terminal Company, and the Georgia Terminal Company as the legal successors of the Gate City Terminal Company, and the motion for new trial filed in this case so states. As proof of this an appeal is made to the record." Whereupon the following motion was filed by counsel for the "Georgia Terminal Company and Henry M. Atkinson, receiver of Georgia Terminal Company": "(1) That the Georgia Terminal Company is the same as the Gate City Terminal Company, the name simply having been changed. (2) Henry M. Atkinson is now the sole receiver of the Georgia Terminal Company. (3) Samuel F. Parrott, formerly one of the receivers of the Georgia Terminal Company, is now dead, and said Henry M. Atkinson has been appointed and is now the sole receiver of said company. Now, therefore, the said Georgia Terminal Company and the said Henry M. Atkinson, as receiver of the Georgia Terminal Company, pray this court to be made parties plaintiff in error in the above-stated case."

On April 2, 1909, the following order was passed by the court in the case: "It being made to appear to the court that the property of the plaintiff corporation is in the hands of Henry M. Atkinson and Samuel F. Parrott as receivers of the United States Circuit Court for the Northern District of Georgia, it is therefore ordered that the said Henry M. Atkinson and Samuel F. Parrott as such receivers be and they are hereby made parties plaintiff in the above-stated cause in lieu of the Gate City Terminal Company, and that the case proceed in the name of said receivers." Upon the verdict rendered on April 3, 1909, a judgment signed by the court and counsel for Thrower was entered as follows: "Whereupon, it is ordered by the court that M. L. Thrower recover of H. M. Atkinson and Samuel F. Parrott, receivers of the Gate City Terminal Company, the sum of eight thousand five hundred dollars to be credited with six thousand dollars paid to M. L. Thrower on April 20, 1907, the date of the award of the assessors in said matter, and execution will issue in favor of M. L. Thrower against the Gate City Terminal Company for the sum of twenty-five hundred dollars and the sum of three hun-

dred and fifty-six dollars as interest on twenty-five hundred dollars at 7 per cent. per annum from April 20, 1907, to date; and when said sums are paid the Gate City Terminal Company will be entitled to the possession and use of the property described in this proceeding." The original motion for new trial recites: "Now come Henry M. Atkinson and Samuel F. Parrott, receivers of the Georgia Terminal Company, and the Georgia Terminal Company, and, first, showing that they were, by order of the Honorable Don A. Pardee, judge of the Circuit Court of the United States for the Northern District of Georgia, on the 19th day of March, 1906, appointed receivers of the Georgia Terminal Company, and that the said Georgia Terminal Company is the legal successor of the Gate City Terminal Company, the plaintiff in the above-stated case, say: Plaintiff, being dissatisfied with the verdict and judgment in the above-stated case," etc. The amendment to this motion begins as follows: "Now comes the movant, the Gate City Terminal Company, and before the hearing of its motion for new trial heretofore filed in the above-stated case;" and in the concluding sentence of the amendment it is recited: "Wherefore movant prays that the foregoing grounds be added to its motion for new trial by amendment." The original motion and the amendment thereto were both signed by attorneys as "Attys. for movant."

We think the motion to allow the receivers of the Georgia Terminal Company and the Georgia Terminal Company to be made parties plaintiff in error in the bill of exceptions should be allowed, and the motion to dismiss the writ of error denied; and it was so ordered. The record shows that an order was taken, before the trial of the case, making Atkinson and Parrott, receivers, parties plaintiff in the case. The original motion for a new trial was made by Atkinson and Parrott as receivers of the Georgia Terminal Company, and the Georgia Terminal Company, and recites that Atkinson and Parrott were appointed receivers of this company by the federal court, and that this company "is the legal successor of the Gate City Terminal Company, the plaintiff in the above-stated case." Counsel for Thrower acknowledged service of the motion, and the record does not show that they ever made any complaint that the recitals above referred to in the original motion were untrue; indeed, the ground of the written motion of Thrower to dismiss the writ of error is "because the case tried in the court below was in the name of Henry M. Atkinson and Samuel F. Parrott, receivers of the Georgia Terminal Company, and the Georgia Terminal Company as the legal successors of the Gate City Terminal Company." The amendment to the motion was in the name of the Gate City Terminal Company, and the judgment on the verdict, signed by counsel for Throw-

er, directs execution to issue against the Gate City Terminal Company for the amount of the judgment, and that upon the payment of that amount the Gate City Terminal Company "will be entitled to the use and possession of the property." It seems that the corporation organized as the Gate City Terminal Company still remains in existence, but under the name of the Georgia Terminal Company, for whom Atkinson and Parrott were appointed receivers. At the time of the trial these receivers were in possession of the property held by the corporation originally chartered in the name of the Gate City Terminal Company. The Gate City Terminal Company and the Georgia Terminal Company are not separate and distinct corporations. The corporation originally chartered as the Gate City Terminal Company has never gone out of existence, but its name has simply been changed to the Georgia Terminal Company. If a suit was instituted by an unmarried woman, and by amendment the suit proceeded in her name acquired by reason of her marriage pending the suit, and if a bill of exceptions was filed in which it was recited that the name of the plaintiff in error was the one she bore before her marriage, we think the mistake could be cured by amendment, if the record disclosed the facts hypothesized; as no new party could be substituted by such amendment, but the same person would be plaintiff in error under her proper name.

[1] We do not think the allowance of the motion that the name of the plaintiff in error be changed as therein prayed would be striking one party and adding another new and distinct party plaintiff in error, but we think the same corporation would be plaintiff in error under its proper name and the name of its receivers.

[2] 2. The proceedings to condemn certain property for public use, instituted by the Gate City Terminal Company, were begun on August 14, 1906, and on September 1, 1906, Thrower, to whom the property then belonged, obtained a temporary restraining order enjoining the further prosecution of these proceedings. This restraining order was dissolved in March, 1907, and on April 20, 1907, an award was made by the assessors valuing the property at \$6,000. Thrower entered an appeal, and the jury in April, 1909, rendered a verdict fixing the value of the property at \$8,500. A judgment on this verdict was rendered for the \$8,500 "to be credited with six thousand dollars paid to M. L. Thrower on April 20, 1907, the date of the award of the assessors." In an agreed statement of facts, constituting a part of the evidence, it is said that after the dissolution of the injunction "condemnation proceedings were carried on and the award made and the money tendered and the property taken possession of on April 20, 1907." Complaint is made that the court erred in charging the jury that, "Just and adequate compensa-

tion means the market value of the property, the actual cash market value of the property on April 20, 1907;" and in refusing a timely written request of the plaintiff in error to charge, "Just and adequate compensation which the plaintiff must pay for the property sought to be condemned is the market value of the property at the time of the institution of the condemnation proceedings;" and also in refusing a written request to charge: "The just and adequate compensation which the plaintiff must pay for the property sought to be condemned is the market value at the time the defendant M. L. Thrower prevented the assessment of this property by enjoining the plaintiff from continuing with its condemnation proceedings." Complaint is also made that the court erred in admitting the testimony of Thrower that "the market value of the property in April, 1907, just before the appraisal in this case, considering the railroad there—the market value of that lot—was \$16,000 or \$17,000," over objections of the plaintiff that the same was irrelevant. The Constitution of this state (article 1, § 3, par. 1 [Civil Code 1910, § 6388]) provides that "Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid." The time at which the value of property taken for public purposes should be fixed is the time it is taken, or the right to take it is complete. It cannot be taken until just and adequate compensation is "first paid." "Tender" is equivalent to "payment," and the right to take private property for public purposes by one having the right of eminent domain never exists until compensation is either paid or tendered.

On April 20, 1907, the day the award of the assessors for \$6,000 was made, the company tendered or paid this amount and took possession of the property, and on the trial of the case before the jury, to whom an appeal was had from the award, the compensation the jury should have given Thrower was the value of the property on April 20, 1907, and interest thereon from that date. *Young v. Harrison*, 17 Ga. 30 (1), 39; *Young v. Harrison*, 21 Ga. 591; *Selma, etc., Railroad Co. v. Keith*, 53 Ga. 178 (6); *Oliver v. Union Pt., etc., Railroad Co.*, 83 Ga. 257, 9 S. E. 1086; *Georgia Southern & Fla. Ry. Co. v. Small*, 87 Ga. 355, 13 S. E. 515; 2 *Lewis on Eminent Domain*, § 705, p. 1220, and authorities cited in note on pages 1224, 1225. The decision we make is not in conflict with the ruling in the case of *Georgia So. & Fla. Ry. Co. v. Small*, supra, where it was held that the compensation to be paid the owner was the value of the property at the time of the trial before the jury to whom an appeal was had from the award of the assessors. In that case, prior to the time of the trial before the jury there had been no payment or tender of the amount of the award of the assessors and the property had not been

taken and no right to take it existed. The fact that Thrower obtained a restraining order enjoining the company from prosecuting the proceedings to condemn would not give the company the right to have awarded, as the amount of compensation to be paid, the value of the property at the date of the restraining order.

[3] 3. Complaint is made that the court erred in admitting in evidence, over objection of the condemning party, the following testimony: "The definite talk about a railroad coming in there enhanced the value of the property considerably in some places. I cannot say what per cent. it enhanced it; at least 200 per cent. Probably more than that in some cases; I can't say exactly." And the testimony of another witness, that "when it was determined where the terminal facilities of the A. B. & A. Railroad were going to be located, the property that was in the line of the improvements bounced up in price and went up very high; went towards the sky. The property that was in the line of the improvements jumped up higher in price than any other property. It increased the price of property, where they told us the railroad would be located, more than anything else." And the testimony of another witness that "by reason of the fact that this railroad was going to want that property in that neighborhood, and going to establish terminals there, this property appreciated very much in value after I had been there the first part of 1906." And the testimony of another witness that "the prospect of railroad terminals being built there increased the value of this property 100 per cent.; the prospect of the railroad enhanced this property." And the testimony of another witness that "the fact that a railroad would come in there and want that property had a splendid effect on that property as to price." The objection to the testimony of each of the witnesses was the same, and was as follows: "(a) On the ground that it was irrelevant; (b) and on the further ground that the benefit which this property would derive on account of a railroad coming through there could not be considered as an element in enhancing the value of the property of which the landowner could take advantage against the condemning railroad company."

Complaint is made that the court erred in refusing the following written request of the plaintiff: "The effect of any improvement that may be put upon the property by the party condemning may have upon its value cannot be considered by you in passing upon its market value." The language of the charge requested was such that, if it had been given, it would have been liable to impress the jury with the idea that they could not consider the effect of building the railroad station in the locality where the property was situate upon its market value, and was properly refused.

The testimony above quoted was admissible, and not subject to either of the objections made thereto. The market value of the property on April 20, 1907, was the measure of compensation to be awarded to Thrower. Prior to this time the railroad company "had graded out alongside of the property" to be taken. One witness testified: "We knew pretty well where they were going to locate the railroad." Another witness testified: "There was an excavation going on in the same block. I can't say just how close to that lot, but all around the lot on one side at least there was a hole in the ground; on one side of the lot, some feet away, leaving room to hold up the bank, and some feet between that bank and that lot." If at the time the market value of the property was to be estimated it was known or anticipated that the railroad company would construct a railroad and build the terminal station in the locality where the property was situated, and this fact served to enhance the market value, the owner would be entitled to the actual market value, as affected by reason of its being known or anticipated that a railroad station would be built in that locality. This is true though the projected improvement was to be made by the condemning party. At the time the market value of the property was to be estimated on April 20, 1907, it was known, or at least anticipated, that the railroad and terminal station would be constructed in that locality where this property was situated. Where improvements in any locality of a certain kind, if made, would enhance the value of property in that locality, and a party having the right of eminent domain begins such improvements, and because of its being known or expected that the improvements will be carried to completion, the market value of property in that locality is enhanced, the party seeking to condemn such property cannot object to being made to pay the actual market value of it before taking it because it has been enhanced by reason of the fact that the improvements which it is known or expected to be made, will be made by the condemning party. See *Harrison v. Young*, 9 Ga. 359; *Young v. Harrison*, 17 Ga. 30; s. c., 21 Ga. 584. In 2 *Lewis on Eminent Domain*, § 745, it is said: "Whatever the time fixed upon with reference to which the compensation shall be estimated, the owner is entitled to the actual value of the land at that time, even though it may have been enhanced by reason of the projected improvement for which it is taken. It is said that it is not really making the condemning party pay for an enhancement caused by its own work, as such enhancement does not come from the mere projection of the work, but from the existence of circumstances which create a demand for the work, and render it probable that such a work will sooner or later be built. In so far as the enhancement is due to such circumstances no doubt it is properly considered and allowed." See cases

cited in notes to above text. We have been requested to overrule the decision in the case of *Young v. Harrison*, 17 Ga. 30, but we think the ruling there made is correct and decline to overrule it. Complaint is made that when that portion of the testimony of one of the witnesses above quoted was admitted, the court stated in the presence of the jury: "It doesn't make any difference what caused the market value, but what it would sell for in the market at that time, anything affecting its market value. If somebody had gone along and stated that there was a gold mine in there, and by reason of that idle rumor it would have brought a certain sum in the market, that was its market value. It doesn't make any difference what enters into it. It is what it would have sold for in the market; that is its market value." While this statement may not have been entirely accurate, we do not think it affords ground for a new trial.

Another ground of the motion for a new trial is as follows: "Because the court erred, when movant was cross-examining the witness M. L. Thrower, a witness for the defendant in said case, on the question that even after the railroad and terminals had been established there, improved property across the street would sell for less money than about \$5,000 or \$6,000, after stating in the presence of the jury, 'I think you have to prove that the other property is similarly situated,' in ruling and stating in the presence of the jury as follows: 'But I think if there is any evidence as to where a railroad was to go and where it was going to stop, that affected this property different from other property, that the valuation of other property is not material.'" The statement of the court complained of was not error requiring a new trial. Nor was there any error requiring a new trial in the ruling and statement referred to in the following ground of the motion for a new trial: "When movant sought, on cross-examination, to question the witness M. L. Thrower, with reference to what would be the market value of the property if the railroad had stopped its work at the time he bought the property and left it in the situation that it was then in, the court erred in ruling and stating in the presence of the jury: 'I don't think you can show that if you were going to abandon your proposition or anything of that sort it would not have been worth so much. "If" is always a very uncertain word. Anything that enters into its market value then. It may have been a mere rumor, or it may have been something that never was going to happen; people might change their minds about it. Property might be worth so much in the market to-day, and it might be worth half of that the day after to-morrow, but it is the thing that causes the market value at any particular time, but not what it would be worth if things changed or you didn't do something. I don't think that is admissible."

[4] 4. Complaint is made that the court erred in refusing to permit the plaintiff to introduce testimony of a witness "that the market value of this property in 1905 was between \$2,500 and \$3,000." In excluding this testimony, the court stated "that going back to the market value in 1905 was most too far back to go into the market value of the property." While we do not think that proof of the market value in 1905 related to a time too remote from that at which the market value was to be estimated as to render the testimony inadmissible, as there was testimony showing beyond dispute that the market value of the property before it was known or expected that the railroad or terminal station would be built was much less than it was after this fact was known or expected, we do not think the exclusion of the testimony affords grounds for a new trial.

Complaint is made that the court refused to permit the plaintiff to prove that in making trades regarding the purchase of other property, "in order to get them closed quickly we paid in some instances excessive prices for them." The exclusion of this testimony was proper.

One ground of the motion for a new trial is that the "court erred in stating in the presence of the jury that the defendant [M. L. Thrower] had a right to get more than he paid for said property." Complaint is made that this "was an expression of opinion by the court that the defendant was entitled to receive more money than he paid for said property." In this ground it is stated: "Movant sets out the following portion of the record as showing exactly what happened in reference to said statement: 'Q. Didn't you have the notion that they would have to pay you for that piece of property whatever you wanted to ask them for it? A. I had a notion that I could get a little more for it than I gave for it. Mr. Colquitt: I think the witness should answer my question, your honor. The Court: I think he has answered it—he had a right to get more than he paid for it.'" In the use of the words "I think he has answered it—he had a right to get more than he paid for it," the court was evidently undertaking to say that Thrower had answered the question asked him by stating that "he had a right to get more than he paid for" the property, and the court did not intend to state it as a fact that Thrower was entitled at the hands of the jury to more than he paid for the property. We do not think the jury were liable to misunderstand the language used by the court. The jury valued the property at less than the amount paid by Thrower for it, and the court instructed them that the compensation he was entitled to was the value of the property on April 20, 1907.

The court committed no error in excluding testimony to the effect that the railroad "had to fill in all the way from Bellwood in or-

der to get into town." This testimony was irrelevant and illustrated no issue involved in the trial of the case.

Counsel for Thrower, in his argument to the jury, stated "that the assessors in said case had awarded Mr. Thrower \$6,000, and that the jury should certainly give Mr. Thrower more than this amount." Counsel for the plaintiff in error moved for a mistrial because of this statement, whereupon the court stated "in the hearing of the jury, that in some jurisdictions the amount of the award was held to be prima facie evidence of the value of the property, and that the burden was upon the condemning party to show that this was not true." Plaintiff complains that the court erred in not declaring a mistrial, and in making the above-quoted statement in the hearing of the jury. The court in his charge said: "A statement was made in your hearing as to the amount the appraisers awarded the defendant. That statement must not be considered by you in any way. Eradicate it from your minds, and determine this case from the evidence before you." If the jury had no right to consider the award of the appraisers as prima facie evidence of the value of the property and the amount to be awarded the defendant, we do not think the refusal to declare a mistrial and the statement by the court in the hearing of the jury constitute cause for a new trial, in view of the above-quoted charge given the jury by the court in his general charge.

There was no error in the charge: "The price that the defendant paid for the property is a circumstance to be considered along with all the other evidence in the case in determining the issue in the case." The testimony showed that Thrower orally bargained with the owner of the property to buy it just a few days before the condemnation proceedings were instituted, and consummated the trade after such proceedings were begun, which was about seven or eight months before the award of the appraisers—the time when the value of the property was to be estimated. There was no error in the charge above quoted.

Complaint is made that the court refused to give the following charge requested by the plaintiff: "You have nothing to do with the question of whether or not Mr. Thrower makes or loses anything by his trade on this property; your only consideration is the market value of the lot taken;" and also in refusing to give the following written request of the plaintiff: "The mere value of the lot sought to be condemned—to the condemning party—is not the market value." While these charges might very well have been given, we do not think their refusal error requiring a new trial. The court charged the jury that the compensation to be awarded Thrower was the market value of the property, and this charge necessarily meant that they were to find its market

value regardless of what Thrower paid for it, or its value to the plaintiff.

Complaint is made that the court refused the written request of the plaintiff to charge: "In finding the market value of this property you are not bound by the oral opinion of the witnesses as to its market value." The court charged the jury as follows: "The opinions of witnesses as to the value of property are not binding upon the jury in the sense that you must accept these opinions. You must give them such weight as you think they are entitled to under the instruction given you, and which will be given you." We think the charge given substantially covered the charge requested, and there was no error in refusing the request.

Complaint is made that the court erred in admitting, over the plaintiff's objections, the testimony of Thrower "that when he bought the piece of property sought to be condemned the railroad owned every other piece of property on a particular 20-foot alley that ran up to his property." Even if the testimony admitted was subject to the objection made thereto "that there was better evidence to show what it [the movant] owned there," we do not think its admission error requiring a new trial, in view of the fact that it related to a collateral matter, and there was other evidence, admitted without objection, substantially to the same effect as the evidence to which objection was made.

One ground of the motion for a new trial is that the court erred in admitting, over plaintiff's objection, the following testimony of a witness for the defendant: "The market value of this property, in case the railroad did not take it, but made it a railroad front, was \$15,000 to \$20,000." We think this testimony was subject to the objection thereto that it was "irrelevant and speculative," but we do not think its admission error requiring a new trial. There was testimony of other witnesses of the same nature as that objected to which was admitted without objection. One of these other witnesses testified that with a railroad front the property would be worth from \$20,000 to \$25,000. We do not think that a new trial should be granted because of the erroneous admission of this testimony, when the jury had before it, without objection, the testimony of several other witnesses regarding the value of the property based on the idea that the railroad company did not take it, but that it would front on the railroad to be constructed by the company; especially in view of the fact that the witness delivering the testimony objected to did not make any reference in his estimate of the value of the property with a railroad front, and of its value without such front.

Complaint is made that the court refused to give two written requests of the plaintiff

to instruct the jury regarding the market value of the property. In one of these requests the following language appears: "'Market value' means the fair value of property as between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances, when a greater [amount] than its fair market price could be obtained, nor its speculative value." In the other request the following language appears: "They [the jury] are not to consider the price at which the property would sell for under special or extraordinary circumstances." The language above quoted from the charges requested was liable to lead the jury to believe, under the special facts of this case, that they could not consider the market value as affected by the fact that it was known, or expected, that the plaintiff would construct a railroad or a terminal station in the locality where the property was situated, and the court properly refused to give the charges requested. A trial of the length and character of the one involved in this record before us is rarely kept entirely free from error. While some errors were committed, as herein pointed out, no error requiring a new trial appears, and the evidence was sufficient to support the verdict.

Judgment affirmed. All the Justices concur.

(136 Ga. 428)

MILLER et al. v. JONES et al.

(Supreme Court of Georgia. June 17, 1911.)

(Syllabus by the Court.)

1. PLEADING (§§ 85, 199*)—TIME FOR PLEADING—DISCRETION OF COURT.

Upon the call of the appearance docket, the judge may in his discretion allow counsel for the defendant a reasonable time thereafter, and during the term, to demur and answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172-178, 464-469; Dec. Dig. §§ 85, 199.*]

2. ACTION (§ 38*)—PETITION—MULTIFARIOUSNESS.

The petition was not subject to demurrer on the ground of multifariousness.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 549; Dec. Dig. § 38.*]

(Additional Syllabus by Editorial Staff.)

3. WILLS (§ 449*)—CONSTRUCTION—PRESUMPTION AGAINST INTESACY.

It is presumed that a testator intends to dispose of his whole estate and does not intend to die intestate as to any part of his property, and this presumption is only overcome where the intention to do otherwise is plain and unambiguous or is necessarily implied.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by Mrs. A. L. Miller and another against R. L. Jones, as executor of the will of W. D. Jones, Sr., and others. From a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

judgment sustaining a demurrer to the petition, plaintiffs bring error. Reversed.

Mrs. A. L. Miller (formerly Jones) and Nannie Jones brought an action against R. L. Jones, as executor of the will of W. D. Jones, Sr., deceased, T. F. Jones, Sr., T. F. Jones, Jr., W. W. Beard, W. B. Hattaway, and C. J. Rambo. The substance of the petition was as follows: W. D. Jones, Sr., died October 14, 1905, leaving a will, as follows:

"Item 1. I wish that my entire estate, both real and personal, be held without division or disposition by my executor for the term of three years, that my just debts may be paid, and that my two daughters be maintained and educated from the proceeds, and that my home and family, Rob, and Jennie and Nannie Jones, be maintained and kept as they now are, except when attending school.

"Item 2. I desire that as soon as it can be conveniently done, I direct my executor to pay to my wife, Carrie Jones, the sum of four hundred dollars, which amount is to be in lieu of dower and year's support.

"Item 3. I desire that at the end of the three years mentioned, any money from my estate shall be divided equally between my son, R. L. Jones, and Jennie and Nannie Jones.

"Item 4. I desire that at the end of three years, I wish my home place, where I now live, together with all personalty, to be the absolute estate of my three children, R. L., Jennie and Nannie, and they shall divide it as they wish.

"Item 5. I desire at the end of three years that all my interest in the Dennis place, now operated by me and my brother, Frank Jones, together with all personalty thereto, shall belong to W. D. Jones, Jr., T. F. Jones, Jr., and Emma Beard, which is to be divided as they desire.

"Item 6. I desire that R. L. Jones, my youngest son, shall be the executor of this my last will and testament, taking such compensation as the law allows administrators of estates, to act without giving bond as such executor."

The will was probated in solemn form on the first Tuesday in December, 1905, and R. L. Jones qualified as executor. For 18 years prior to the death of the testator, he and T. F. Jones, Sr. (Frank) conducted as partners a farming business on the Dennis place referred to in the will; each of the partners owning an undivided half interest in the land constituting such place, and of the personalty thereon used in such business. The testator acted as overseer or manager of the plantation at an agreed salary of \$300 per year; and T. F. Jones, Sr., kept the accounts and books of the business, sold the produce made thereon, collected the proceeds of the sales, and managed the financial affairs generally of the business. A running account existed and continued between such

partners, without a settlement, during the 18 years next preceding the death of the testator, at which time T. F. Jones, Sr., as a surviving partner, was indebted to the testator in a large amount. Within three years after the death of the testator and the probate of his will, W. D. Jones sold and conveyed all of his interest in all the property devised and bequeathed to him under the will to W. W. Beard. Subsequently, on October 31, 1907, W. W. Beard, T. F. Jones, Sr., and two of the older set of children mentioned in the will, viz., Emma Beard and T. F. Jones, Jr., under an agreement, made a division in kind of the Dennis place, and in accordance therewith executed deeds whereby each of such parties took the portion of the place so allotted. In November, 1907, T. F. Jones, Jr., sold and conveyed to T. F. Jones, Sr., all interest which the former had in the Dennis place under the will, and under the agreement above referred to. On February 14, 1908, T. F. Jones, Sr., sold and conveyed the portion of the Dennis place which had been conveyed to him by T. F. Jones, Jr., and certain produce from such place, to C. J. Rambo and W. B. Hattaway. All of such parties so dealing with the interest of the testator in the Dennis place went into possession of the portion thereof which they had obtained under such conveyances, and thereafter received the rents and profits thereof, and all of them had full notice, at the time of taking possession, of the rights of the plaintiffs under the will, and all of such parties confederated together and conspired with T. F. Jones, Sr., in the manner above indicated, to defeat the rights of the plaintiffs in and to such of the net income, rents, issues, and profits arising from the Dennis place, as plaintiffs were, under the terms of the will, entitled to receive and enjoy for their maintenance, etc., during the period of three years from the death of the testator. At the time of the death of the testator, his individual debts aggregated \$680.24, which debts were by his will made a first charge upon the income arising from his entire estate. At the time of his death and for some time prior thereto, the testator, in partnership with his son, R. L. Jones, conducted a public cotton-ginning business on the home place mentioned in the will, the debts of which partnership, at the death of the testator, amounted to \$4,119.96, or other large sum. On October 19, 1907, the ginning business was completely destroyed by fire, and R. L. Jones by way of compromise collected \$2,012.50 as insurance thereon, half of which amount was assets belonging to the estate of the testator, and as such passed into the hands of R. L. Jones, as executor, subject to the indebtedness of the last-mentioned partnership.

In January, 1907, the dwelling on the home place mentioned in the will was also

burned by fire, and R. L. Jones, as executor, collected on an insurance policy taken out upon such dwelling for the protection and benefit of himself and plaintiffs the sum of \$1,597, which amount the plaintiffs charge, upon information and belief, was used by the executor in paying off debts owing by the estate of testator, and the last-mentioned partnership, instead of holding plaintiffs' two-thirds interest therein in trust for them and selling the personal property belonging to the estate of the testator for the purpose of paying the debts for which it was liable. The executor never called upon T. F. Jones, Sr., to account for any of the personalty, consisting of live stock, farming implements, etc., used in connection with the business conducted by the testator and T. F. Jones, Sr., on the Dennis place, and in which the testator owned an undivided half interest, but allowed such personalty to pass into the hands of W. W. Beard, Emma Beard, and T. F. Jones, Jr., C. J. Rambo, and W. B. Hattaway, as well as to remain in the hands of T. F. Jones, Sr., as long as he kept control of the Dennis place, which personalty such parties converted to their own individual use and placed the same beyond the power of the executor to sell for the purpose of paying the debts due by the testator. By reason of the failure of R. L. Jones, as executor, to sell a sufficient amount of the personal property of the estate to pay off its debts, and of his failure to pay his individual indebtedness as a member of the partnership in the ginning business that existed between him and the testator, as well as by reason of the fact that such executor permitted certain described lands constituting a part of the home place, which had been specifically devised to the plaintiffs and R. L. Jones, to be sold at sheriff's sale on April 2, 1908, and on May 6, 1908, under various executions for stated amounts in favor of different named plaintiffs against R. L. Jones, some of which were against him as executor and others against him individually and as executor, the plaintiffs' interests in the home place have been sacrificed. The value of the portions of the land of the home place sold under such executions was \$5,800 or other large sum, and they were sold at forced sales, permitted and encouraged by the executor and the devisees of the Dennis place and their successors in interest, in the spring of 1908 during a financial panic, and were grossly sacrificed in order to pay the debts of the estate, which inured to the benefit of the devisees under the will of the testator's interest in the Dennis place, and entirely deprived plaintiffs of their interest in the lands so sold, and defeated the scheme of their father, the testator, as expressed in his will, which was to divide his land into two equal parts; one, consisting of the home place, to go to the three younger children, namely, the plaintiffs and R. L. Jones, and the other, consisting of his interest in the Dennis place, to

go to his three older children, viz., Emma Beard, W. D. Jones, Jr., and T. F. Jones, Jr. The executor, R. L. Jones, has collected and received, as money belonging to the estate of his testator, \$6,556.39, or other large sum, for which he has not accounted to plaintiffs, and they charge on information and belief that he has paid out of such moneys on his individual debts \$792.83, and on the debts due by the partnership in the ginning business \$4,119.96. In the language of the petition: The only amounts which the said executor has paid over to or in behalf of petitioners, since the death of his testator, are as follows:

March 28, 1906.	To Nannie Jones, cash.....	\$ 9 65
June 23, " "	" " " " " " " " " " " "	27 50
Feb'y. 23, " "	" " " " " " " " " " " "	121 35
Dec. 5, 1906.	Tuition for Jennie Jones.....	202 50
June 23, 1906.	" " " " " " " " " " " "	177 50
June 29, 1906.	School expenses of Jennie Jones	220 00
Nov. 1907.	To Jennie Jones, cash.....	47 50
		<hr/> \$806 00

Since the 14th of October, 1908, the time fixed by the will for a division of the property of the testator's estate by his executor among the beneficiaries, the plaintiffs have called upon the executor for an accounting and settlement with them for their respective shares of the estate, but he has failed and refused to comply with their demand; he has likewise refused to come to any accounting or settlement with any of the other parties above mentioned as interested in the estate, or to bring T. F. Jones, Sr., to an accounting or settlement with the estate, and therefore it is necessary that the plaintiffs themselves proceed to have such parties brought to an accounting and settlement with the estate. The prayers of the petition are: (1) That T. F. Jones, Sr., be brought to an accounting and settlement with the estate, respecting the business transactions between him and the testator as to the farming operations on the Dennis place, prior to the death of the testator, as well as the interest of the estate in all the personalty used in connection with such business prior to the testator's death, as well as for the rents, issues, and profits received by him from the interest owned by the estate in the Dennis place since the death of the testator. (2) That T. F. Jones, Jr., W. W. Beard, Emma Beard, W. B. Hattaway, C. J. Rambo each be required to come to an accounting and settlement with the estate, respecting the rents, issues, and profits arising from the interest of the estate in the Dennis place, received by them since the death of the testator, as well as for such of the personal property connected with such plantation as they or any of them may have received and used since such date. (3) "That the said T. F. Jones, Jr., W. W. Beard, Emma Beard, and R. L. Jones may be decreed to come to a full, just, and complete accounting and settlement with your petitioners as to the respective share of

the debts of said estate which each of them should share, as a condition precedent to taking any of the benefits under the will of the said W. D. Jones, Sr., and that the share of each of them in such debts shall, when ascertained by such accounting, be decreed to be a charge upon the interest of said estate in the Dennis place, and that said interest in said plantation be sold for the purpose of making a just and fair division amongst the beneficiaries of said will (or their assignees), in accord with its scheme and purpose, of the moneys arising from all of the assets of said estate and remaining after discharging all of the debts of said estate." (4) That Beard, Hattaway, and Rambo, in so far as their claim of interest in the Dennis place is concerned, be decreed to stand in the shoes of the devisees named in the will, through whom they claim directly or indirectly. (5) That in the accounting and settlement with the estate the plaintiffs be decreed to be entitled to a credit of two-thirds of the amount collected as insurance on the dwelling destroyed on the home place, and two-thirds of a half interest in the insurance collected on the ginning outfit, and that the plaintiffs be further credited with two-thirds of the value of the lands forming a part of the home place which were sold under execution sales for the purpose of paying the debts of the estate. (6) That the executor be brought to an accounting with the plaintiffs respecting all of the assets of the estate which have come into his hands since his qualification, and that he be decreed to have forfeited the right to commissions as executor on account of the misapplication of the assets of the estate as before stated. (7) That the agreement between T. F. Jones, Sr., and T. F. Jones, Jr., on the one side, and W. W. Beard and Emma Beard, on the other, by which they undertook to divide in kind the Dennis place, be set aside and decreed to be inoperative in so far as the plaintiffs and other parties are concerned. (8) For general relief and process.

During the appearance term the trial judge announced that he would call the appearance docket on the succeeding day. When, in accordance with such announcement, the present case was called in its order, counsel for the defendants who had then been served announced that he had been actively engaged in court all the preceding week and had not had time to prepare and file defenses in their behalf, and asked for time within which to file such defenses. The court thereupon allowed him until the last day of the term to file them. This permission was given on April 13, 1909. Two days thereafter counsel for such defendants filed a joint demurrer and answer in their behalf. Counsel for the plaintiffs urged the court, when the case was called in its order upon the appearance docket, to enter the same as in default; and subsequently objected to the filing of the demurrer and answer of the defendants, on the

ground that the case was in default when called upon the appearance docket. The objection was overruled, and the demurrer and answer allowed to be filed on April 15, 1909. Exceptions pendente lite were filed by the plaintiffs assigning error upon the ruling of the judge as to this matter. The remaining defendants at the October term, 1909, which was the appearance term as to them, filed demurrers and answers. The court sustained a common ground of demurrer of all of the defendants, attacking the petition for multifariousness. Plaintiffs excepted, assigning error upon their exceptions pendente lite, and upon the sustaining of the demurrer.

A. L. Miller and Glessner & Park, for plaintiffs in error. King & Castellow, Hawes & Pottle, Byron Collins, and Chas. D. Russell, for defendants in error.

FISH, C. J. (after stating the facts as above). [1] 1. Upon the call of the appearance docket, the judge may in his discretion allow counsel for the defendant a reasonable time thereafter, and during the term, to demur and answer. There was no abuse of the judge's discretion in this case in allowing counsel, for the reasons set out in the statement of facts, two days after the call of the appearance docket in which to demur and answer: In *Deering Harvester Co. v. Thompson*, 116 Ga. 418, 42 S. E. 772, the order held to be invalid allowed the defendant until a date after the adjournment of the appearance term within which to file an answer.

[2] 2. The demurrer sustained by the court was that the petition was bad for multifariousness, because: (1) It sought an accounting with the executor, with which neither of the other defendants nor any one of them had any connection or concern; (2) it prayed for an accounting with T. F. Jones, Sr., as the surviving partner of a business conducted by him and the testator during the latter's life, as well as for an accounting of business transactions T. F. Jones, Sr., had with the testator, with neither of which accountings were any of the other defendants concerned; (3) It sought an accounting with and a contribution from "W. W. Beard, Emma Beard, and others, in reference to the indebtedness of the estate of W. D. Jones, and with such cause of action" the other defendants had no connection or concern; and (4) because "the only cause of action attempted to be set forth in said petition against W. B. Hattaway and C. J. Rambo is for an accounting and contribution in reference to the portion of the plantation known as the Dennis place, and the petition shows on its face that these defendants acquired title to said land from T. F. Jones, Sr., and have absolutely no connection or concern with the interest in any other of the matters or things or causes of action set forth in the petition."

"To sustain a bill against the charge of

multifariousness, it is not indispensable that all the parties should have an interest in all the matters contained in the suit. It is sufficient if each party has an interest in some matter in the suit, which is common to all, and they are connected with others." *Worthy v. Johnson*, 8 Ga. 236 (1), 52 Am. Dec. 399. "Where the plaintiffs have a common interest against all of the defendants in a suit as to one or more of the questions raised by it, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstance of some of the defendants being subject to distinct liabilities in respect to different branches of the subject-matter will not render the bill multifarious." *City Bank of Macon v. Bartlett*, 71 Ga. 798. "Where all the complainants belonged to the same class and had a common interest, and all the defendants belonged to one class and were subject to a common liability, it does not matter that the extent of the rights of each of the complainants, or the liability of each of the defendants, may not be the same." *Id.* A petition is not multifarious, though it concerns things of different natures against several defendants, whose rights are distinct, if it sets forth one connected interest among them all, centering in the point in issue in the case. *Conley v. Buck*, 100 Ga. 187, 28 S. E. 97; *Greer v. Andrews*, 133 Ga. 193, 65 S. E. 416. Did the petition in the case now in hand set forth a common interest which the plaintiffs had against all the defendants as to any question raised, so as to make them all necessary parties for the purpose of enforcing that common interest? Before replying to this inquiry, it becomes necessary to construe the will involved in the case.

[3] The natural and reasonable presumption is that a testator, when he executes his will, intends to dispose of his whole estate, and does not intend to die intestate as to any part of his property, which presumption is overcome only where the intention of the testator to do otherwise is plain and unambiguous or is necessarily implied. *Black v. Nolan*, 132 Ga. 452, 64 S. E. 647. Moreover, it is clear, we think, from the will itself in this case, that the testator intended to dispose of his whole estate; for in the first item thereof he declares that: "I wish that my entire estate, both real and personal, be held without division or disposition by my executor for the term of three years, that my just debts may be paid, and that my two daughters be maintained and educated from the proceeds, and that my home and family, Rob, and Jennie and Nannie Jones, be maintained and kept as they now are, except when attending school." It is apparent that the testator desired his entire estate to be kept together for three years in order that his executor might discharge from the income thereof the debts against the estate, and from the same source defray the ex-

penses of the maintenance and education of his two younger daughters, the plaintiffs, and the maintenance of his family consisting of his three younger children, R. L. Jones and the plaintiffs, and also from the same source that the executor, as soon as it could "be conveniently done," should pay to the testator's widow a given sum in lieu of dower and a year's support, as provided for in the second item of the will. The only property mentioned in and disposed of by the will was the interests of the testator in two places or plantations and the personalty on each and used in connection therewith. In one of these places known as the home place and in the personalty thereon, the testator owned the entire interest, all of which at the end of three years was "to be the absolute estate" of his three children, R. L. Jones and the plaintiffs, who should then divide amongst themselves. In the other lands, known as the Dennis place, and in the personalty thereon and used in connection therewith, the testator owned a half undivided interest. In reference to this property the testator declared in the fifth item of his will as follows: "I desire at the end of three years that all my interest in the Dennis place, now operated by me and my brother Frank Jones, together with all personalty thereto, shall belong to W. D. Jones, Jr., T. F. Jones, Jr., and Emma Beard, which is to be divided as they desire." It appears from the petition that the persons named in the fifth item were an older set of children of the testator, and that the persons named in the fourth item, to whom was given the home place and the personalty thereon, were the younger set of the testator's children. After providing that his entire estate should be kept together for the term of three years and that the income thereof should be devoted to certain specified purposes as already indicated, the testator declared in the third item of his will that: "I desire that at the end of the three years mentioned, any money from my estate shall be divided equally between my son, R. L. Jones, and Jennie and Nannie Jones." Construing the testamentary scheme as ascertained from the entire will and also the connection in which the language of the third item is used, and the language itself as there employed, we feel safe in saying that the intention of the testator was that at the end of three years "any money from [his] estate"—that is, any balance of the income, such as rents and profits belonging to the estate from the two plantations—should be equally divided between the three younger children named in the third item. At the end of the three years the corpus of the estate was to go to the children; the home place, including the personalty thereon, to the younger set, and all the "interest" in the Dennis place, including all personalty thereon, to the older set. The words "all my interest in the Dennis place," as used in the fifth item

of the will, referred, we think, not merely to his half undivided interest in the land constituting that place and to a like interest in the personalty thereon, but also included whatever interest he might have in the business enterprise conducted by himself and T. F. Jones, Sr., as partners in connection with such place, and therefore covered any indebtedness in the way of profits, wages, etc., owing by the partnership to the testator at the time of his death.

Having set forth the real testamentary scheme of the will, does it follow that the plaintiffs under the allegations of their petition had a common interest as to some matter in the suit which was common to all of the defendants, and in which the latter were all interested in resisting? In our opinion the petition showed that the plaintiffs had such an interest.

In the effect, the plaintiffs alleged that under the terms of the will they were to be maintained and educated out of the income from the entire estate during the period of three years after the testator's death; that the executor failed to carry out this obligation placed upon him by the will; that he permitted the other defendants to go into possession of the land and personalty constituting the "interest" of the testator in the Dennis place, and to receive and appropriate to their own uses the income and profits of such property during the three years the executor was bound to hold the same together and to devote the income therefrom in part to the maintenance and education of the plaintiffs; and that at the expiration of the three years the plaintiffs were entitled to two-thirds of any money that should then have been in the hands of the executor from the income of the Dennis place. Surely the plaintiffs had the right to call the executor to an accounting and settlement in reference to this matter, as well as to all other matters in respect to which they claimed he had mismanaged his trust; and if the other defendants had appropriated, with notice of the plaintiffs' rights under the will, to their own uses any portion of the income belonging to the estate which should have come into the hands of the executor from the Dennis place during the three years after the death of the testator, and if the executor failed and refused to require the other defendants to account to him for such income appropriated by them, then the plaintiffs were entitled to bring an action against the other defendants for an accounting and settlement as to such income received and appropriated by them, and to make the executor a codefendant in such action. *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399.

Moreover, as we have seen, the scheme of the will was that the entire estate should be kept together by the executor for the term of three years before the division thereof,

as provided in the will, should be made, and in the meantime the debts of the testator, as well as the money to be paid to his widow and the expenses of maintenance and education of the plaintiffs, should all be paid from the income derived from the entire estate. Of course all of the property of the estate was liable for the testator's debts, and creditors with executions could proceed against any of it. If the executor failed to pay the debts owing by the estate from the income thereof, and execution creditors had lands constituting a portion of the home place levied upon and sold to satisfy their debts, then the plaintiffs, to whom had been specifically devised a two-thirds interest in the lands of the home place, would have the right to require contribution from the devisees to whom had been specifically devised the testator's "interest" in the lands constituting the Dennis place, as well as from those holding under such last-named devisees with notice of the plaintiffs' rights as to this matter. 2 *Jarman on Wills* (6th Ed.) 2031; 37 Cyc. 392; 27 A. & E. Enc. Law, 251; *Compton v. Pitman*, 49 Ga. 612; *Jones v. Sikes*, 85 Ga. 546, 11 S. E. 664; *Civil Code* 1910, § 4588.

It was proper to have the alleged pro rata liability of each of the defendant devisees of the Dennis place and of the defendants holding under them determined in one action. See *Chamblee v. Atlanta Brewing & Ice Co.*, 131 Ga. 554, 62 S. E. 1032. As was well said by Mr. Justice Warner in the case of *Nail v. Mobley*, 9 Ga. 278: "It is the interest of parties, as well as the interest of the public, that all matters in controversy between them should be settled in one suit, when it can be done with safety and without great practical inconvenience."

We have decided the only points necessary to dispose of the question as to whether or not the petition was multifarious, and with confidence have arrived at the conclusion that it was not; and therefore the judgment of the lower court must be reversed. All the Justices concur.

(136 Ga. 475)

SOUTHERN CEMENT STONE CO. v.
LOGAN COAL & SUPPLY CO.

(Supreme Court of Georgia. June 21, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 884*)—RIGHT TO REVIEW—ACQUIESCENCE IN DECISION.

Upon the hearing of an application for an interlocutory injunction, the court enjoined the plaintiff from doing certain acts and the defendant from doing certain acts, but provided that the order granting the injunction against the plaintiff should be superseded upon the giving of a specified bond, conditioned to pay the defendant such damages as it may recover on the final trial. It being made to appear to this court that the plaintiff gave bond in accordance with the terms of the order, an exception to the order on the ground that the plaintiff should

have been allowed to do the work without giving such bond will not be entertained.

(a) If the order be construed to mean that the defendant was permitted to do certain work merely upon giving bond conditioned to pay the plaintiff such damages as it might recover upon the final trial of the case, an exception to the order, on the ground that the defendant should have been enjoined without being permitted to perform the acts upon giving bond, will not be considered by this court, when it appears that the defendant gave bond in accordance with the terms of the order, and, since the bill of exceptions was filed, has performed the acts which the plaintiff sought to have the defendant restrained from doing; nor will such exception be considered if the order be construed to mean that the defendant was not permitted to do such work unless it gave the required bond and also registered its business with the municipality of Brunswick and took out a license from that city, where the work done by the defendant was upon the streets of the city and in pursuance of a contract between the defendant and the city, the latter being no party to the case.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 8612-3616; Dec. Dig. § 884.*]

Error from Superior Court, Glynn County; O. B. Conyers, Judge.

Action by the Southern Cement Stone Company against the Logan Coal & Supply Company. From an order granting an interlocutory injunction on condition, plaintiff brings error. Writ of error dismissed.

F. H. Harris and R. D. Meader, for plaintiff in error. Crovatt & Whitfield, for defendant in error.

HOLDEN, J. This case involved a contest between the parties as to which had the right to do certain paving and curbing of the sidewalks on a street in the city of Brunswick. The appellant was plaintiff in the court below, and the parties will be referred to as plaintiff and defendant. On an interlocutory hearing for temporary injunction, the court issued an order enjoining the plaintiff from paving the sidewalks on specified portions of the street, and enjoining the defendant from paving certain other portions of the sidewalks. The terms of the order were such that the injunctions were superseded with respect to the plaintiff upon its giving a bond required by the order, conditioned to pay the defendant such damages as it might recover on the final trial of the case. Exceptions filed by the plaintiff assign as error: First, so much of this order as required it to give bond before allowing it to do certain work; and, second, so much of the order as permitted the defendant to continue certain other work upon complying with the conditions of the order and restrained the plaintiff from doing that particular work, plaintiff contending that the court should have enjoined the defendant from doing this portion of the work and have permitted the plaintiff to perform it without any restriction. The defendant filed in this court a mo-

tion to dismiss the writ of error, which motion contained the following grounds: "(1) The respective parties to said case, having each for itself made and filed in the office of the clerk of Glynn superior court the several bonds, certified copies of which are hereto attached and made a part of this motion, contemplated and authorized by the judgment of the court below excepted to and to be reviewed in said case, nothing remains upon which the judgment of the Supreme Court, if rendered now in the premises, can operate. (2) That each of said parties, having so made and filed in its own behalf the bond authorized by the judgment of the court excepted to and to be reviewed, thereby accepted the terms of said judgment and is estopped from excepting thereto, and no judgment rendered thereupon by the Supreme Court of Georgia can now be of effect. (3) The acts sought to be enjoined having been fully done and accomplished since the filing of the bill of exceptions in said case, the writ of error ought not to be entertained." Attached to the motion were certified copies of the bonds given by the plaintiff and the defendant pursuant to the terms of the interlocutory order referred to above.

Upon the plaintiff accepting the conditions of the order by giving the required bond, it became freed from any restraint under the injunction against its doing that portion of the work covered by the bond and which forms the basis of the assignment of error first mentioned above. Whether or not the third ground of the motion to dismiss can be construed as alleging that this portion of the work has been completed, the plaintiff rested under no injunction with reference thereto after the giving of the bond, and had a right to go ahead with that portion of the work. There is now, therefore, no question for this court to decide with respect to the action of the court in dealing with that portion of the work in the interlocutory order to which exception is made. The practical effect of the order was to enjoin the plaintiff unless it gave a certain bond, and, plaintiff having given the bond, there was no injunction outstanding against it. If the plaintiff wished to except to the order enjoining it unless it gave bond, it should have excepted without giving the bond and accepting the terms of the order. The attitude in which the plaintiff placed itself in excepting to the order enjoining it unless it gave bond, and that in which it placed itself in accepting the terms of the order by giving the bond so that it could proceed with the work, are inconsistent. The plaintiff could not *except* to the provisions of the order and also *accept* its terms. See, in this connection, *Glover v. S. F. & W. Ry. Co.*, 107 Ga. 34, 32 S. E. 876 (3); *Rome R. Co. v. Thompson*, 101 Ga. 26, 28 S. E. 429 (11).

The third ground of the motion to dismiss

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r. Indexes

recites that the acts "sought to be enjoined" have been fully done and accomplished. A copy of the motion to dismiss, and a rule nisi of this court requiring counsel for the plaintiff to show cause why the motion should not be sustained, were served on such counsel, and in their answer to the latter they admit that the plaintiff and the defendant have given the bonds required by the order, and, with reference to the acts of the defendant sought to be enjoined, they state: "The defendant in error has not, so far as we are advised, performed the work of laying the pavement and curbing in compliance with its contract, and we do not admit that it has done so. The act sought to be enjoined originally was the laying of such paving and curbing by the defendant. Even if it has done so, it would have been in contempt of the trial judge's order as to registering its business and paying its license, and the court will not presume that it has done an illegal act." There is no denial of the statement, in the third ground of the motion to dismiss, that the acts sought to be enjoined have been fully done and accomplished since the filing of the bill of exceptions. Under this answer, it is proper for this court, in dealing with the motion to dismiss, to treat the work by the defendant, sought to be enjoined by the plaintiff, as having been "fully done and accomplished" since the filing of the bill of exceptions. See, in this connection, *Henderson v. Hoppe*, 103 Ga. 684, 685, 686, 30 S. E. 653. The bond required by the order as a prerequisite to the defendant doing the work sought to be enjoined having been given, the doing of such work by the defendant will not be held to be illegal. The order granted in this case is not altogether clear in its terms. It is susceptible of a construction that, upon the defendant merely giving the bond required, it could proceed with the work. If this construction be put upon it, it appearing that the bond has been given and the work completed, an exception to the order permitting the defendant to do the work upon giving the bond would not be considered. *Baird v. Atlanta*, 131 Ga. 451, 62 S. E. 525; *Davis v. Jasper*, 119 Ga. 57, 45 S. E. 724; *Henderson v. Hoppe*, *supra*. It should be construed to mean that, upon giving the required bond, the defendant should not do the work without first registering its business and taking out a municipal license. It should be borne in mind that this proceeding was not brought by the city, but was a controversy between two competing contractors to perform certain work on the sidewalks, and the work which the defendant was to do was under a contract with the city itself, and not as a general contractor doing work for other people. It appears that the bond was given and the work has actually been completed. While it is not affirmatively shown that the defendant registered and took out a municipal license,

neither does it appear that it did not do so. As the work was done directly under a contract with the city and under its supervision, we cannot assume that it was illegally done without complying with the necessary municipal requirements. Nor do we think that under such circumstances, after the giving of the bond and the completion of the work, this court is bound to proceed to determine whether the court committed error in granting the order complained of respecting the injunction sought against its performance, on the assumption that such work was done for the city without a due compliance with the municipal laws, or merely because it is not affirmatively shown that there was a registration and an issuance of a license.

It appearing that there is now no substantial issue between the parties before this court for decision, the writ of error is dismissed. All the Justices concur.

(9 Ga. App. 550)

McCOOK v. LAUGHLIN. (No. 3,051.)
(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§§ 235, 277*)—FORECLOSURE—AFFIDAVIT OF ILLEGALITY—AMENDMENT—PAYMENT.

There was no error in the allowance of an amendment to the affidavit of illegality, which merely amplified a pre-existing ground alleging payment. The reference to the contract was immaterial. The material subject of inquiry was whether the mortgagor had paid the transferee of the mortgage a sufficient amount to discharge the mortgage, either in money or in specifics accepted by the transferee in lieu of money. A mortgagor has the right to direct that an unquestioned indebtedness due to him by the holder of a mortgage shall be applied towards the payment of the mortgage and the discharge of its lien, and such direction on the part of the debtor is equivalent to payment.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. §§ 235, 277.*]

2. FORECLOSURE OF MORTGAGES—STRIKING ANSWER.

There was no error in refusing to strike the answer of the defendant to the mortgage foreclosure. The answer stated the defendant's case so fully as to put the plaintiff on notice, and its allegations were such that, if they were proved, they constituted a valid defense.

3. SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of Sparta; R. W. Moore, Judge.

Action by McGregor McCook, to foreclose a chattel mortgage, against Sid Laughlin. From a judgment for defendant, plaintiff brings error. Affirmed.

R. H. Lewis and R. L. Merritt, for plaintiff in error. Burwell & Fleming, for defendant in error.

RUSSELL, J. [1] McCook foreclosed a mortgage on certain personal property. The

mortgage was originally given to one Evans Johnson, and was by him transferred, on March 2, 1908, to McCook. To the foreclosure of the mortgage, Laughlin, the defendant, interposed an affidavit of illegality, in the first paragraph of which he pleaded that the mortgage had been fully paid, and in the remaining paragraphs proceeded to state the manner in which he claimed the payment was made. On the trial the defendant was permitted, over objection of the plaintiff, to amend his affidavit of illegality by setting up that the mortgage was originally made to Johnson, and that after December, 1908, the plaintiff advanced to the defendant sufficient money under said contract to pay off the mortgage, but that the plaintiff caused the mortgage to be transferred to himself, and held the same as an advance to the defendant under the contract, and that the defendant had paid it as a part of the things advanced under the contract.

[2] A second paragraph of the amendment averred that the defendant having paid the plaintiff since the said transfer considerably more than the amount of the mortgage the mortgage was fully paid off and discharged, and should be canceled. The plaintiff objected to the allowance of this amendment, upon the ground that the proceeding was "a foreclosure of a mortgage purchased by the plaintiff in this case from an outside party, against this defendant," and "that the defendant seeks to plead another contract between [the plaintiff] and the defendant, and not a plea to the mortgage sought to be foreclosed; and, further, because said amendment attempts to set up a plea of payment, and does not set out when paid, where paid, and to whom paid." The affidavit of illegality had attached to it an itemized bill of particulars, setting out certain lumber furnished by the defendant to the plaintiff, and certain labor which he alleged he had performed for him. We fall to see the point of the objection to the amendment, or how the question is affected by the fact that the mortgage was originally payable to Evans Johnson, instead of to McCook, the plaintiff in *fi. fa.* The question as to whether there was any other contract between McCook and Laughlin is immaterial, except in so far as it is a part of the history of the case.

The real question is whether, as stated by the defendant, he had paid McCook enough to discharge the mortgage. Whatever contracts may have existed between McCook and Laughlin, or regardless of when the mortgage was transferred to McCook, if, as a matter of fact, Laughlin made payments to McCook, at any time while McCook was the holder of the mortgage, which the debtor directed to be applied in extinguishment of the mortgage, these payments would be good, and if the payments made by him were sufficiently large to extinguish the indebtedness

then the levy should be dismissed. According to the allegations of Laughlin's affidavit of illegality, or plea, he made a contract with McCook, in December, 1908, by which McCook agreed to buy certain lumber from him at a specified price, and this, so far as this case is concerned, is perhaps the only material use of the contract. According to the defendant's affidavit, when compared with the statement rendered him by McCook, he had paid enough to have discharged the mortgage, and he alleged that this was the understanding. He testified that he directed that the lumber for which he had not otherwise paid to be applied to the discharge of the mortgage, and this would have been equally effectual.

Judgment affirmed.

(9 Ga. App. 524.)

ATLANTIC COAST LINE R. CO. v. LANE & AUTRY. (No. 2,960.)

(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 91*)—PROCEDURE—STATEMENT OF CAUSE OF ACTION.

The statement of the plaintiffs' cause of action was sufficient for the purposes of a suit in the justice's court. It set forth plainly an action for damages to personal property. The statements of fact in the summons impliedly charged negligence, although it was not expressly alleged that the defendant was negligent.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 321; Dec. Dig. § 91.*]

2. JUSTICES OF THE PEACE (§ 194*)—APPEAL TO JURY—CERTIORARI.

There was no error in dismissing the certiorari. The remedy of the dissatisfied party was appeal, and not certiorari. An issue of fact was presented, which required the decision of a jury. Where the amount in controversy in a justice's court is \$50 or less, and the issue involved is one purely of fact, there must be an appeal to a jury in the justice's court before the case can be carried to the superior court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 774, 775; Dec. Dig. § 194.*]

Error from Superior Court, Grady County; Frank Park, Judge.

Action by Lane & Autry against the Atlantic Coast Line Railroad Company. From a judgment of the superior court, dismissing certiorari to a justice of the peace, defendant brings error. Affirmed.

Cain & Wille, for plaintiff in error. Ledford & Terrell, for defendants in error.

RUSSELL, J. [1] Lane & Autry sued the Atlantic Coast Line Railroad Company in a justice's court for damages. The justice of the peace rendered a judgment for the plaintiffs, and the defendant company sued out a writ of certiorari. Upon the hearing in the superior court the judge dismissed the certiorari. In the justice's court the plaintiff in error demurred to the summons generally,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

and also specially because it was not alleged the killing was done negligently, or by the negligent running of defendant's trains or cars. The justice overruled the demurrer, and exception was taken to this ruling. We think the ruling of the magistrate was right. The summons required the plaintiff "to answer to plaintiff's demand upon an action for damages to personal property, * * * a copy of which cause of action is hereto attached." In the copy of the cause of action attached to the summons, following an itemized statement of the dates upon which certain hogs were killed and the value of each, it is stated: "All of the above property killed by the running of engine, cars, or other machinery of the Atlantic Coast Line Railroad Company at and near McGriff street crossing in the town of Whigham, Ga., and in said district G. M., said county and state." We have several times ruled that niceties of pleading are not required in a justice's court, though, of course, it is required that the plaintiff shall so plainly and distinctly set forth his complaint as to define his cause of action and enable the defendant to be clearly apprised of what he is required to defend. We understand this to be the rule laid down by the Supreme Court in *Macon & Birmingham Railway Company v. Walton*, 121 Ga. 275, 48 S. E. 940, which is cited by counsel for plaintiff in error. In that case it was held that although it was permissible to style the plaintiff's suit as an action upon an account, when it was not technically such an action, the plaintiff is not relieved from the necessity of setting out his cause of action with some degree of certainty, and having a copy of the same attached to the summons. In the *Walton* Case the summons called the action a suit upon an account, and did not have attached to it a copy of the cause of action actually sued upon. As Judge Simmons, in delivering the opinion, remarked: "It is impossible to tell, from the summons or from the 'account' thereto attached, the nature of the claim upon which the action was based. There was nothing to put the defendant upon notice of the character of such claim, that it might be able to prepare a defense." The court did not hold that it was necessary for an action for damages in a justice's court to specifically allege the negligence complained of, but only that the character of the action, if it was one for damages, should be stated. In the present case the summons says plainly that the suit is for "damages to personal property," and from the statement, in setting forth the cause of action, that the personal property damaged was killed by the running of the engine, cars, and other machinery of the railroad company, it is to be inferred that the railroad company was negligent, because this is the presumption of the law, and when such

killing is done and proved the plaintiff has made a prima facie case.

[2] 2. The judge dismissed the certiorari upon the ground that it was sued out from the judgment of the justice of the peace in a case where the amount claimed was less than \$50, without an appeal to a jury. We think this ruling is correct. The decision is controlled by the ruling of this court in *Schultes v. Campos*, 5 Ga. App. 277, 63 S. E. 23. An issue of fact was presented in this case. The plaintiffs showed the killing of the hogs by the trains of the defendant company. This raised the presumption of negligence, which it was the duty of the defendant to rebut by testimony showing that there was no negligence. It could not be said as a matter of law that the testimony of defendant's witnesses was sufficient to rebut the presumption raised by law; and therefore there was an issue of fact which should have been determined by a jury upon appeal. As to one of the hogs alleged to have been killed on August 25th there was no evidence introduced in behalf of defendant.

Judgment affirmed.

(9 Ga. App. 552)

STRICKLAND v. STATE. (No. 3,081.)

(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§ 60*) — VOLUNTARY MANSLAUGHTER.

Where one shoots at another, intending to kill him, under such circumstances that the killing, if accomplished, would be voluntary manslaughter, but the shot misses him and accidentally kills an innocent third person, the homicide will be voluntary manslaughter. 1 Bishop's New Criminal Law, § 328; 2 Bishop's New Criminal Law, § 719.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 84; Dec. Dig. § 60.*]

2. CRIMINAL LAW (§ 1064½*) — REVIEW — ASSIGNMENTS OF ERROR.

The only ground in the motion for a new trial which contains a special assignment of error of law is not verified by the trial judge, and therefore presents no question for this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2887; Dec. Dig. § 1064½.*]

3. CRIMINAL LAW (§§ 939, 941, 942*) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered testimony is merely cumulative and impeaching in character, and could have been produced at the trial by the exercise of due diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318, 2323, 2331; Dec. Dig. §§ 939, 941, 942.*]

4. SUFFICIENCY OF EVIDENCE.

There is evidence to support the verdict.

Error from Superior Court, Jackson County; C. H. Brand, Judge.

M. Y. Strickland was convicted of voluntary manslaughter, and brings error. Affirmed.

Geo. C. Thomas, A. C. Brown, and Jno. J. Strickland, for plaintiff in error. Clifford Walker, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

© Ga. App. 520)

GLASS v. CHILDS. (No. 2,861.)

(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

GAMING (§ 19*)—CONTRACTS (§ 138*)—SPECULATIVE TRANSACTIONS—EFFECT OF ILLEGALITY—AID OF COURTS.

It being undisputed that the note and the check sued upon were given in settlement for the original margin and profits in a gambling contract or speculation in cotton futures, the verdict for the defendant was right, and the court did not err in refusing a new trial, especially as the alleged newly discovered testimony tended only to further show that the dealings between the plaintiff and defendant were of a character forbidden by law. The aid of courts of justice cannot be invoked to enforce alleged rights which depend upon contracts outlawed by sound public policy and good morals. The plaintiff having admitted upon the trial that the indebtedness he sought to recover was for money claimed by him as his share of a deal in cotton futures, in which the defendant and himself were to share jointly in the profits and loss, the verdict for the defendant was demanded, and, if there had been errors in the trial, they would be immaterial.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 39-44; Dec. Dig. § 19;* Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

Error from City Court of Covington; W. H. Whaley, Judge.

Action by J. B. Glass against W. W. Childs. Judgment for defendant, and plaintiff brings error. Affirmed.

C. C. King, for plaintiff in error. Middlebrook, Rogers & Knox, for defendant in error.

RUSSELL, J. Glass brought suit against Childs upon a note and a check. Childs admitted the execution of both instruments. He admitted a refusal to pay the check, and that the bank upon which the check was drawn had not paid it upon presentation. He set up two defenses: One was that the note and check were without consideration; that at the time he gave the note he had forgotten, or was uncertain, whether he had paid the plaintiff what he owed him or not, and, not being willing to swear that he had paid him, he executed the papers in question, but thereafter he found a bank check which he had given to Glass, and which had been paid by the bank to Glass, which antedated the note and check sued upon, and which represented identically the same transaction. Upon that ground he claimed that his debt to Glass had actually been paid before he gave the note and check. It is alleged, however, in this plea, that "in the fall or winter of 1905 plaintiff asked de-

fendant to join him in buying 100 bales of cotton futures, which defendant did, plaintiff and defendant each one putting up \$100 as a margin to cover loss on said futures, and the contract was taken in defendant's name, and the note and draft or check sued on were given the plaintiff for his \$100 so advanced as a margin on said cotton future contract, and for his part of the profits thereon, and the interest on the money up to the time of giving said note," and for this reason the defendant pleaded that both the note and the check were based on an illegal contract and speculation scheme, and cannot be enforced or collected out of him, and that the consideration of the note is illegal, void, and contrary to public policy, because it is a part of said illegal contract. It will thus be observed that each of the pleas in fact set up a total failure of consideration—the one, because the debt was alleged to have been paid by mistake before the note was given; the other, because the consideration was one not recognized nor tolerated by law.

There was conflict in the evidence with regard to the check said to be given in settlement of the differences between the plaintiff and defendant, but there was no conflict as to the nature of the dealings in which they were engaged with each other, and no dispute that if there was any dividend due the defendant to the plaintiff it was for the plaintiff's original margin and his share of profits and deals in cotton futures where the collections were made by the defendant. The plaintiff himself admitted in his testimony that the purchase of 200 bales of cotton futures, in two purchases and two sales of 100 bales each, was the only transaction they ever had, and that each purchase was made in the name of the defendant; one-half of the purchase being for himself and one-half for the defendant, the defendant receiving all the money for both sales—both the margin put up and the profits, though he insisted that the defendant had never paid anything. The defendant, agreeing with the plaintiff as to the nature of the transaction upon which the alleged indebtedness depended, simply urged that he had paid the debt before he gave the note and check through mistake, by means of a check for \$245, which he had paid the plaintiff, and which he introduced in evidence as corroborative of his statement.

The finding in favor of the defendant upon the plea of failure of consideration by anterior payment of the indebtedness was supported by some evidence, and the defense based upon the illegality or immorality of the consideration was absolutely demanded by the evidence, because the plaintiff himself admitted this defense to be true. We find no error in the ruling of the court

upon the admissibility of testimony, nor in the charge. But, even if there were errors, they would be immaterial, because the law will not lend its aid to secure for either party an advantage to which he might be entitled under a contract which is abhorrent to sound public policy and good morals. No principle of jurisprudence is better settled than this. An extensive citation of authority is unnecessary. We need only to refer to the cases of *Watkins v. Nugen*, 118 Ga. 373, 45 S. E. 262, *Id.*, 118 Ga. 378, 45 S. E. 260, *Tompkins v. Compton*, 93 Ga. 525, 21 S. E. 79, and cases cited, as well as *Hentz v. Booz*, 8 Ga. App. 577, 70 S. E. 108. It is a general rule of law that, where it is plainly disclosed that the parties are themselves engaged in an undertaking which the law cannot decently afford to touch, the law will leave them where it finds them. A court of justice will not lend its aid to the enforcement of any contract, the making of which is prohibited, nor to the enforcement of anything which is necessary to complete the accomplishment of an unlawful purpose. If A. and B. make a sale of a forged paper, and the purchaser pays the proceeds to A., the aid of a court of law could not be invoked to force A. to pay to B. his part of the proceeds of the sale of the forged paper, and it would not give the court any concern if B. were successful in defrauding A. by withholding from his companion in guilt his share of the fruits of the iniquity. We grant that in the instance we have suggested the degree of moral obloquy would be far greater than in a case where the parties were simply engaged in gambling in cotton futures; but the principle is the same so far as the courts are concerned. Where an act which from beginning to end is contrary to public policy is incomplete, and something remains to be done to complete it according to the original undertaking of the parties thereto, the courts cannot afford to assist in the completion of the illegal act.

One of the grounds of the motion for new trial depended upon the fact that the plaintiff since the trial had found a check for \$100 which antedated the check given by the defendant and upon which the defendant predicated his claim that he had paid the debt. For the reasons we have stated, it was not error for the trial judge to disregard the newly discovered evidence, because it only tended to show more clearly the nature of the transaction in which the parties to the case engaged. But, aside from this, the testimony is of no probative value, for it is merely cumulative of the testimony of the plaintiff and impeaching to the testimony of the defendant, and, furthermore, the plaintiff himself swore upon the trial that the first time they bought cotton futures together each party paid \$100 margin, and

the check which has been found does nothing more than sustain that statement. It would not illustrate anything as to the payment of the claim by the defendant, because it is not really inconsistent with the defendant's contention.

Judgment affirmed.

(9 Ga. App. 537)

DUKES v. STATE. (No. 3,012.)

(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 111*)—REQUISITES OF ACCUSATION—STATUTORY OFFENSES—EXCEPTIONS.

The chief enacting clause of the act of 1907, regulating the sale of narcotic drugs, does not render the sale of cocaine in every instance illegal. The things expressly excepted from the enacting clause of the law should be expressly negated, or the alleged violation should be so specifically charged as to negative the statutory exceptions by implication.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 295-298; Dec. Dig. § 111.*]

2. INDICTMENT AND INFORMATION (§ 91*)—REQUISITES OF ACCUSATION—UNLAWFUL NATURE OF ACT.

The true test of the sufficiency of an indictment to withstand a general demurrer, or a motion to quash, is found in the answer to the question: Can the defendant admit the charge as made and still be innocent? If he can, the indictment is fatally defective. The mere characterization of an act which may lawfully be committed as unlawful does not suffice to so inform one accused of crime of the nature of the offense with which he is charged as to enable him to prepare for trial. To charge that an act intrinsically lawful was done unlawfully, without more, is not a statement of a fact, but a mere conclusion of the pleader.

[Ed. Note.—For other cases, see *Indictment and Information*, Dec. Dig. § 91.*]

3. DEMURRER TO INDICTMENT.

The court erred in overruling the defendant's demurrer, and all of the subsequent proceedings were nugatory.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

R. J. Dukes was convicted of violating Acts 1907, p. 121, relating to the sale of narcotic drugs, and brings error. Reversed.

Hitch & Denmark, for plaintiff in error. Walter C. Hartridge, Sol. Gen., for the State.

RUSSELL, J. [1,2] The defendant was indicted in the superior court of Chatham county charged with the offense of misdemeanor; it being alleged that in Chatham county, on a day named, he "did unlawfully sell and furnish cocaine, contrary to the laws of the said state," etc. The defendant demurred to the indictment upon the following grounds: Generally and also for the reason that the indictment charges conclusions only; that the selling or furnishing of cocaine is not necessarily unlawful; that the indictment fails to set forth any particular facts by reason of which the alleged selling was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

unlawful; that the indictment denies the accused the right to know enough of the particular facts constituting the alleged offense to enable him to prepare for trial, in that it fails to set out the essential elements of the particular offense charged, and because the indictment fails to inform the accused with sufficient definiteness and certainty as to the way or means by which he is alleged to have violated the law. There are two additional grounds of demurrer, one in which the plaintiff insists that the act under which the indictment was found is unconstitutional, and another which specifies all of the various ways in which the act in question may be violated, and avers that the indictment fails to negative the existence of any or all of the facts and circumstances under which the selling and furnishing of cocaine may be lawful.

The constitutionality of the act of 1907, regulating the sale of narcotic drugs (Acts 1907, p. 121), has been ruled by the Supreme Court, and consequently there was no error in overruling the demurrer based upon the contention that the act was unconstitutional.

We shall consider so much of the demurrer as relates to the proper characterization of sales of cocaine lawful and sales unlawful, in connection with what we shall have to say in regard to the sufficiency of the language used in the indictment in the present case, because in framing a criminal charge language may be employed which will as effectually relieve the defendant from the necessity of preparing to meet a different charge as if it were expressly excepted by distinct statement. One who is charged with the offense of carrying a pistol concealed would have no difficulty in being informed by the charge contained in such an accusation that he could not be tried for having a pistol at a public gathering. In other words, the distinct statement of the manner in which an offense was actually committed operates to exclude a charge that it was committed in any other way than that alleged. In the first enacting clause of the act now under consideration (Acts 1907, p. 121), it is made "unlawful for any person, firm or corporation to sell, furnish or give away any cocaine, alpha or beta eucaine, opium, morphine, heroin, chloral hydrate, * * * except upon the original written orders or prescriptions of a lawfully authorized practitioner of medicine, dentistry or veterinary medicine, which order or prescription shall be dated and shall contain the name of the person for whom prescribed, or, if ordered by a practitioner of veterinary medicine, shall state the kind of animal for which ordered, and shall be signed by the person giving the prescription or order." We are of the opinion that the indictment in the present case is fatally defective because it

is not alleged either that the cocaine was sold without a written prescription of a lawful practitioner of medicine, dentistry, or veterinary medicine, or that it was sold upon a prescription which was not dated, or that it did not contain the name of the person for whom prescribed, and, if ordered by a practitioner of veterinary medicine, it did not state the kind of animal for which it was ordered, or that, the purchaser being a practitioner of veterinary medicine, the order did not state the kind of animal for which it was ordered, or that the prescription or order was not signed by the person giving the prescription.

A general negation of the exception would in many cases be sufficient, as where it is stated that it was sold upon no prescription at all, but in the present case there is neither express nor implied negation of the exception.

Judgment reversed.

(9 Ga. App. 559)

MAUGHON v. STATE. (No. 3,491.)

(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§ 250*)—MANSLAUGHTER—EVIDENCE.

The evidence supports the verdict.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 250.*]

2. CRIMINAL LAW (§ 877*)—INDICTMENT AND INFORMATION (§ 82*)—PRINCIPALS IN FIRST DEGREE—CONVICTION.

"Where A. and B. are present, and A. commits an offense in which B. aids and abets him, the indictment may either allege the matter according to the facts, or charge them both as principals in the first degree, for the act of one is the act of the other, and upon such indictment B., who was present, aiding and abetting, may be convicted, though A. is acquitted."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2096, 2097; Dec. Dig. § 877.* Indictment and Information, Cent. Dig. § 225; Dec. Dig. § 82.*]

3. CRIMINAL LAW (§ 913*)—NEW TRIAL—GROUND—ACQUITTAL OF CODEFENDANT.

When two are jointly indicted for murder as principals in the first degree, and one is convicted of voluntary manslaughter, and subsequently the other is acquitted, this fact of itself would not entitle the former to a new trial; and this is especially true where the evidence authorized the finding that the act of killing, while actually perpetrated by the one acquitted, was, under legal principles, imputable to the one convicted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 913.*]

4. HOMICIDE (§§ 83, 44*)—EVIDENCE—VOLUNTARY MANSLAUGHTER.

The law applicable to the issues made by the evidence was clearly and correctly submitted to the jury, and the assignments of error to excerpts from the charge are without merit.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 68; Dec. Dig. §§ 83, 44.*]

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

J. W. V. Maughon was convicted of manslaughter, and brings error. Affirmed.

See, also, 7 Ga. App. 660, 67 S. E. 842.

N. L. Hutchins, I. L. Oakes, J. A. Perry, and T. J. Shackelford, for plaintiff in error. Clifford Walker, Sol. Gen., O. A. Nix, and W. B. Sloan, for the State.

HILL, C. J. Maughon was jointly indicted with Kelley Elrod for the crime of murder, and on his separate trial was convicted of voluntary manslaughter. His motion for a new trial being overruled, he brings error.

This is the second time this case has been before this court for review, and on the previous occasion we granted a new trial on exceptions to the charge of the court. In the opinion then rendered we made a full statement of the evidence. Maughon v. State, 7 Ga. App. 660, 67 S. E. 842.

[1] It is not now deemed necessary to repeat this statement, except in a general way, for the purpose of showing the theories relied upon by the state and the defendant illustrative of the special assignments of error to be considered and determined.

Maughon was a constable. The sheriff of the county asked him to arrest two brothers, Zack and Jake Cleghorn, for whom he held warrants, exhibiting the warrants to Maughon. Complying with the request, Maughon did arrest both of the brothers, telling them that he had warrants against them. They escaped from custody. Subsequently Maughon requested Kelley Elrod to go with him to rearrest the two Cleghorns. They proceeded to the home of the brother-in-law of the two men for whom they were searching, having been informed that they might be found there, and reached there about daybreak Saturday morning. Maughon went to the front door of the house and Elrod to the back door. The brothers were inside this house, and attempted to escape therefrom. The decedent ran to the front door, where he met Maughon, who took hold of his arm and attempted to hold him, and he jerked loose from Maughon and ran out of the door and around the corner of the house, and while running away he was fired on twice, one shot taking effect. While this witness who testified to the facts could not positively identify either Maughon or Elrod as the party who fired the shot, she was positive that the shots both came from the direction of these two men. Immediately after the two shots were fired, she heard the decedent exclaim: "You have shot me." And the accused and Elrod ran off. About five minutes after the firing of these two shots, the decedent was found shot, and was dead. In addition to this direct evidence the state proved that the accused, subsequently to the killing, made incriminatory statements substantially as follows: In one of these statements he said that "they," referring to himself and his codefendant, Elrod, "shot twice,

and at the second shot the decedent hollered." Another statement of this character was that the accused said that two or three shots were fired, and that while he was struggling with the decedent he called out to Kelley Elrod to shoot, and Kelley Elrod shot twice; that Cleghorn had hold of him when Elrod shot the first time; that Cleghorn then turned him loose and ran off about 10 steps; and that Elrod shot at him again and he hollered, and Elrod shot at him again. It will be seen from this evidence that the theory of the state was that, while Elrod fired the fatal shot, the two, Elrod and Maughon, were acting jointly, and that Elrod fired the shot in obedience to the request or command of the accused to do so, and that, therefore, as he was aiding and abetting the actual perpetrator of the offense, he was equally guilty.

The defense relied upon was that Maughon did not shoot at all; that, when the decedent came out of the door, the accused asked him who he was, taking hold of him with his left hand, and telling him to stop, for he was under arrest; that the decedent shoved him off the veranda, and struck him in the face with his fist, and knocked him to his knees, and, when he arose, his pistol being in his overcoat pocket, he attempted to get it, but while he was struggling with the decedent for the pistol he called to Elrod to come around where he was, and, as Elrod came around, he hollered, "Halt! halt!" and fired twice; that Elrod did not fire in the direction of the deceased, but up in the air; that the deceased then broke loose and ran away, and in a few seconds the third shot was fired in the direction in which the deceased ran. He denied the incriminatory statements made by the deceased, and denied that either he or Elrod had fired the fatal shot, and stated that the decedent was actually killed by his brother, who fired the third shot under the impression that he was firing at the officers.

The issues, clear cut and simply stated, between the state and the accused, are these: Did Elrod, under the circumstances as proved by the state, fire the fatal shot? If he did so, Maughon was as guilty as he was, being present, aiding and abetting the unlawful act. On the other hand, did the brother of the deceased fire the fatal shot? These conflicting theories are supported by evidence. The question was one for the jury to determine. They solved the problem in favor of the state, accepting the theory that Elrod fired the fatal shot under the order and command of Maughon; but mitigated, however, the theory of the state to the extent of believing that he was acting under a sudden heat of passion on account of the assault made upon him by the decedent, and so found him guilty of voluntary manslaughter.

The law applicable to both the theories of the state and the accused was fairly and clearly presented to the jury in the charge; and, unless there is merit in some of the special assignments of error, this court has no

right to disturb the verdict. We will take up the special assignments of error in their order and consider them in the light of the evidence, which has been briefly, but substantially, stated.

[2] The first ground of the amended motion presents the fact that since the conviction of the accused for the offense of voluntary manslaughter Kelley Elrod, his codefendant, has been tried and acquitted, and it is insisted that as the state contended that the accused was guilty of murder because he was present, aiding and abetting Elrod to shoot the decedent, and since the verdict of the jury in the Elrod Case proved the fact that neither Elrod nor Maughon fired the fatal shot that took the life of the deceased, but that the fatal shot was fired by some one else, a new trial should be granted to the accused in order that he might have the benefit of the verdict in favor of Elrod.

[3] Both Maughon and Elrod were indicted as the actual perpetrators of the crime, the indictment containing only the one count, but under this one count it is well settled that either or both may have been convicted as principals in the first or second degree, if the evidence had so authorized, and they could have been convicted either of murder or manslaughter under this one count of the indictment. *Collins v. State*, 88 Ga. 347, 14 S. E. 474, and cases cited, especially *Hill v. State*, 28 Ga. 604; *McLeod v. State*, 128 Ga. 17, 57 S. E. 83; *Bradley v. State*, 128 Ga. 20, 57 S. E. 237; *Lewis v. State*, 71 S. E. 417, decided May 12, 1911, by the Supreme Court of Georgia. In the case of *Collins v. State*, supra, it is held that "one indicted as principal merely can be convicted on evidence proving him guilty as principal in the second degree, if the facts be such as that the act by which the crime was perpetrated will on established principles of law be imputed to him as committed by himself through the agency of another. In such case the distinction of degrees is immaterial." In the case of *Bruce v. State*, 99 Ga. 50, 25 S. E. 760, it is held that where two persons are indicted for murder, one as principal in the first degree, and the other as principal in the second degree, the latter may be tried and convicted of murder, although the former had been previously tried and convicted of voluntary manslaughter only. In the opinion the Chief Justice cited the following illustration from 1 *Starkie on Criminal Pleading* (2d Ed.) 81: "Where A. and B. are present, and A. commits an offense in which B. aids and assists him, the indictment may either allege the matter according to the fact, or charge them both as principals in the first degree; for the act of one is the act of the other. And upon such an indictment B., who was present, aiding and abetting, may be convicted, though A. is acquitted. * * * If an indictment for murder charges that A. gave the mortal stroke, and that B. was present, aiding and abetting,

both A. and B. may be convicted, though it turn out that B. struck the blow, and that A. was present, aiding and abetting. To go one step further, upon a similar indictment, charging A. as a principal in the first degree, and B. as present aiding and abetting, B. may be convicted, though A. be acquitted." In *Hill v. State*, 28 Ga. 604, it is said: "The indictment charged the defendant as a principal. The evidence showed that another inflicted the mortal blow, the prisoner being present, aiding and abetting. Held, that the variance was immaterial; both being principals in law, as well as in deed, and the stroke of one being in law the stroke of the other." *Plain v. State*, 60 Ga. 284; 2 *Bishop's New Criminal Procedure*, §§ 3, 4. These decisions, and many others which we might cite, show that from a legal standpoint the conviction of the accused for voluntary manslaughter can be sustained, although the state claimed that Elrod was the actual perpetrator of the crime, and the jury had acquitted him of this offense. In other words, from a strictly legal standpoint, the acquittal of Elrod was wholly immaterial, and the fact of his acquittal furnishes no legal reason for the acquittal of the accused. This ruling is both sound and logical. The verdict in the Elrod Case, although conclusive as between the state and himself, is not in any sense conclusive of the truth of the transaction. He may have been guilty notwithstanding the verdict of the jury. There may have been reasons in his case, growing out of the inability of the state to produce the same evidence on this trial as on the first, which induced the jury to acquit him, which did not exist in the case of Maughon; but, irrespective of this question, we are simply concerned with the proposition of law that, where two are jointly indicted as principals, the acquittal of one does not in any legal sense inure to the benefit of the other, although it may be a circumstance of exculpation. The case of *Jackson v. State*, 54 Ga. 439, is relied on by learned counsel for the plaintiff in error in support of his position that a new trial should be granted in order that Maughon may have the benefit of the acquittal of Elrod. The Jackson Case does not support this contention. In the Jackson Case Judge McCay, speaking for the court, gives as the reason why Jackson, the principal in the second degree, ought to have a new trial on account of the grant of a new trial to the principal in the first degree, that the record of the conviction of the principal in the first degree had been used on the trial of the other case and may have injured the accused, and that, this record having been expunged by setting the verdict aside, the principal in the second degree ought to have a new trial without this evidence bearing against him. In construing this decision the Supreme Court holds in the Bruce Case, supra, that the principle there announced did not conflict with the holding that the

principal in the second degree may be tried and convicted of murder, although the principal in the first degree had been convicted of voluntary manslaughter only. And we say in this case that this principle does not conflict with the enunciation here made that where two are jointly indicted as principals in the first degree, and one is convicted of voluntary manslaughter, and subsequently the other is acquitted, this presents no reason why the verdict of conviction should be set aside and another trial granted. If Elrod had been convicted as principal in the first degree, and then Maughon had been convicted of voluntary manslaughter or murder, and subsequently the record of Elrod's conviction had been used as evidence against Maughon, and subsequently Elrod was granted a new trial, this fact would justify the grant of a new trial to Maughon. The headnote in the Jackson Case, supra, is as follows: "When on the trial of A. for murder in the second degree the record of the conviction of B. as principal in the first degree was introduced as evidence, and A. was found guilty as such principal in the second degree, and afterwards B. was granted a new trial, upon which he was found not guilty, held, that A. ought to have a new trial." While, as Judge McCay says in the Jackson Case, there may be some little confusion in the books as to the use of a verdict of guilty or acquittal of the principal in the first degree on the trial of the principal in the second degree, we think the true distinction is this: Where two men are jointly indicted, one as principal in the first degree, and one as principal in the second degree, the guilt of the principal in the first degree must be established by the state, but the record is not conclusive of that fact, and the conviction or acquittal may be denied, notwithstanding the record, and the verdict simply goes in evidence for what it is worth; but it is not conclusive and the truth may nevertheless be shown by evidence. The way we look at this case under the evidence none of this discussion is really material. Here two men were jointly indicted as principals in the first degree. One was tried and convicted of voluntary manslaughter, and the second was tried and acquitted, wholly without reference to the truth of the verdict in the first case, and the only pertinent and material question before us is whether the verdict was authorized by the law under the evidence in the present case. The law, as we have endeavored to show, authorized a verdict of guilty of voluntary manslaughter, and there is evidence to support such a verdict, although a jury has acquitted the other defendant, Elrod. And the principle announced in the Jackson Case, which was relied upon by learned counsel for the plaintiff in error, is not at all applicable to the facts of this case, but must be limited entirely to the facts of that case as enunciated in the headnote above quoted. We therefore

conclude that the accused is not entitled to another trial on this assignment of error.

Objection is made to the following excerpt from the charge of the court: "A person may be a principal in an offense in two degrees. A principal in the first degree is the actor or absolute perpetrator of the crime. A principal in the second degree is he who is present, aiding and abetting the act to be done. To illustrate, one person participating and attempting to strike is equally guilty with the one who strikes. In other words if the evidence shows to the jury to your satisfaction beyond a reasonable doubt, as explained to you, that Elrod fired the fatal shot that killed the deceased, and you further believe that he was told to do so, told to shoot him by Maughon, and he, Maughon, was present, aiding and abetting the act of killing and participating in the act of killing, then he would be just as guilty as Elrod, though he didn't fire the fatal shot. This is just an illustration or explanation of the two degrees of any offense known in law as principals in the first and second degree, and it is not meant on the part of the court, in making this illustration, to express or intimate any opinion whether Elrod fired the shot or not." It is insisted that this charge was inapplicable, misleading, and confusing, since the indictment charged both of the defendants with being the actual perpetrators and joint principals in the murder, there being no charge in the indictment against either as a principal in the second degree, and the contention and theory of the state being that Elrod alone fired the shot that took the life of the deceased; that this charge authorized the jury to return a verdict of guilty of voluntary manslaughter as principal in the second degree, and this would have been erroneous; and, further, that, where a defendant is charged in the indictment as the absolute actor and perpetrator of the crime, he cannot be convicted as a principal in the second degree. That portion of the above excerpt where the learned trial judge makes a concrete application of the general principle announced to the facts of this case is especially objected to, it being insisted that there was nothing in the evidence, or in the admissions, as contended by the state, of Maughon, to show that he ever told Elrod to shoot Cleghorn at the time Elrod fired his pistol, and that this was an improper intimation by the court of an opinion that the evidence showed that Maughon told Elrod to shoot the deceased, or to shoot at him, it being earnestly contended by learned counsel that, even if this language was used by the accused to Elrod, there was nothing to show that the language applied to Cleghorn, the deceased, and that it might reasonably have been inferred from the language that the accused did not mean for Elrod to shoot at the deceased, but meant for him to shoot in the air for the purpose of frightening

the deceased in order that he might desist from resisting arrest; that the language of the court as objected to was calculated to impress the jury with the idea that the judge believed that the language of Maughon requesting Elrod to shoot was a direction to him to shoot Cleghorn.

The first objection urged against this charge need not be considered, since the jury did not find the defendant guilty of voluntary manslaughter as principal in the second degree, but did find him guilty as the principal perpetrator of the crime of voluntary manslaughter, which they were fully authorized to do under the indictment. We do not see, however, why the jury could not legally return a verdict in the second degree. [4] While one cannot be convicted as an accessory before the fact to a charge of voluntary manslaughter, because the existence of an accessory presupposes premeditation and preparation, yet we do not see why one could not be convicted as principal in the second degree in the offense of voluntary manslaughter, for one can presently aid and abet a crime which may be committed on a sudden heat of passion, and without premeditation. There is quite a difference in this respect in the offense of an accessory before the fact and that of a principal in the second degree.

The second objection made to this charge is fully answered in the first division of this opinion, where decisions are cited in support of the proposition that one indicted as the absolute actor and perpetrator of the crime could be convicted under such charge as principal in the second degree. The objection urged against the concrete application by the court of the general principles of law to the facts of this case we think is without merit. It will be remembered that the theory of the state was that Maughon was guilty because he commanded Elrod to shoot at Cleghorn; that this act made him a principal in the second degree at least; in other words, that the crime actually committed by Elrod was imputed to Maughon as being committed by him through the agency of Elrod, and this made him equally guilty. It was the duty of the court to present this contention of the state to the jury, and in doing so to make such intelligent application of the law to the facts proved as would make the contention understood by the jury. Neither is there any intimation that this language of Maughon applied to Elrod. The judge simply told the jury: "If the evidence shows to your satisfaction beyond a reasonable doubt that Elrod fired the fatal shot that killed the deceased, and if you further believe that he was told to do so, told to shoot him by Maughon, and he, Maughon, was present, aiding and abetting the act of killing and participating in the act of killing, then he would be just as guilty as Elrod, though he didn't fire the fatal shot." It was not necessary for the court to charge the converse

of this proposition to the jury, for clearly the converse was included in the proposition itself. If they did not believe that Maughon told Elrod to shoot Cleghorn, or that he told him to shoot in the air, or at something else, the jury would have understood, and could have understood, nothing else but that in this latter event Maughon would not be guilty with Elrod. In brief, we think that the charge objected to not only laid down a correct proposition of law, but made a clear hypothetical application to the principal facts of the case, and that the jury could not have reasonably inferred from the language of the judge that the court either entertained or expressed any opinion on the subject.

The following charge of the court on the subject of voluntary manslaughter is objected to: "If you believe from the evidence that the deceased, Cleghorn, made an assault either with his fist, or otherwise, upon Maughon, or was attempting to get his pistol to assault him with it, and if you further believe that smarting under this provocation, and acting under a sudden heat of passion provoked thereby, he, Maughon, ordered Elrod to shoot Cleghorn, and Elrod, acting in pursuance of this request, then and there shot and killed Cleghorn while he was fleeing from them, the killing, under these circumstances, would be voluntary manslaughter; and, if you believe this to be the truth of the case, you would be authorized to find the defendant Maughon guilty of voluntary manslaughter." It is insisted that there is no evidence either on the part of the state or of the defendant to authorize a charge on voluntary manslaughter. The evidence for the state alone or for the defendant alone would probably not authorize a charge on the law of voluntary manslaughter, for, if the first was the truth of the transaction, the accused was guilty of murder; and, if the latter was the truth of the transaction, the accused was guilty of nothing, because the killing was not done by him or by Elrod, nor did he participate criminally therein, but it was the result of a shot fired by the brother of the decedent under the impression that he was shooting at the defendants. But the jury in considering the evidence was not compelled to find the truth either in the evidence for the state or in the evidence for the defendant, but they had a right to consider the evidence of both sides in determining the issues presented and in arriving at the truth. To illustrate by the facts of this case: The accused testified in part that the decedent came to the door, engaged in a struggle with him, assaulted him, pushed him off the porch, and attempted to get his pistol. The wife of the decedent testified that her husband was shot by one of the two defendants, which one she did not know, but that the shots came from their direction, and that, when the second shot was fired, her husband said that he was shot, and she

found him in a few minutes thereafter dead. If the jury believed that this evidence of the accused and this evidence of the state was the truth of the transaction so far as it went, and was applicable to the case, and they believed that, smarting from the assault made upon him by the decedent, the accused either shot, or ordered Elrod, his companion, to shoot, the deceased, and this was done under a sudden heat of passion provoked by the assault thus made upon him, the law of voluntary manslaughter was applicable. Indeed, we think that taking the evidence altogether the charge on the law of voluntary manslaughter as given by the court was demanded, and that the accused would have had just cause of complaint against the judge if he had not charged the law of voluntary manslaughter just as he did.

The remaining ground of the motion for a new trial is not verified, and is not insisted upon in the brief filed by counsel for plaintiff in error. We have given the case a very careful examination, and we find no error of law, and there is evidence in the record which supports the verdict of voluntary manslaughter.

Judgment affirmed.

(9 Ga. App. 511)

MILLER v. ROBERTS. (No. 2790.)

(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. CONTRACTS (§ 266*)—RESCISSION—CONDITIONS PRECEDENT—RESTORATION OF BENEFITS.

One party to a contract cannot rescind for fraud while retaining the benefits of the contract. In order to entitle him to rescind, he must promptly upon discovery of the fraud restore, or offer to restore, to the other party whatever he has received by virtue of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1186; Dec. Dig. § 266.*]

2. SALES (§ 41*)—VALIDITY—MISREPRESENTATION BY SELLER—MEANS OF INFORMATION—RELIANCE BY BUYER.

When the means of knowledge are at hand and equally available to both parties to a contract of sale and purchase, if the purchaser does not avail himself of these means, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the representations of the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 84; Dec. Dig. § 41.*]

3. BILLS AND NOTES (§ 534*)—RECOVERY OF ATTORNEY'S FEES—CONDITION PRECEDENT—NOTICE—WAIVER.

Where a promissory note contains an obligation to pay attorney's fees, the statutory notice which the plaintiff is required to give to the defendant as a condition precedent to his right to recover attorney's fees cannot be waived in the note, and the attempt to waive it therein is unenforceable and of no effect. (Hill, C. J., dissents as to this ruling.)

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 534.*]

Error from City Court of Blakely; W. A. Jordan, Judge.

Action by W. C. Miller against J. W. Roberts. Judgment for defendant, and plaintiff brings error. Reversed.

W. L. Geer, for plaintiff in error. W. F. Weaver, for defendant in error.

HILL, C. J. This was a suit on a promissory note. A verdict for the defendant was rendered and plaintiff's motion for a new trial was overruled.

The consideration of the note was the exclusive right to sell, in the counties of Early, Decatur, and Miller, "a pinless clothesline," under patent rights issued by the government of the United States to the seller. The defendant pleaded that when the sale was made the plaintiff represented to him that the only costs connected with the sale of the pinless clothesline would be the purchase price represented by the note sued upon, that none of the towns in the three counties of Early, Decatur, and Miller required any license or special business tax for the sale of said clothesline, and that, relying upon the truth of this statement, the purchase was made and the note given. This representation the defendant "found to be absolutely without truth, and, on account of said fraudulent representation, the patent right became and instantly was, upon the defendant's being required to pay a license to sell pinless clotheslines, worthless and useless to the defendant, and he immediately offered to return said patent right to the plaintiff, which offer was refused." Neither the note nor the contract of sale contained any representation on the subject of the payment of a license as alleged by the plea, and the plaintiff testified that no such statement was ever made by him to the defendant.

The defendant, in support of his plea, testified that he had sold about \$100 worth of the pinless clotheslines covered by his contract in the counties mentioned, but that on reaching the town of Bainbridge, in Decatur county, he was informed that a license would be required before he could sell the line in that city, and, on inquiry, found that such was the case in the other towns in the county. He introduced in evidence an ordinance of the town of Blakely requiring the payment of \$25 as a license before he would have the right to sell in that town the aforesaid pinless clothesline, and he testified that when he found that this was required he went to the plaintiff and asked that he either pay the license or rescind the contract.

[1] 1. The evidence in behalf of the defendant did not make a case which, under the law, would entitle him to have the contract rescinded for fraud. Conceding that a fraudulent representation was made, and that upon its discovery the defendant promptly offered to rescind, he did not offer to restore

to the plaintiff any of the proceeds which he had realized from sales under his contract of purchase, and which he testified amounted to at least \$100. Certainly he was not entitled to rescind the contract for fraud, when, according to his own statement, he had received a benefit out of the contract greater than the consideration for which the contract had been made.

[2] 2. Nor do we think the defense of deceit or fraud was established. This court is thoroughly committed to a high standard of good faith in the making of contracts, and either party to a contract is bound to disclose to the other any knowledge he may have of a material fact which may affect the value of the subject-matter or consideration of the contract. *Marletta Fertilizer Co. v. Beckwith*, 4 Ga. App. 249, 61 S. E. 149. But it is well settled that the law does not afford relief to one who suffers by not using the ordinary means of information that may be at hand, whether his neglect be due to indifference or to credulity. Whether the towns in the three counties mentioned required the payment of a license by the seller of pinless clotheslines was a fact which could be found out by the defendant as easily as by the plaintiff. In other words, the information was equally available to both parties. It is a matter of general knowledge that most towns and cities do require licenses from vendors of such articles.

The assertion by the plaintiff (assuming that he made it) that no license was required by any of the towns in any of those three counties was simply the assertion of a fact, the truth of which could have easily been inquired into by the defendant, and the defendant was bound to make such inquiry, and would not be authorized to rescind the contract for any damage resulting from a misrepresentation which, by the exercise of the most ordinary and reasonable diligence, he could have discovered was a misrepresentation. *Greene v. Bryant*, 2 Ga. 66. As was tersely expressed by Lord Kenyon, in the old case of *Pasley v. Freeman*, 3 Term Reports, 64: "Undoubtedly, where the common caution and prudence of man are sufficient to guard him, the law will not protect him in his negligence."

But to sum the whole matter up in a nutshell: Neither the law, nor equity, nor good conscience, will allow one party to a contract to rescind the contract for alleged fraud, or will on that ground relieve him from a compliance with his contract, where, according to his own statement, he has received from the contract a pecuniary benefit greater in amount than the consideration of the contract, and retains in his possession the fruits of the contract, and makes no offer to make an equitable adjustment thereof with the plaintiff. We do not see how the defendant can be relieved of the obligations of his contract while retaining the benefits thereof.

[3] 3. The note sued on in this case con-

tained an agreement to pay "all costs of collection, including 10 per cent. on principal and interest as attorney's fees, if collected by law or through an attorney at law, and contained, also, a provision as follows: "The makers, indorsers and sureties on this note waive the ten days notice that is now required by law to be given as to when, where, and in what court the owner will proceed to collect or sue this note, and agree that if the owner places this note in the hands of an attorney for collection he is to collect ten per cent. upon the principal and interest as attorney's fees, and the said ten per cent. is hereby made a part of the principal."

The court instructed the jury that this attempt to waive the notice which the statute makes a condition precedent to the recovery of attorney's fees was unenforceable and of no effect, and to this instruction the plaintiff excepts. While the writer is of the opinion that this instruction was erroneous, the other members of the court are of the view that the exception is not well taken, and the writer is authorized to state the following as the opinion of the majority of the court:

The Civil Code 1910, § 4252, provides: "Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, are void, and no court shall enforce such agreement to pay attorney's fees, unless the debtor shall fail to pay such debt on or before the return day of the court to which suit is brought for the collection of the same: Provided, the holder of the obligation sued upon, his agent, or attorney notifies the defendant in writing, ten days before suit is brought, or his intention to bring suit, and also the term of the court to which suit will be brought."

Prior to the act of 1890, known as the Twitty bill (codified into section 3667 of the Civil Code of 1895), there was nothing in our law or public policy which forbade the maker of a note or other obligation from promising to pay attorney's fees in addition to the debt. By the Twitty bill it was provided that obligations to pay attorney's fees were void and unenforceable by the courts, unless the defendant, upon being sued, filed a plea which he failed to sustain. This declared a new public policy in this state as to obligations to pay attorney's fees in addition to the principal and interest due upon an indebtedness. In 1900 this law was amended so as to make it read as it appears in the Code of 1910, § 4252, but the same policy in general outline was preserved; that policy being that such obligations should not be enforced, unless the creditor was in fact put to the necessity of employing an attorney to collect the debt through suit. The law declaring this policy was so shaped that to the creditor himself should not be left the absolute determination of the time when this necessity to employ

counsel was upon him. The legislative mind seemed to contemplate that the creditor would be afforded full measure of protection in this respect, if the law provided a means whereby he could employ the attorney on what is called the return day of the court (that is, the last day on which suit may be filed, as respects a particular term), so that the present law on the subject does not allow the creditor to collect attorney's fees, though stipulated for in the note, unless he gives the debtor 10 days notice of his intention to file suit, informing him as to the court in which it will be brought, and of the term to which it is to be brought, and if the debtor pays up before the return day of the court arrives, or before the suit is filed upon the return day itself, the creditor cannot even if the notice has been given, enforce the obligation to pay the attorney's fees.

It may be said, therefore, that the declared public policy of this state on this subject is that obligations to pay attorney's fees in addition to the principal and interest stipulated for in the instrument creating the indebtedness are to be wholly void and unenforceable, unless the debtor by his act of not paying the debt before the return day, after he has been given timely notice, puts the creditor to the necessity of hiring an attorney. If the provision in the statute as to the giving of the notice was merely something which the law had established in favor of the debtor, and not involving any public interest or public policy, the debtor would undoubtedly have the right to waive it, under the Civil Code 1910, § 10; but we understand the rule to be that, wherever a provision of law is made for the enforcement of some public policy of the state, no person will be allowed to waive that provision, though he himself may be the immediate beneficiary.

The welfare of the state itself frequently demands that the law-making power shall enact statutes and declare public policies for the purpose of protecting citizens from hard contractual exactions or stipulations against which they might naturally be expected to protect themselves, but against which, on account of certain inherent weaknesses common to many classes of the people, they do not ordinarily take care to protect themselves; and where such safeguards have been erected the courts will not allow the parties to contract against the enforcement of the policy declared by the law. Instances of such legislation are familiar, the debtor classes being perhaps the most frequent beneficiaries; for example, the laws against taking usury, the law which prohibits a mortgagor from waiving his equity of redemption, the law against the enforcement of contractual penalties, etc. It is a familiar notion, often given expression in our jurisprudence, that it is one of the objects of the law to prevent debtors, urged by the pressure of the necessity of securing credit, or money, or

extension of indebtedness, from yielding to such unjust or unreasonable exactions as a hard creditor may see fit to make.

So as to the present matter, the law, recognizing that many debtors, pressed by their necessity, would, in order to get the money, credit, or the extension which they desired, be willing to contract to pay the creditor attorney's fees in addition to principal and interest, whether the creditor was ever put to the necessity of using the attorney or not, stepped in and declared, as a matter of public policy, that such an obligation should be unenforceable, unless the necessity arose, just as it has declared, upon a similar consideration, that a promise to pay more than 8 per cent. interest is void. If the courts should enforce a waiver, such as the one here presented, made contemporaneously with the obligation to pay the attorney's fees, the whole policy in the law could easily be avoided in all cases by the smallest amount of designing. A debtor, willing to promise to pay the attorney's fees, would make no quibble over waiving the statutory notice. If this court should hold this waiver to be valid, it would be but a short while before it would be usual for all standard, printed forms of notes to contain a similar provision, and the law would be a dead letter.

There is nothing in what is here held which would prevent a debtor, after his note had matured, or even when it was about to mature, from waiving formal service of the notice, if he was in fact informed that suit for the indebtedness would be brought to a designated term of a particular court; in other words, there is nothing in the policy of the law which would forbid him to acknowledge service of a notice, or even to waive service, if he was in fact given notice of the intention to sue, and given the opportunity contemplated by the statute of paying the debt before the return day; but the majority of the court does not think that the waiver can be made as a part of the original contract, or that the spirit of the law can be violated by the stipulations of the parties.

The writer thinks that the statute in question was made solely for the benefit of the makers of the obligations therein described, and the requirement that notice must be given 10 days before suit is a personal privilege, which can be waived by the defendant, and that when he does so in the note he is bound by the waiver, and cannot be heard subsequently to repudiate it. Defendants are authorized to waive process, as well as the time of filing suit, and to consent that a judgment may be taken at an earlier term than the law would otherwise authorize. Civ. Code, 1910, § 5561. Section 5562, is mandatory in its terms. It declares that "the petition shall be filed at least twenty days before the term to which it is returnable." This waiver is analogous to the stat-

utory notice now under consideration, and yet the Supreme Court has held that where the defendant waives, in writing, the requirement, as between himself and the plaintiff, the waiver is binding, in the absence of fraud, and the defendant cannot subsequently be heard to object that the petition was not filed 20 days before the term of the court to which the suit was returnable. *Steadman v. Simmons*, 39 Ga. 591. Where the maker of an obligation makes a contract to pay the 10 per cent. attorney's fees, and the statutory notice is not given as required, can it be doubted that the defendant would have the right, where suit is brought for the recovery of attorney's fees, to come into court and consent that a judgment be rendered against him for the attorney's fees, although the notice had not been given? And what he can do after suit is filed it would seem he could do previously. As before stated, I think the notice in question is solely a personal right or privilege.

Section 10 of the Civil Code of 1910 provides as follows: "Laws made for the preservation of public order or good morals cannot be done away with or abrogated by any agreement; but a person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest." The statute now under discussion was not made for the preservation of public order or good morals, and, clearly being enacted in favor of defendants who are sued on obligations wherein they agree to pay attorney's fees, may be waived by them, unless such waiver injures others or affects the public interest. The public has no interest in a contract of this character, and none, except those who are parties to the contract, can possibly be injured by any waiver relating thereto.

Nor do we think that contracts which provide for the collection of attorney's fees from the defendant are against the public policy of this state. Prior to the act of 1891, commonly known as the Twitty bill, there was no legislation on this subject; the matter being purely one of individual contract. The act of 1891 first declared that these contracts were "absolutely void," and could not be enforced by the courts, unless the defendant filed a plea or pleas which he failed to sustain. Acts 1891, p. 221. The contract, although declared to be absolutely void, was not in fact absolutely void. It depended upon whether the plea or pleas filed to the suit were sustained, and if the plea or pleas were not sustained the contract was enforceable and the fees were collectible.

The act of 1900 (Acts of 1900, p. 53) struck out the words in the act of 1891, "unless a plea or pleas be filed by the defendant and not sustained," and inserted in lieu thereof the following words, to wit: "Unless the debtor shall fail to pay such debt on or before the return day of the court to which

suit is brought for the collection of the same; provided the holder of the obligation sued upon, his agent, or attorney, notifies the defendant in writing ten days before suit is brought, of his intention to bring suit, and also the term of the court to which suit will be brought." The contract to pay fees, although declared to be void, under this amendment was not absolutely void, but only voidable, for, notwithstanding the language of the statute, which declares that the contract is absolutely void, the contract is valid where the debtor fails to pay the debt before the return day of the court to which suit is brought, and provided, further, that the statutory notice is given to the defendant. The contract to pay attorney's fees, therefore, is not one in violation of any law of this state, or contrary to the public policy of this state, and is entirely in harmony with the law and public policy of the state, but must be enforced in accordance with the requirements of the statute.

The agreement to waive the statutory notice is not analogous to a contract to waive the exemption of wages from process of garnishment, or, independently of statutory or constitutional provision, the waiver of a homestead exemption. In the absence of any such statutory or constitutional provision, it has been uniformly held by the courts of this country that any agreement waiving the right to claim the exemption of property from execution, or from garnishment process, is against public policy, and is void. *Freeman on Executions* (3d Ed.) § 216. This class of exemptions applies to heads of families or to laborers who depend for their support upon their daily wages, and the benevolent purpose of such legislation is to protect dependent families or laborers. Even as to homestead exemptions in this state, there is an express provision allowing waiver of this exemption down to a certain limit. In the absence of such a provision, it is clear that the waiver of homestead exemption would not be upheld by the court. In the case of *Traders' Investment Co. v. Macon Ry. Co.*, 3 Ga. App. 185, 59 S. E. 454, this court held that a contract, either specific or general, by which journeymen mechanics and day laborers, as debtors, attempt to waive the exemption of their wages from the process of garnishment is not enforceable, adopting as the decision of the court a learned opinion by Associate Justice Lumpkin of the Supreme Court, while on the circuit bench. In this opinion of Judge Lumpkin, it will be seen that he holds that these waivers are contrary to the public policy of the state, and are not valid, because they affect injuriously the rights of those who are dependent upon the laborer for support.

Looking at the subject now under discussion in its broadest aspect, I think that it is against the inherent right of individuals under a free government to curtail in any re-

spect their absolute liberty of contract, unless such contract is against the declared policy of the state, or affects in some way injuriously the rights of others, or the public interest; and a statute made solely for the benefit of the individual, and limited to his personal rights, can be waived by him; and, when waived in writing, the waiver is binding and enforceable.

Judgment reversed.

(9 Ga. App. 526)

ALDERMAN v. VALDOSTA, M. & W. R. CO.
(No. 2,982)

(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

EMINENT DOMAIN (§ 238*)—PROCEEDINGS TO TAKE PROPERTY—AWARD OF ASSESSORS—REVIEW BY COURT.

A party who is dissatisfied with the award in condemnation proceedings which have been instituted to assess the damages to private property taken for public use, and who desires to appeal from the decision of the assessors to the superior court, is not required to give bond for the eventual condemnation money as in case of other appeals.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 238.*]

Error from Superior Court, Colquitt County; J. H. Merrill, Judge.

Condemnation proceedings by the Valdosta, Moultrie & Western Railroad Company against I. L. Alderman. From a judgment of a superior court dismissing an appeal from the award of assessors, Alderman brings error. Reversed.

Shipp & Kline and L. L. Moore, for plaintiff in error. E. K. Wilcox and J. A. Wilkes, for defendant in error.

RUSSELL, J. According to the record, the Valdosta, Moultrie & Western Railroad Company, being unable to agree with Alderman, who owned certain real estate over which the company desired to construct its railroad, instituted proceedings in accordance with the provisions of sections 5208, 5209, 5218, 5220, and 5221 of the Civil Code (1910). Upon the hearing before the assessors they returned a finding fixing the value of the land at \$225, awarding no consequential damages, and deducting nothing for consequential benefits. From this award Alderman entered an appeal to a jury in the superior court. He, however, did not give any bond or security, and when the case was sounded for trial the judge of the superior court sustained a motion to dismiss the appeal, based upon the ground that no appeal bond had been given.

The only question presented for our determination is whether one who is dissatisfied with an award in a proceeding brought for the purpose of condemning private property for a public use, and who desires to

enter an appeal to the superior court, is required to give bond and security as in other cases of appeal. In our opinion it is unnecessary to give bond in an appeal from the award of assessors in condemnation proceedings. The learned judge of the superior court who presided in this case no doubt entertained the opinion that provisions of section 5228 of the Civil Code (1910), which gives the right of appeal to the superior court in condemnation proceedings, were to be construed as making the same requirements as are made to the appeals mentioned in sections 4998 and 4999, and that, as a bond is required in these cases, a party dissatisfied with an assessor's award should likewise give bond when entering an appeal therefrom. We confess that at first we were not free from doubt upon the subject. There is, however, a plain reason why appellants, in appeals generally, should give bond and security for the eventual condemnation money, while there is no substantial reason why any party who desires to appeal from the award of assessors in condemnation proceedings should be required to give bond for the eventual condemnation money.

If a public corporation is dissatisfied with the award and appeals, in order to reduce the amount which it is required to pay for the property it takes for public use, and the consequential damages, it is unnecessary for it to give bond, because it cannot acquire title to the property until it has paid the amount finally adjudged to be due to the property owner. If the property owner desires to appeal, because in his opinion the award is unjust to him, either because no damages have been assessed, or because in his judgment the amount is too small, it would be a vain thing to require him to pay the eventual condemnation money, for in the very nature of the case he cannot be liable to the corporation for any amount, even though the assessors might find that the consequential benefits to his land are greater than its original value, and therefore that he is not entitled to compensation. This states an extreme case. In no case could a railroad company or other public corporation be given a judgment against a landowner for consequential benefits, because, no matter how beneficial the construction of the proposed public work might be, the landowner has not asked for the construction of the improvements, nor is he liable for benefits conferred upon him without his request or consent. Cases might be imagined where a public corporation, in order to proceed with the work, might pay the amount of the award, and be unable to collect the sum allowed it by a jury, in case there was a reduction from the amount returned by the assessors; but this could not be reached by requiring the appellant to give bond, because, if the railroad was dissatisfied and entered

an appeal, it, and not the appellee, would be the party to give bond. It would seem that, in any case of appeal from the award of the assessors in condemnation proceedings, the situation is such that, if the appellant should fail to sustain his contention, the appellee would not be injured by the appellant's failure to give bond, except in a case where the landowner might receive, upon his own appeal, a smaller finding than that awarded him by the assessors.

In a case where the public corporation, in order to proceed with the work, might have paid the original award, and the landowner had in the meantime become insolvent, a judgment against him for the difference between the amount paid him by the corporation and the amount of the jury's verdict might be barren of results. This phase of the case, however, seems to have been in legislative contemplation, for Civil Code 1910, § 5230, provides that, "If the amount so awarded by the assessors is less than that found by the final judgment, the company shall be bound to pay the sum so finally adjudged, in order to retain the property; and if it be less than that awarded by the assessors, the owner shall be bound to refund any excess paid to or received by him, and a judgment for such excess shall be rendered against him, *to be collected by levy as in other cases.*" (Italics ours.) The peculiarity of this verbiage would seem to clearly indicate that the Legislature did not intend to require a bond in appeals from the award of assessors in cases of condemnation; for, if so, provision would have been made for the entry of judgment against the security as well as against the appellant himself, and a levy would have proceeded as in other cases of appeal, instead of "as in other cases" where a judgment is entered solely against the party himself. It is to be noted, too, that there is no reference to any proceeding or remedy against a security in any of the sections which go to make up chapter 9 of the second title of the Code of Practice in the Civil Code. Sections 5206-5246 relate to the condemnation of private property, while the practice of entering judgment against the security upon an appeal in other cases is familiar law.

As marking another difference between the appeal provided in cases of condemnations (Civil Code 1910, § 5228), and the appeals provided for in chapter 1 of the second title of the Code of Practice, the latter must be entered within four days after the adjournment of the court in which the judgment was rendered, with express provision for security and the payment of costs (except in the case of executors, etc.); or, in case of inability to pay costs and give security, an affidavit in forma pauperis supplies their place. The appeal in condemnation proceedings may be entered in writing within 10 days from the

time the award is filed, and no reference is made either to the payment of costs, the giving of a bond, or the substitute of an affidavit in forma pauperis; and in section 5246 it is expressly provided that a county may decline to accept the land which it seeks to condemn, in case the final judgment fixing the damages is for any reason unsatisfactory to the county authorities, by merely paying the costs. Not only from these instances, but also on account of the very nature of the case, we think it is clear that it was not the intention of the Legislature, in cases of appeal from the award of assessors in condemnation proceedings, to require the appellant to give the security required in other cases of appeal, and we therefore think the judge of the superior court erred in dismissing the appeal in this case.

In those cases where the party seeking to condemn does not wish to proceed with the work, security would be unnecessary, because such party could not obtain the title or use of the land until the final judgment entered upon the verdict of the jury had been complied with; and the Legislature seemed to think it just to let the landowner appeal without security, although there might arise cases in which the condemning party, having paid the full amount awarded by the arbitrators in order to proceed with the work, would find himself in a position where, by reason of the landowner's insolvency, he could not collect the judgment which the jury might award him on the trial of the landowner's appeal; for, even on the landowner's appeal, the award of the arbitrators might be lowered.

Judgment reversed.

(3 Ga. App. 571)

DEAN v. STATE. (No. 3,520.)

(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

INDICTMENT AND INFORMATION (§ 125*)—CRIMINAL LAW (§ 202*)—FORMER JEOPARDY—DUPLICITY—SEPARATE OWNERSHIP OF GOODS STOLEN.

Where several articles are stolen at one time, there is only one larceny, whether the ownership is in one person or in different persons. The state in such case may charge in one indictment the larceny of all the articles stolen, alleging ownership according to the fact. But after the thief has been indicted and convicted of the larceny of any one of the articles the prosecution is exhausted, and he cannot subsequently be indicted for the larceny of one of the articles embraced in the same larceny, and which the state chose to omit from the former indictment.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 125;* Criminal Law, Dec. Dig. § 202.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Duncan Dean was convicted of larceny, and brings error. Reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

P. D. Rich, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

HILL, C. J. The single question presented in this case for the decision of the court is whether a person who at the same time and place takes, steals, and carries away with the intent to steal five cows belonging to different owners, the larceny constituting but one transaction, can be indicted in separate indictments for five separate larcenies, or whether the indictment and conviction for larceny in stealing one of the cows, the property of a designated owner, would be a bar to subsequent indictment and prosecution for the larceny of any of the other cows. In our opinion the indictment and conviction of the accused for the larceny of one of the cows under the circumstances above stated would be a bar to further prosecution for the larceny of any of the other cows stolen by him at the same time and from the same place and in the same transaction. Unquestionably the state could include in the same transaction the larceny of all five of the cows, alleging different ownership and a different value as to each cow. This would constitute but one offense, covering the one transaction, and would be sustained by proof that the accused stole any of the cows as charged therein. In *Lowe v. State*, 57 Ga. 172, it is held that an indictment for simple larceny for stealing two hogs at the same time and place, though alleging that one is the property of one person, and the other of another, covers but one transaction, and charges but one offense, and judgment thereon will not be arrested. In the case of *Tippins v. State*, 14 Ga. 422, it is held that while the thief may be tried in any county in which he may be found in possession of the stolen goods, a trial in one county will be a bar to a trial in another county. Mr. Bishop in his work on Criminal Law (2 Bishop's New Criminal Law, § 888) declares that "it is a plain doctrine of all our courts that, if in a single transaction more articles than one belonging to the same owner are stolen, the indictment may charge the larceny of the whole in one count. It is but one larceny. And, should the articles have different owners, most permit the allegation to be in the same way. But, whether the ownership is in one person or many, the indictment need include no more of the articles than the prosecuting power chooses." And in further discussing this subject he says: "In principle the wrong as a crime is to the public, not to the private owner. The thief ordinarily does not care, and often he does not know, whose are the things he is taking. And, though the indictment is required to set out the ownership, the purpose is simply identification of the articles. So that the state, empowered by law to elect in what form it will accuse a wrongdoer, can put all of one theft into a single

count, or a part thereof, as it chooses. Still, where many articles are stolen at one time, there is only one theft, whether the ownership is in one person or many. And, after the thief has been in jeopardy for any part of the one larceny, the prosecution is exhausted, and he cannot be indicted for anything the state chooses to omit." And, further, that, "though the articles are not taken and carried away together, yet, if the taking is one continuous transaction, the larceny is one." And he cites many decisions to sustain the text. In a well-considered decision by the Supreme Court of Indiana (*Furnace v. State*, 153 Ind. 95, 54 N. E. 441) it is said: "We recognize no good reason to depart from what may be considered the great current of authority and hold the pleading in question bad when it can reasonably be said that it discloses that the larceny complained of was but a single act or transaction in violation of the law against larceny, although the property which is the subject of the crime belonged to several different persons. The particular ownership, as charged in the pleading, of the money stolen, did not give character to the act of stealing it, but was merely a part of the description of the particular crime charged to have been committed. The indictment charged but one offense against the state." Many authorities are cited in support of the decision. In that case the defendant was indicted for stealing at the same time and place "\$5 in money, the property of Jane Engle, and \$4.50 in money, the property of Samuel Engle," and the court held that the larceny, occurring at the same time and place, constituted but a single transaction. In *Holles v. United States*, 8 MacArthur (D. C.) 370, 86 Am. Rep. 106, the federal judge held that for the indictment for larceny of the goods of several at the same time there can be conviction and sentence but for the single offense. The learned judge declared that it is a rule of criminal pleading that, where several articles of property are stolen at the same time and place, the stealing constitutes but one offense, and should be so charged in the indictment or information. It should be regarded as a single act, and the result of one intention. Where the articles are stolen at different times, they are different acts of larceny, and may be charged as different offenses. "But it seems that if the property of several persons, lying together in one bundle or chest, upon the same table, or even in the same house, be stolen together at one time, the value of the whole may be put together, for such stealing is one entire felony." 2 Russell on Crimes, 177. In 1 Hale's Pleas of the Crown, 531, the author gives the following illustration of the principle: "It seems to me that if at the same time the thief steals goods of A. to the value of sixpence, goods of B. to the value of sixpence and goods of C. to the value of sixpence, being, perchance, in one bundle, or upon a

table, or in one shop, this is grand larceny, because it is one entire felony, done at the same time, though the persons had several properties." See, also, to the same effect, 3 Chitty's Criminal Law, 959. While there is some conflict among courts on this question, the text-writers do not differ as to the principle announced above in the quotation from Mr. Bishop's work on Criminal Law. And a large preponderance of the decisions of the courts is to the effect that the larceny of articles belonging to different owners, if committed at the same time and place, constitutes but one offense; and that while the state can, if it chooses, include all these offenses in one indictment, yet, if it chooses to indict the thief for stealing only one of the articles belonging to one of the owners, it cannot subsequently be allowed to indict for the larceny of any of the other articles taken at the same time and in the same transaction, but which had been omitted from the previous indictment. Here the plea of *autrefois* convict clearly alleged that the accused had stolen at the same time and place, as a part of the same transaction and constituting only one larceny, five cows belonging to different owners, and that he had been indicted and convicted for stealing one of the cows, and that this conviction was a bar to any further prosecution for the theft of any of the other cows which had been stolen at the same time, although belonging to different owners, and the demurrer admitted the truth of these allegations. In this state, where the "same-transaction test" is the rule for determining the question of jeopardy, we are clear that one larceny cannot be divided into several because there were several owners of the goods stolen at the same time, to allow separate prosecutions in each case of distinct ownership would be to regard the larceny as simply a trespass against the individual owner, and not a trespass against the public law, and would be contrary to both the letter and the spirit of the constitutional guaranty.

Judgment reversed.

(9 Ga. App. 510)

HUGHES v. ATLANTA STEEL CO.
ATLANTA STEEL CO. v. HUGHES.
(Nos. 2,781, 2,782.)

(Court of Appeals of Georgia. July 25, 1911.)

(*Syllabus by the Court.*)

1. INJURIES TO SERVANT.

The questions of law raised in the cross-bill of exceptions having been certified by this court to the Supreme Court, and that court having decided the questions adversely to the contentions of the plaintiff in error in the cross-bill, the judgment of the lower court on the cross-bill must be affirmed.

2. APPEAL AND ERROR (§ 977*)—REVIEW—GRANT OF NEW TRIAL.

The judgment of the lower court in granting the motion for a new trial on a single

ground must be affirmed, under the ruling of the Supreme Court in the case of *Smith v. Maddox-Rucker Banking Co.*, 135 Ga. 151, 68 S. E. 1031, and the decision of this court in *Holland v. Williams*, 3 Ga. App. 636, 60 S. E. 331.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3863; Dec. Dig. § 977.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Robert Hughes against the Atlanta Steel Company. From the judgment, both parties brought error to the Court of Appeals, which certified a question of law to the Supreme Court. 71 S. E. 728. Judgment affirmed, on answer of Supreme Court.

F. M. Hughes and Westmoreland Bros., for plaintiff. Smith, Hammond & Smith, for defendant.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 530)

SOUTHERN RY. CO. v. CAMPBELL.
(No. 3,009.)

(Court of Appeals of Georgia. July 25, 1911.)

(*Syllabus by the Court.*)

1. RAILROADS (§ 359*) — TRESPASSERS ON TRACK—DUTIES OF RAILROAD.

A railroad company in the operation of its trains owes to a trespasser upon its tracks no duty, save that of not injuring him willfully or wantonly.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1238, 1239; Dec. Dig. § 359.*]

2. RAILROADS (§ 398*) — TRESPASSERS ON TRACK—EVIDENCE.

The evidence shows that the homicide was not willfully or wantonly committed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1362; Dec. Dig. § 398.*]

Error from City Court of Hall County; Geo. K. Looper, Judge.

Action by Tinnie Campbell against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Ed. Quillian, O. R. Faulkner, and Jno. J. Strickland, for plaintiff in error. R. R. Arnold and Howard Thompson, for defendant in error.

RUSSELL, J. The plaintiff, Mrs. Tinnie Campbell, brought suit against the Southern Railway Company to recover damages for the homicide of her son, A. C. Campbell, upon whom she alleged she was dependent. It appears that he was killed by a train of the defendant on November 27, 1908.

It appears from the record that a negro preacher named Pittman, on his way to the depot of the defendant at New Holland, to purchase a ticket to Alto, Ga., saw Campbell sitting on one side of the railroad track, with his feet in the center of the track, and with his hands between his knees and his head down. Pittman was crippled and was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

hurrying, because train No. 12, which he intended to board, was almost due. As he passed, according to his testimony, he said to Campbell, "It is nearly train time, and you had better get up from there. The train will be along directly." Pittman testified that he was about 40 feet from him when he spoke, and he spoke loud enough to be heard, though he did not stop walking; that he was trying to make connection with his train; that he looked back, and, as Campbell had not moved, he spoke again, saying, "It is nearly train time, and you had better get up." Campbell never moved at all. It appears that Pittman proceeded to the depot and told several parties who were at the depot door and in the waiting room: "Yonder sits a man up there on the railroad track, and I spoke to him twice, and he did not move, and if he sits there long the train will get him." He then went on to the depot agent, who was inside of the ticket office, writing. After calling for a ticket to Alto, Pittman told the agent: "There is a man sitting up there on the railroad track, and I spoke to him twice, and he did not give me any attention." The agent said, "Where?" and Pittman said, "Up yonder right on the railroad, just above the crossing." Just as the agent "struck" his ticket and handed him back his change, Pittman said, as he turned his back to the window, he saw the freight train coming in the cut away up there, and remarked, "Yonder comes the train now."

Other witnesses testified that as the train came in sight all the people out there were giving signs to the engineer; some threw up their hands, some waved their hats, and some their handkerchiefs. According to the testimony, the engineer saw the signals given him by the bystanders, but the train proceeded on its way. The deceased did not move, and was killed by the collision of the pilot of the engine with his body. The deceased was killed about 250 yards north of the station, and there was testimony to the effect that a person could see nearly a half mile from the point where the railroad track emerged from the cut to the point where the young man was killed, though it was admitted by these witnesses, upon cross-examination, that an engineer sitting on his engine could hardly distinguish a man or any object on the ground at the point where the deceased was killed, because, on account of the curve, the boiler would be between him and any object on the track at that point. In the main there is no conflict in the testimony.

It is apparent that almost immediately after the agent and several bystanders at the depot were notified by Pittman of Campbell's being upon the track, the freight train, composed of 23 cars, came in sight, running at a rate variously estimated as from 30 to 40 miles an hour. It was running down-grade. The witness Lewis, who was very specific in his testimony, says that when

he first saw the train coming it was about 650 yards away. This freight train was to be followed, and was followed immediately, by a passenger train, No. 12, which was the train upon which passengers were intending to enter and did take passage. After the engine passed the depot, where the crowd made signals to the engineer to stop, and when it had reached a point of about 150 yards from where Campbell was sitting, the engineer gave three short whistles and applied the air brakes, but the train was not stopped until it had passed at least 50 to 75 feet beyond the point where the body lay, or about 100 or 125 feet from where the engine hit the man.

According to the testimony of the company's employes, of whom there were three upon the engine, as the train approached New Holland, running about 30 miles an hour, and when the engine came within 150 yards of the depot, there were several in the yard, and the engineer was blowing his fancy whistle, and there were two or three out there waving their hands on the fireman's side. It is customary for crowds to gather around a station, though not necessarily waving their hands. Those were not any kind of signals at all. The waving of the hands is not a stop signal. A stop signal is backward and forward. According to their testimony, the employes with the crowd were just out there "cutting up" and there was no signal that was recognized as a danger signal or a stop signal. The waving of hands and throwing up of the hats began when the engine was about 150 yards from the station. They testified that when they got even with the office some one pointed north of the depot, and the engineer and fireman looked in that direction, and discovered some one lying on the track about 100 yards ahead of the train. The engineer applied air in emergency and tried to stop the train. He put on the emergency first, and then blew the alarm signal. The air was working in good condition and everything was done that could be done to stop the train. The engineer used sand and reversed the engine before he got to where this man was lying, but it took about 200 yards to stop the train after he undertook to stop it.

The engineer testified that he was running about 35 miles an hour when he passed the depot at New Holland. When he got close enough to see the people there, he noticed them throw up their hands, two or three of them. He just considered it a kind of salute, a kind of waving at him. "Very frequently we see people doing that while passing stations along a public place, when we pass them near the railroad. Very often I see a man throw up his hands to me, especially those I am acquainted with along the line, and sometimes those I am not acquainted with. There was not anything when I first saw the signal to indicate to

right to disturb the verdict. We will take up the special assignments of error in their order and consider them in the light of the evidence, which has been briefly, but substantially, stated.

[2] The first ground of the amended motion presents the fact that since the conviction of the accused for the offense of voluntary manslaughter Kelley Elrod, his codefendant, has been tried and acquitted, and it is insisted that as the state contended that the accused was guilty of murder because he was present, aiding and abetting Elrod to shoot the decedent, and since the verdict of the jury in the Elrod Case proved the fact that neither Elrod nor Maughon fired the fatal shot that took the life of the deceased, but that the fatal shot was fired by some one else, a new trial should be granted to the accused in order that he might have the benefit of the verdict in favor of Elrod.

[3] Both Maughon and Elrod were indicted as the actual perpetrators of the crime, the indictment containing only the one count, but under this one count it is well settled that either or both may have been convicted as principals in the first or second degree, if the evidence had so authorized, and they could have been convicted either of murder or manslaughter under this one count of the indictment. *Collins v. State*, 88 Ga. 347, 14 S. E. 474, and cases cited, especially *Hill v. State*, 28 Ga. 604; *McLeod v. State*, 128 Ga. 17, 57 S. E. 83; *Bradley v. State*, 128 Ga. 20, 57 S. E. 237; *Lewis v. State*, 71 S. E. 417, decided May 12, 1911, by the Supreme Court of Georgia. In the case of *Collins v. State*, supra, it is held that "one indicted as principal merely can be convicted on evidence proving him guilty as principal in the second degree, if the facts be such as that the act by which the crime was perpetrated will on established principles of law be imputed to him as committed by himself through the agency of another. In such case the distinction of degrees is immaterial." In the case of *Bruce v. State*, 99 Ga. 50, 25 S. E. 760, it is held that where two persons are indicted for murder, one as principal in the first degree, and the other as principal in the second degree, the latter may be tried and convicted of murder, although the former had been previously tried and convicted of voluntary manslaughter only. In the opinion the Chief Justice cited the following illustration from 1 Starkie on Criminal Pleading (2d Ed.) 81: "Where A. and B. are present, and A. commits an offense in which B. aids and assists him, the indictment may either allege the matter according to the fact, or charge them both as principals in the first degree; for the act of one is the act of the other. And upon such an indictment B., who was present, aiding and abetting, may be convicted, though A. is acquitted. * * * If an indictment for murder charges that A. gave the mortal stroke, and that B. was present, aiding and abetting,

both A. and B. may be convicted, though it turn out that B. struck the blow, and that A. was present, aiding and abetting. To go one step further, upon a similar indictment, charging A. as a principal in the first degree, and B. as present aiding and abetting, B. may be convicted, though A. be acquitted." In *Hill v. State*, 28 Ga. 604, it is said: "The indictment charged the defendant as a principal. The evidence showed that another inflicted the mortal blow, the prisoner being present, aiding and abetting. Held, that the variance was immaterial; both being principals in law, as well as in deed, and the stroke of one being in law the stroke of the other." *Plain v. State*, 60 Ga. 284; 2 Bishop's New Criminal Procedure, §§ 3, 4. These decisions, and many others which we might cite, show that from a legal standpoint the conviction of the accused for voluntary manslaughter can be sustained, although the state claimed that Elrod was the actual perpetrator of the crime, and the jury had acquitted him of this offense. In other words, from a strictly legal standpoint, the acquittal of Elrod was wholly immaterial, and the fact of his acquittal furnishes no legal reason for the acquittal of the accused. This ruling is both sound and logical. The verdict in the Elrod Case, although conclusive as between the state and himself, is not in any sense conclusive of the truth of the transaction. He may have been guilty notwithstanding the verdict of the jury. There may have been reasons in his case, growing out of the inability of the state to produce the same evidence on this trial as on the first, which induced the jury to acquit him, which did not exist in the case of Maughon; but, irrespective of this question, we are simply concerned with the proposition of law that, where two are jointly indicted as principals, the acquittal of one does not in any legal sense inure to the benefit of the other, although it may be a circumstance of exculpation. The case of *Jackson v. State*, 54 Ga. 439, is relied on by learned counsel for the plaintiff in error in support of his position that a new trial should be granted in order that Maughon may have the benefit of the acquittal of Elrod. The Jackson Case does not support this contention. In the Jackson Case Judge McCay, speaking for the court, gives as the reason why Jackson, the principal in the second degree, ought to have a new trial on account of the grant of a new trial to the principal in the first degree, that the record of the conviction of the principal in the first degree had been used on the trial of the other case and may have injured the accused, and that, this record having been expunged by setting the verdict aside, the principal in the second degree ought to have a new trial without this evidence bearing against him. In construing this decision the Supreme Court holds in the Bruce Case, supra, that the principle there announced did not conflict with the holding that the

principal in the second degree may be tried and convicted of murder, although the principal in the first degree had been convicted of voluntary manslaughter only. And we say in this case that this principle does not conflict with the enunciation here made that where two are jointly indicted as principals in the first degree, and one is convicted of voluntary manslaughter, and subsequently the other is acquitted, this presents no reason why the verdict of conviction should be set aside and another trial granted. If Elrod had been convicted as principal in the first degree, and then Maughon had been convicted of voluntary manslaughter or murder, and subsequently the record of Elrod's conviction had been used as evidence against Maughon, and subsequently Elrod was granted a new trial, this fact would justify the grant of a new trial to Maughon. The headnote in the Jackson Case, *supra*, is as follows: "When on the trial of A. for murder in the second degree the record of the conviction of B. as principal in the first degree was introduced as evidence, and A. was found guilty as such principal in the second degree, and afterwards B. was granted a new trial, upon which he was found not guilty, held, that A. ought to have a new trial." While, as Judge McCay says in the Jackson Case, there may be some little confusion in the books as to the use of a verdict of guilty or acquittal of the principal in the first degree on the trial of the principal in the second degree, we think the true distinction is this: Where two men are jointly indicted, one as principal in the first degree, and one as principal in the second degree, the guilt of the principal in the first degree must be established by the state, but the record is not conclusive of that fact, and the conviction or acquittal may be denied, notwithstanding the record, and the verdict simply goes in evidence for what it is worth; but it is not conclusive and the truth may nevertheless be shown by evidence. The way we look at this case under the evidence none of this discussion is really material. Here two men were jointly indicted as principals in the first degree. One was tried and convicted of voluntary manslaughter, and the second was tried and acquitted, wholly without reference to the truth of the verdict in the first case, and the only pertinent and material question before us is whether the verdict was authorized by the law under the evidence in the present case. The law, as we have endeavored to show, authorized a verdict of guilty of voluntary manslaughter, and there is evidence to support such a verdict, although a jury has acquitted the other defendant, Elrod. And the principle announced in the Jackson Case, which was relied upon by learned counsel for the plaintiff in error, is not at all applicable to the facts of this case, but must be limited entirely to the facts of that case as enunciated in the headnote above quoted. We therefore

conclude that the accused is not entitled to another trial on this assignment of error.

Objection is made to the following excerpt from the charge of the court: "A person may be a principal in an offense in two degrees. A principal in the first degree is the actor or absolute perpetrator of the crime. A principal in the second degree is he who is present, aiding and abetting the act to be done. To illustrate, one person participating and attempting to strike is equally guilty with the one who strikes. In other words if the evidence shows to the jury to your satisfaction beyond a reasonable doubt, as explained to you, that Elrod fired the fatal shot that killed the deceased, and you further believe that he was told to do so, told to shoot him by Maughon, and he, Maughon, was present, aiding and abetting the act of killing and participating in the act of killing, then he would be just as guilty as Elrod, though he didn't fire the fatal shot. This is just an illustration or explanation of the two degrees of any offense known in law as principals in the first and second degree, and it is not meant on the part of the court, in making this illustration, to express or intimate any opinion whether Elrod fired the shot or not." It is insisted that this charge was inapplicable, misleading, and confusing, since the indictment charged both of the defendants with being the actual perpetrators and joint principals in the murder, there being no charge in the indictment against either as a principal in the second degree, and the contention and theory of the state being that Elrod alone fired the shot that took the life of the deceased; that this charge authorized the jury to return a verdict of guilty of voluntary manslaughter as principal in the second degree, and this would have been erroneous; and, further, that, where a defendant is charged in the indictment as the absolute actor and perpetrator of the crime, he cannot be convicted as a principal in the second degree. That portion of the above excerpt where the learned trial judge makes a concrete application of the general principle announced to the facts of this case is especially objected to, it being insisted that there was nothing in the evidence, or in the admissions, as contended by the state, of Maughon, to show that he ever told Elrod to shoot Cleghorn at the time Elrod fired his pistol, and that this was an improper intimation by the court of an opinion that the evidence showed that Maughon told Elrod to shoot the deceased, or to shoot at him, it being earnestly contended by learned counsel that, even if this language was used by the accused to Elrod, there was nothing to show that the language applied to Cleghorn, the deceased, and that it might reasonably have been inferred from the language that the accused did not mean for Elrod to shoot at the deceased, but meant for him to shoot in the air for the purpose of frightening

the deceased in order that he might desist from resisting arrest; that the language of the court as objected to was calculated to impress the jury with the idea that the judge believed that the language of Maughon requesting Elrod to shoot was a direction to him to shoot Cleghorn.

The first objection urged against this charge need not be considered, since the jury did not find the defendant guilty of voluntary manslaughter as principal in the second degree, but did find him guilty as the principal perpetrator of the crime of voluntary manslaughter, which they were fully authorized to do under the indictment. We do not see, however, why the jury could not legally return a verdict in the second degree. [4] While one cannot be convicted as an accessory before the fact to a charge of voluntary manslaughter, because the existence of an accessory presupposes premeditation and preparation, yet we do not see why one could not be convicted as principal in the second degree in the offense of voluntary manslaughter, for one can presently aid and abet a crime which may be committed on a sudden heat of passion, and without premeditation. There is quite a difference in this respect in the offense of an accessory before the fact and that of a principal in the second degree.

The second objection made to this charge is fully answered in the first division of this opinion, where decisions are cited in support of the proposition that one indicted as the absolute actor and perpetrator of the crime could be convicted under such charge as principal in the second degree. The objection urged against the concrete application by the court of the general principles of law to the facts of this case we think is without merit. It will be remembered that the theory of the state was that Maughon was guilty because he commanded Elrod to shoot at Cleghorn; that this act made him a principal in the second degree at least; in other words, that the crime actually committed by Elrod was imputed to Maughon as being committed by him through the agency of Elrod, and this made him equally guilty. It was the duty of the court to present this contention of the state to the jury, and in doing so to make such intelligent application of the law to the facts proved as would make the contention understood by the jury. Neither is there any intimation that this language of Maughon applied to Elrod. The judge simply told the jury: "If the evidence shows to your satisfaction beyond a reasonable doubt that Elrod fired the fatal shot that killed the deceased, and if you further believe that he was told to do so, told to shoot him by Maughon, and he, Maughon, was present, aiding and abetting the act of killing and participating in the act of killing, then he would be just as guilty as Elrod, though he didn't fire the fatal shot." It was not necessary for the court to charge the converse

of this proposition to the jury, for clearly the converse was included in the proposition itself. If they did not believe that Maughon told Elrod to shoot Cleghorn, or that he told him to shoot in the air, or at something else, the jury would have understood, and could have understood, nothing else but that in this latter event Maughon would not be guilty with Elrod. In brief, we think that the charge objected to not only laid down a correct proposition of law, but made a clear hypothetical application to the principal facts of the case, and that the jury could not have reasonably inferred from the language of the judge that the court either entertained or expressed any opinion on the subject.

The following charge of the court on the subject of voluntary manslaughter is objected to: "If you believe from the evidence that the deceased, Cleghorn, made an assault either with his fist, or otherwise, upon Maughon, or was attempting to get his pistol to assault him with it, and if you further believe that smarting under this provocation, and acting under a sudden heat of passion provoked thereby, he, Maughon, ordered Elrod to shoot Cleghorn, and Elrod, acting in pursuance of this request, then and there shot and killed Cleghorn while he was fleeing from them, the killing, under these circumstances, would be voluntary manslaughter; and, if you believe this to be the truth of the case, you would be authorized to find the defendant Maughon guilty of voluntary manslaughter." It is insisted that there is no evidence either on the part of the state or of the defendant to authorize a charge on voluntary manslaughter. The evidence for the state alone or for the defendant alone would probably not authorize a charge on the law of voluntary manslaughter, for, if the first was the truth of the transaction, the accused was guilty of murder; and, if the latter was the truth of the transaction, the accused was guilty of nothing, because the killing was not done by him or by Elrod, nor did he participate criminally therein, but it was the result of a shot fired by the brother of the decedent under the impression that he was shooting at the defendants. But the jury in considering the evidence was not compelled to find the truth either in the evidence for the state or in the evidence for the defendant, but they had a right to consider the evidence of both sides in determining the issues presented and in arriving at the truth. To illustrate by the facts of this case: The accused testified in part that the decedent came to the door, engaged in a struggle with him, assaulted him, pushed him off the porch, and attempted to get his pistol. The wife of the decedent testified that her husband was shot by one of the two defendants, which one she did not know, but that the shots came from their direction, and that, when the second shot was fired, her husband said that he was shot, and she

found him in a few minutes thereafter dead. If the jury believed that this evidence of the accused and this evidence of the state was the truth of the transaction so far as it went, and was applicable to the case, and they believed that, smarting from the assault made upon him by the decedent, the accused either shot, or ordered Elrod, his companion, to shoot, the deceased, and this was done under a sudden heat of passion provoked by the assault thus made upon him, the law of voluntary manslaughter was applicable. Indeed, we think that taking the evidence altogether the charge on the law of voluntary manslaughter as given by the court was demanded, and that the accused would have had just cause of complaint against the judge if he had not charged the law of voluntary manslaughter just as he did.

The remaining ground of the motion for a new trial is not verified, and is not insisted upon in the brief filed by counsel for plaintiff in error. We have given the case a very careful examination, and we find no error of law, and there is evidence in the record which supports the verdict of voluntary manslaughter.

Judgment affirmed.

(9 Ga. App. 511)

MILLER v. ROBERTS. (No. 2790.)

(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. CONTRACTS (§ 266*)—RESCISSION—CONDITIONS PRECEDENT—RESTORATION OF BENEFITS.

One party to a contract cannot rescind for fraud while retaining the benefits of the contract. In order to entitle him to rescind, he must promptly upon discovery of the fraud restore, or offer to restore, to the other party whatever he has received by virtue of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1186; Dec. Dig. § 266.*]

2. SALES (§ 41*)—VALIDITY—MISREPRESENTATION BY SELLER—MEANS OF INFORMATION—RELIANCE BY BUYER.

When the means of knowledge are at hand and equally available to both parties to a contract of sale and purchase, if the purchaser does not avail himself of these means, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the representations of the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 84; Dec. Dig. § 41.*]

3. BILLS AND NOTES (§ 534*)—RECOVERY OF ATTORNEY'S FEES—CONDITION PRECEDENT—NOTICE—WAIVER.

Where a promissory note contains an obligation to pay attorney's fees, the statutory notice which the plaintiff is required to give to the defendant as a condition precedent to his right to recover attorney's fees cannot be waived in the note, and the attempt to waive it therein is unenforceable and of no effect. (Hill, C. J., dissents as to this ruling.)

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 534.*]

Error from City Court of Blakely; W. A. Jordan, Judge.

Action by W. C. Miller against J. W. Roberts. Judgment for defendant, and plaintiff brings error. Reversed.

W. I. Geer, for plaintiff in error. W. F. Weaver, for defendant in error.

HILL, C. J. This was a suit on a promissory note. A verdict for the defendant was rendered and plaintiff's motion for a new trial was overruled.

The consideration of the note was the exclusive right to sell, in the counties of Early, Decatur, and Miller, "a pinless clothesline," under patent rights issued by the government of the United States to the seller. The defendant pleaded that when the sale was made the plaintiff represented to him that the only costs connected with the sale of the pinless clothesline would be the purchase price represented by the note sued upon, that none of the towns in the three counties of Early, Decatur, and Miller required any license or special business tax for the sale of said clothesline, and that, relying upon the truth of this statement, the purchase was made and the note given. This representation the defendant "found to be absolutely without truth, and, on account of said fraudulent representation, the patent right became and instantly was, upon the defendant's being required to pay a license to sell pinless clotheslines, worthless and useless to the defendant, and he immediately offered to return said patent right to the plaintiff, which offer was refused." Neither the note nor the contract of sale contained any representation on the subject of the payment of a license as alleged by the plea, and the plaintiff testified that no such statement was ever made by him to the defendant.

The defendant, in support of his plea, testified that he had sold about \$100 worth of the pinless clotheslines covered by his contract in the counties mentioned, but that on reaching the town of Bainbridge, in Decatur county, he was informed that a license would be required before he could sell the line in that city, and, on inquiry, found that such was the case in the other towns in the county. He introduced in evidence an ordinance of the town of Blakely requiring the payment of \$25 as a license before he would have the right to sell in that town the aforesaid pinless clothesline, and he testified that when he found that this was required he went to the plaintiff and asked that he either pay the license or rescind the contract.

[1] 1. The evidence in behalf of the defendant did not make a case which, under the law, would entitle him to have the contract rescinded for fraud. Conceding that a fraudulent representation was made, and that upon its discovery the defendant promptly offered to rescind, he did not offer to restore

to the plaintiff any of the proceeds which he had realized from sales under his contract of purchase, and which he testified amounted to at least \$100. Certainly he was not entitled to rescind the contract for fraud, when, according to his own statement, he had received a benefit out of the contract greater than the consideration for which the contract had been made.

[2] 2. Nor do we think the defense of deceit or fraud was established. This court is thoroughly committed to a high standard of good faith in the making of contracts, and either party to a contract is bound to disclose to the other any knowledge he may have of a material fact which may affect the value of the subject-matter or consideration of the contract. *Marietta Fertilizer Co. v. Beckwith*, 4 Ga. App. 249, 61 S. E. 149. But it is well settled that the law does not afford relief to one who suffers by not using the ordinary means of information that may be at hand, whether his neglect be due to indifference or to credulity. Whether the towns in the three counties mentioned required the payment of a license by the seller of pinless clotheslines was a fact which could be found out by the defendant as easily as by the plaintiff. In other words, the information was equally available to both parties. It is a matter of general knowledge that most towns and cities do require licenses from vendors of such articles.

The assertion by the plaintiff (assuming that he made it) that no license was required by any of the towns in any of those three counties was simply the assertion of a fact, the truth of which could have easily been inquired into by the defendant, and the defendant was bound to make such inquiry, and would not be authorized to rescind the contract for any damage resulting from a misrepresentation which, by the exercise of the most ordinary and reasonable diligence, he could have discovered was a misrepresentation. *Greene v. Bryant*, 2 Ga. 68. As was tersely expressed by Lord Kenyon, in the old case of *Pasley v. Freeman*, 3 Term Reports, 64: "Undoubtedly, where the common caution and prudence of man are sufficient to guard him, the law will not protect him in his negligence."

But to sum the whole matter up in a nutshell: Neither the law, nor equity, nor good conscience, will allow one party to a contract to rescind the contract for alleged fraud, or will on that ground relieve him from a compliance with his contract, where, according to his own statement, he has received from the contract a pecuniary benefit greater in amount than the consideration of the contract, and retains in his possession the fruits of the contract, and makes no offer to make an equitable adjustment thereof with the plaintiff. We do not see how the defendant can be relieved of the obligations of his contract while retaining the benefits thereof.

[3] 3. The note sued on in this case con-

tained an agreement to pay "all costs of collection, including 10 per cent. on principal and interest as attorney's fees, if collected by law or through an attorney at law, and contained, also, a provision as follows: "The makers, indorsers and sureties on this note waive the ten days notice that is now required by law to be given as to when, where, and in what court the owner will proceed to collect or sue this note, and agree that if the owner places this note in the hands of an attorney for collection he is to collect ten per cent. upon the principal and interest as attorney's fees, and the said ten per cent. is hereby made a part of the principal."

The court instructed the jury that this attempt to waive the notice which the statute makes a condition precedent to the recovery of attorney's fees was unenforceable and of no effect, and to this instruction the plaintiff excepts. While the writer is of the opinion that this instruction was erroneous, the other members of the court are of the view that the exception is not well taken, and the writer is authorized to state the following as the opinion of the majority of the court:

The Civil Code 1910, § 4252, provides: "Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, are void, and no court shall enforce such agreement to pay attorney's fees, unless the debtor shall fail to pay such debt on or before the return day of the court to which suit is brought for the collection of the same: Provided, the holder of the obligation sued upon, his agent, or attorney notifies the defendant in writing, ten days before suit is brought, or his intention to bring suit, and also the term of the court to which suit will be brought."

Prior to the act of 1890, known as the Twitty bill (codified into section 3667 of the Civil Code of 1895), there was nothing in our law or public policy which forbade the maker of a note or other obligation from promising to pay attorney's fees in addition to the debt. By the Twitty bill it was provided that obligations to pay attorney's fees were void and unenforceable by the courts, unless the defendant, upon being sued, filed a plea which he failed to sustain. This declared a new public policy in this state as to obligations to pay attorney's fees in addition to the principal and interest due upon an indebtedness. In 1900 this law was amended so as to make it read as it appears in the Code of 1910, § 4252, but the same policy in general outline was preserved; that policy being that such obligations should not be enforced, unless the creditor was in fact put to the necessity of employing an attorney to collect the debt through suit. The law declaring this policy was so shaped that to the creditor himself should not be left the absolute determination of the time when this necessity to employ

counsel was upon him. The legislative mind seemed to contemplate that the creditor would be afforded full measure of protection in this respect, if the law provided a means whereby he could employ the attorney on what is called the return day of the court (that is, the last day on which suit may be filed, as respects a particular term), so that the present law on the subject does not allow the creditor to collect attorney's fees, though stipulated for in the note, unless he gives the debtor 10 days notice of his intention to file suit, informing him as to the court in which it will be brought, and of the term to which it is to be brought, and if the debtor pays up before the return day of the court arrives, or before the suit is filed upon the return day itself, the creditor cannot even if the notice has been given, enforce the obligation to pay the attorney's fees.

It may be said, therefore, that the declared public policy of this state on this subject is that obligations to pay attorney's fees in addition to the principal and interest stipulated for in the instrument creating the indebtedness are to be wholly void and unenforceable, unless the debtor by his act of not paying the debt before the return day, after he has been given timely notice, puts the creditor to the necessity of hiring an attorney. If the provision in the statute as to the giving of the notice was merely something which the law had established in favor of the debtor, and not involving any public interest or public policy, the debtor would undoubtedly have the right to waive it, under the Civil Code 1910, § 10; but we understand the rule to be that, wherever a provision of law is made for the enforcement of some public policy of the state, no person will be allowed to waive that provision, though he himself may be the immediate beneficiary.

The welfare of the state itself frequently demands that the law-making power shall enact statutes and declare public policies for the purpose of protecting citizens from hard contractual exactions or stipulations against which they might naturally be expected to protect themselves, but against which, on account of certain inherent weaknesses common to many classes of the people, they do not ordinarily take care to protect themselves; and where such safeguards have been erected the courts will not allow the parties to contract against the enforcement of the policy declared by the law. Instances of such legislation are familiar, the debtor classes being perhaps the most frequent beneficiaries; for example, the laws against taking usury, the law which prohibits a mortgagor from waiving his equity of redemption, the law against the enforcement of contractual penalties, etc. It is a familiar notion, often given expression in our jurisprudence, that it is one of the objects of the law to prevent debtors, urged by the pressure of the necessity of securing credit, or money, or

extension of indebtedness, from yielding to such unjust or unreasonable exactions as a hard creditor may see fit to make.

So as to the present matter, the law, recognizing that many debtors, pressed by their necessity, would, in order to get the money, credit, or the extension which they desired, be willing to contract to pay the creditor attorney's fees in addition to principal and interest, whether the creditor was ever put to the necessity of using the attorney or not, stepped in and declared, as a matter of public policy, that such an obligation should be unenforceable, unless the necessity arose, just as it has declared, upon a similar consideration, that a promise to pay more than 8 per cent. interest is void. If the courts should enforce a waiver, such as the one here presented, made contemporaneously with the obligation to pay the attorney's fees, the whole policy in the law could easily be avoided in all cases by the smallest amount of designing. A debtor, willing to promise to pay the attorney's fees, would make no quibble over waiving the statutory notice. If this court should hold this waiver to be valid, it would be but a short while before it would be usual for all standard, printed forms of notes to contain a similar provision, and the law would be a dead letter.

There is nothing in what is here held which would prevent a debtor, after his note had matured, or even when it was about to mature, from waiving formal service of the notice, if he was in fact informed that suit for the indebtedness would be brought to a designated term of a particular court; in other words, there is nothing in the policy of the law which would forbid him to acknowledge service of a notice, or even to waive service, if he was in fact given notice of the intention to sue, and given the opportunity contemplated by the statute of paying the debt before the return day; but the majority of the court does not think that the waiver can be made as a part of the original contract, or that the spirit of the law can be violated by the stipulations of the parties.

The writer thinks that the statute in question was made solely for the benefit of the makers of the obligations therein described, and the requirement that notice must be given 10 days before suit is a personal privilege, which can be waived by the defendant, and that when he does so in the note he is bound by the waiver, and cannot be heard subsequently to repudiate it. Defendants are authorized to waive process, as well as the time of filing suit, and to consent that a judgment may be taken at an earlier term than the law would otherwise authorize. Civ. Code, 1910, § 5561. Section 5562, is mandatory in its terms. It declares that "the petition shall be filed at least twenty days before the term to which it is returnable." This waiver is analogous to the stat-

utory notice now under consideration, and yet the Supreme Court has held that where the defendant waives, in writing, the requirement, as between himself and the plaintiff, the waiver is binding, in the absence of fraud, and the defendant cannot subsequently be heard to object that the petition was not filed 20 days before the term of the court to which the suit was returnable. *Steadman v. Simmons*, 39 Ga. 591. Where the maker of an obligation makes a contract to pay the 10 per cent. attorney's fees, and the statutory notice is not given as required, can it be doubted that the defendant would have the right, where suit is brought for the recovery of attorney's fees, to come into court and consent that a judgment be rendered against him for the attorney's fees, although the notice had not been given? And what he can do after suit is filed it would seem he could do previously. As before stated, I think the notice in question is solely a personal right or privilege.

Section 10 of the Civil Code of 1910 provides as follows: "Laws made for the preservation of public order or good morals cannot be done away with or abrogated by any agreement; but a person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest." The statute now under discussion was not made for the preservation of public order or good morals, and, clearly being enacted in favor of defendants who are sued on obligations wherein they agree to pay attorney's fees, may be waived by them, unless such waiver injures others or affects the public interest. The public has no interest in a contract of this character, and none, except those who are parties to the contract, can possibly be injured by any waiver relating thereto.

Nor do we think that contracts which provide for the collection of attorney's fees from the defendant are against the public policy of this state. Prior to the act of 1891, commonly known as the Twitty bill, there was no legislation on this subject; the matter being purely one of individual contract. The act of 1891 first declared that these contracts were "absolutely void," and could not be enforced by the courts, unless the defendant filed a plea or pleas which he failed to sustain. Acts 1891, p. 221. The contract, although declared to be absolutely void, was not in fact absolutely void. It depended upon whether the plea or pleas filed to the suit were sustained, and if the plea or pleas were not sustained the contract was enforceable and the fees were collectible.

The act of 1900 (Acts of 1900, p. 53) struck out the words in the act of 1891, "unless a plea or pleas be filed by the defendant and not sustained," and inserted in lieu thereof the following words, to wit: "Unless the debtor shall fail to pay such debt on or before the return day of the court to which

suit is brought for the collection of the same; provided the holder of the obligation sued upon, his agent, or attorney, notifies the defendant in writing ten days before suit is brought, of his intention to bring suit, and also the term of the court to which suit will be brought." The contract to pay fees, although declared to be void, under this amendment was not absolutely void, but only voidable, for, notwithstanding the language of the statute, which declares that the contract is absolutely void, the contract is valid where the debtor fails to pay the debt before the return day of the court to which suit is brought, and provided, further, that the statutory notice is given to the defendant. The contract to pay attorney's fees, therefore, is not one in violation of any law of this state, or contrary to the public policy of this state, and is entirely in harmony with the law and public policy of the state, but must be enforced in accordance with the requirements of the statute.

The agreement to waive the statutory notice is not analogous to a contract to waive the exemption of wages from process of garnishment, or, independently of statutory or constitutional provision, the waiver of a homestead exemption. In the absence of any such statutory or constitutional provision, it has been uniformly held by the courts of this country that any agreement waiving the right to claim the exemption of property from execution, or from garnishment process, is against public policy, and is void. *Freeman on Executions* (3d Ed.) § 216. This class of exemptions applies to heads of families or to laborers who depend for their support upon their daily wages, and the benevolent purpose of such legislation is to protect dependent families or laborers. Even as to homestead exemptions in this state, there is an express provision allowing waiver of this exemption down to a certain limit. In the absence of such a provision, it is clear that the waiver of homestead exemption would not be upheld by the court. In the case of *Traders' Investment Co. v. Macon Ry. Co.*, 3 Ga. App. 185, 59 S. E. 454, this court held that a contract, either specific or general, by which journeymen mechanics and day laborers, as debtors, attempt to waive the exemption of their wages from the process of garnishment is not enforceable, adopting as the decision of the court a learned opinion by Associate Justice Lumpkin of the Supreme Court, while on the circuit bench. In this opinion of Judge Lumpkin, it will be seen that he holds that these waivers are contrary to the public policy of the state, and are not valid, because they affect injuriously the rights of those who are dependent upon the laborer for support.

Looking at the subject now under discussion in its broadest aspect, I think that it is against the inherent right of individuals under a free government to curtail in any re-

spect their absolute liberty of contract, unless such contract is against the declared policy of the state, or affects in some way injuriously the rights of others, or the public interest; and a statute made solely for the benefit of the individual, and limited to his personal rights, can be waived by him; and, when waived in writing, the waiver is binding and enforceable.

Judgment reversed.

(9 Ga. App. 526)

ALDERMAN v. VALDOSTA, M. & W. R. CO.
(No. 2,982.)

(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

EMINENT DOMAIN (§ 238*)—PROCEEDINGS TO TAKE PROPERTY—AWARD OF ASSESSORS—REVIEW BY COURT.

A party who is dissatisfied with the award in condemnation proceedings which have been instituted to assess the damages to private property taken for public use, and who desires to appeal from the decision of the assessors to the superior court, is not required to give bond for the eventual condemnation money as in case of other appeals.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 238.*]

Error from Superior Court, Colquitt County; J. H. Merrill, Judge.

Condemnation proceedings by the Valdosta, Moultrie & Western Railroad Company against I. L. Alderman. From a judgment of a superior court dismissing an appeal from the award of assessors, Alderman brings error. Reversed.

Shipp & Kline and L. L. Moore, for plaintiff in error. E. K. Wilcox and J. A. Wilkes, for defendant in error.

RUSSELL, J. According to the record, the Valdosta, Moultrie & Western Railroad Company, being unable to agree with Alderman, who owned certain real estate over which the company desired to construct its railroad, instituted proceedings in accordance with the provisions of sections 5208, 5209, 5218, 5220, and 5221 of the Civil Code (1910). Upon the hearing before the assessors they returned a finding fixing the value of the land at \$225, awarding no consequential damages, and deducting nothing for consequential benefits. From this award Alderman entered an appeal to a jury in the superior court. He, however, did not give any bond or security, and when the case was sounded for trial the judge of the superior court sustained a motion to dismiss the appeal, based upon the ground that no appeal bond had been given.

The only question presented for our determination is whether one who is dissatisfied with an award in a proceeding brought for the purpose of condemning private property for a public use, and who desires to

enter an appeal to the superior court, is required to give bond and security as in other cases of appeal. In our opinion it is unnecessary to give bond in an appeal from the award of assessors in condemnation proceedings. The learned judge of the superior court who presided in this case no doubt entertained the opinion that provisions of section 5228 of the Civil Code (1910), which gives the right of appeal to the superior court in condemnation proceedings, were to be construed as making the same requirements as are made to the appeals mentioned in sections 4998 and 4999, and that, as a bond is required in these cases, a party dissatisfied with an assessor's award should likewise give bond when entering an appeal therefrom. We confess that at first we were not free from doubt upon the subject. There is, however, a plain reason why appellants, in appeals generally, should give bond and security for the eventual condemnation money, while there is no substantial reason why any party who desires to appeal from the award of assessors in condemnation proceedings should be required to give bond for the eventual condemnation money.

If a public corporation is dissatisfied with the award and appeals, in order to reduce the amount which it is required to pay for the property it takes for public use, and the consequential damages, it is unnecessary for it to give bond, because it cannot acquire title to the property until it has paid the amount finally adjudged to be due to the property owner. If the property owner desires to appeal, because in his opinion the award is unjust to him, either because no damages have been assessed, or because in his judgment the amount is too small, it would be a vain thing to require him to pay the eventual condemnation money, for in the very nature of the case he cannot be liable to the corporation for any amount, even though the assessors might find that the consequential benefits to his land are greater than its original value, and therefore that he is not entitled to compensation. This states an extreme case. In no case could a railroad company or other public corporation be given a judgment against a landowner for consequential benefits, because, no matter how beneficial the construction of the proposed public work might be, the landowner has not asked for the construction of the improvements, nor is he liable for benefits conferred upon him without his request or consent. Cases might be imagined where a public corporation, in order to proceed with the work, might pay the amount of the award, and be unable to collect the sum allowed it by a jury, in case there was a reduction from the amount returned by the assessors; but this could not be reached by requiring the appellant to give bond, because, if the railroad was dissatisfied and entered

differ from my Associates as to its applicability to the facts appearing in the present record. We all agree in the assertion of the general principle that the defendant has the right to make just such statement as he may see proper in his own behalf, yet that there are some instances in which the court is not only authorized, but may be required, to interfere with defendant's going into matters entirely disconnected with the trial. However, many facts which might not be competent or relevant as testimony might corroborate a defendant's statement or tend to prove its truth. For instance, a man prosecuted for carrying a concealed pistol, as this defendant was, might be able to impress the jury more strongly with the truthfulness of his denial that the pistol was concealed by going into a detailed account as to why he had the pistol at all, and the purpose for which he was carrying it, or by detailing circumstances which would lead a reasonable mind to conclude that it was incredible that under the circumstances he could have had a pistol at all, if (as in the present instance) he denied having a pistol altogether. I think that the statement which the court prevented the accused from making falls within this rule. The reasons why, in my judgment, the law intended that the utmost liberality should be allowed the defendant in the making of a statement are set forth in *Richardson v. State*, 3 Ga. App. 313, 59 S. E. 916.

(9 Ga. App. 623)

GUTHRIE et al. v. STATE. (No. 3,455.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

The evidence is sufficient not only to support a finding that the defendants were guilty of a riot, generally speaking, but also that they committed it in the particular manner and with the particular intent set forth in the accusation.

2. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REFUSAL.

The requests to charge, so far as legal and pertinent, were fairly covered in the general charge to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. RULINGS OF COURT.

No material error appears.

Error from City Court of Nashville; J. G. Cranford, Judge.

S. F. Guthrie and others were convicted of riot, and bring error. Affirmed.

J. P. Knight, W. G. Harrison, and W. C. Lankford, for plaintiffs in error. J. H. Gary, Sol., and Hendricks & Christian, for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 589)

PUCKETT v. SOUTHERN RY. CO.

(No. 3,007.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

CARRIERS (§ 356*)—EJECTION OF PASSENGER.

The damages sued for in this case, if proved, would be recoverable under the decisions of the Supreme Court in *Head v. Georgia Pacific Ry. Co.*, 79 Ga. 360, 7 S. E. 217, 11 Am. St. Rep. 434, and *Georgia Railroad & Banking Co. v. Dougherty*, 86 Ga. 744, 12 S. E. 747, 22 Am. St. Rep. 499. The court erred in dismissing the petition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1423-1432; Dec. Dig. § 356.*]

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by Beller Puckett against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Ennis & Shaw, for plaintiff in error. Maddox, McCamy & Shumate and Geo. A. H. Harris & Sona, for defendant in error.

HILL, C. J. Judgment reversed.

(9 Ga. App. 583)

GILPIN v. SMITH. (No. 2,872.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1005*)—REVIEW—CONFLICTING EVIDENCE.

The evidence on the main point involved (that is, as to whether the defendant bought the property with actual notice) was in such conflict as to make the finding of the jury, approved by the trial judge, conclusive upon this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8949; Dec. Dig. § 1005.*]

2. EVIDENCE (§ 353*)—DOCUMENTARY EVIDENCE—PRIVATE WRITINGS.

Although a paper is signed by mark, and is neither attested nor recorded, it is admissible in evidence when its execution is directly proved by one who saw it signed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404-1431; Dec. Dig. § 353.*]

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action between J. H. Gilpin and N. J. Smith. From the judgment, Gilpin brings error. Affirmed.

E. S. Longley, for plaintiff in error. R. G. Hartsfield, for defendant in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 593)

HERNDON v. STATE. (No. 3,039.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 169*)—ILLEGAL SALE—EVIDENCE.

The case on its merits is controlled by *Sessions v. State*, 6 Ga. App. 336, 64 S. E. 1101 (3),

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s indexes.

and by *Plummer v. State*, 8 Ga. App. 379, 69 S. E. 28.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 188; Dec. Dig. § 169.*]

2. NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered testimony is insufficient to require a new trial.

Error from City Court of Dublin; K. J. Hawkins, Judge.

Sam Herndon was convicted of a violation of the liquor law, and brings error. Affirmed.

S. P. New and R. Earl Camp, for plaintiff in error. W. O. Davis, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 307.)

GEORGIA S. & F. RY. CO. v. DU BOSE.
(No. 3,127.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

CARRIERS (§ 408*)—LOSS OF BAGGAGE—BURDEN OF PROOF.

The evidence authorizes the verdict.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1557-1571; Dec. Dig. § 408.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by A. M. Du Bose against the Georgia Southern & Florida Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Jno. I. Hall and Hardeman, Jones, Callaway & Johnston, for plaintiff in error. Sidney W. Hatcher, for defendant in error.

HILL, C. J. The brief filed for the railway company, plaintiff in error, opens with the following sentence: "There is no error in the charge of the court, or in any ruling of the court upon the trial. A new trial should have been granted because the verdict was contrary to the undisputed evidence." The correctness of the statement contained in the first sentence above quoted is fully concurred in, and no error of law is complained of. A careful consideration of the evidence leads this court to a directly opposite conclusion from that stated in the second sentence above. The plaintiff in error, as the initial carrier, did not successfully carry the burden of proof by showing that the contents of the baggage of a passenger intrusted to its care had not been stolen while the baggage was in its own possession. Besides, the most reasonable deduction from the undisputed evidence was that the contents of the baggage had been stolen by an employé of the initial carrier, and before the baggage had been delivered by the initial carrier to the connecting carrier.

Judgment affirmed.

(9 Ga. App. 334)

WALDEN et al. v. STATE (No. 2,947.)
(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1070*)—JOINT WRIT OF ERROR—DENIAL OF NEW TRIAL.

Several persons were jointly indicted, jointly tried, and jointly convicted. All but two of the defendants voluntarily complied with the judgment and sentence of the court, and these two filed a joint motion for a new trial, which was overruled, and they brought the case to this court on a joint writ of error from the judgment overruling their motion for a new trial. Held that, having been jointly indicted, jointly tried, and jointly convicted they had the right to bring a joint writ of error to this court to review the judgment overruling their joint motion for a new trial. The fact that the others who were jointly indicted and convicted with them failed to join them in the motion for a new trial, but voluntarily complied with the judgment and sentence of the court, does not affect the right of those who do except.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2700, 2701; Dec. Dig. § 1070.*]

2. CRIMINAL LAW (§ 1186*)—APPEAL—PROOF OF VENUE.

The brief of evidence fails to show any proof of venue, and for this reason alone this court is compelled to grant a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3215-3230; Dec. Dig. § 1186.*]

Error from City Court of Cairo; J. R. Singletary, Judge.

Jerry Walden and others were convicted of crime, and bring error. Reversed.

R. C. Bell and J. Q. Smith, for plaintiffs in error. W. J. Willie, Sol., for the State.

RUSSELL, J. Judgment reversed.

(9 Ga. App. 613)

VAUGHAN v. STATE (No. 3,265.)
(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 874*)—POLLING JURY—WAIVER OF RIGHT.

The right to poll the jury is lost as soon as the jury has dispersed and again becomes a part of the general public; and where the accused in a criminal case consents that the jury may disperse when they have found their verdict, and they do separate and disperse, leaving the verdict in the possession of the foreman to be returned into court next morning, the right to poll the jury is lost, and cannot be asserted by any reassembling of the jury, when the verdict is delivered by the foreman to the clerk of the court in pursuance of the agreement. *Prescott v. City Council of Augusta*, 118 Ga. 549, 45 S. E. 431; *Hopkins v. State*, 6 Ga. App. 403, 65 S. E. 57.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2085-2088; Dec. Dig. § 874.*]

2. REVIEW ON APPEAL.

There is no exception as to any error of law, other than that dealt with in the foregoing headnote, and the verdict is supported by the evidence.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

me that there was any danger, or trying to stop me; no signals across the track that I saw. The ones I saw were on the left-hand side, the fireman's side. I do not know just exactly how far I was when I saw it—150 to 200 yards. One man crossed over on my side before I passed the depot there. About the time the engine passed the depot or passed the man, he threw his hands up like that, and pointed down that way, and I threw my hands on the throttle and shut the engine off, and at that time the fireman discovered he saw something on the track and called my attention to it, and I applied the air in emergency, reversed the engine, and used sand. When he did that, I did everything possible to stop my train as soon as I could." According to the testimony of the engineer, Campbell was lying down on the track parallel with the rails just before he was struck by the pilot of the engine, and seemed to raise himself and make an effort to get off the track just before he was struck.

The plaintiff testified that her son contributed \$100 or more each year toward her support, and that she was dependent upon him to that extent, as her husband was only earning \$1 per day. The jury returned a verdict for \$2,000 in favor of the plaintiff. Exception is taken to the judgment refusing the defendant's motion for new trial.

We think that the evidence is sufficient to authorize the conclusion that the plaintiff was dependent upon the deceased, and that he contributed to her support. While there must be both dependence and contribution, we do not think that the fact that the plaintiff's husband was bound for her support, and may have been able to supply her with a maintenance more meager than that which she received, would preclude the idea of dependence; and the fact that the mother may sometimes have supplied the deceased with small articles, or even advanced to him small sums of money, would not have been sufficient to contradict the fact that he contributed to her support, in view of the evidence that he frequently supplied her with larger sums and with various necessities of life.

None of the exceptions to the refusal of the court to give instructions which were requested can be sustained; for it appears, from a review of the charge as delivered, that each of the instructions requested was given in charge to the jury. The excerpt in the charge of which complaint is made should, in our opinion, have been qualified by an explanation of the term "imminent peril," and the jury should have been told that the liability for gross negligence, which attaches when negligence is tinged with wantonness and willfulness, would not attach, if the circumstances were such as not to impress the engineer with the belief that the deceased was in imminent peril. In other words, we do not think that it is to be assumed as a matter of course that one who is

in front of an engine upon a railroad track is necessarily in imminent peril. On the contrary, the natural presumption would seem ordinarily to be that such a one would get off the track before the train would reach him. But it is not necessary for us to pass upon this question, in view of the ruling of the Supreme Court in *Atlanta Railway & Power Company v. Walker*, 112 Ga. 725, 88 S. E. 107.

[1] Conceding that the depot agent could have made more exertions to avert the terrible catastrophe which overtook the deceased, and that the engineer was negligent in not attempting to stop the train when the bystanders first signaled or waved to him, the real question in this case is, Do the facts show that the killing of the deceased was wanton and willful? In other words, conceding that both of the agents of the company were negligent, is the negligence so gross as to lead to a fair and reasonable inference that it must have been induced by recklessness amounting to wantonness. While neglect, in some cases, may be so gross as to warrant the presumption that it was wanton, and thus authorize the inference that the act was willful, still this is a matter to be determined in the light of all the circumstances, and especially in the light of the mind of the actors in the casualty.

Let us look at the facts of the case at bar. In the first place as to the depot agent. There can be no negligence, unless the person charged with neglect owes a duty toward the object of the negligence. The depot agent owed Mr. Campbell no duty. Of course, if it had been possible for the agent, in the exercise of humanity, to have done anything to remove Campbell from the track, morally and personally it would have been his duty to do so. But when it is said that his negligence amounts to wantonness, and when it is sought to charge the defendant company with liability for his act, it must be remembered that this agent is a special agent charged with special duties, and that the company is liable, neither for his negligence nor for any overt act committed, except within the scope of his duties. This principle is clearly stated in the case of *Christian v. Columbus Railroad Company*, 79 Ga. 460, 7 S. E. 216, which is cited by counsel for defendant in error, in which the railroad company was held liable, according to the allegations of the petition, for the wrongful homicide of a patron, committed by its depot agent in his office while the customer was lawfully there for the transaction of business with the agent pertaining to his agency. But even in that case the action was allowed to stay in court only because it was alleged in the petition that the railroad company employed the agent knowing that he was insane at the time of his employment; for Judge Bleckley holds that if the homicide was the result of in-

sanity, and the railroad company was faultless in regard to employing the agent, anything which would excuse the agent criminally for the act would have excused the railroad company civilly.

Was it the duty of the depot agent as a servant of the railroad company, employed for the special purpose of selling tickets at that particular time, to remove trespassers from the tracks, and was the statement of Pittman sufficient to give notice to the agent of the company that Campbell was in fact in peril? The statement that Campbell did not move when the negro Pittman called to him does not carry to our minds the conclusion that he was unable to move, and was therefore in peril. The bystanders whom Pittman notified at the door of the depot could see Campbell, and, so far as the instincts of humanity were concerned, their duty and their natural impulse to save him harmless was as great as that of the agent of the railroad company. Evidently, therefore, the bystanders did not consider him to be in peril, because none of them made any effort to remove him from the track. So far as the depot agent is concerned, he is employed for the specific purpose of selling tickets at those periods or particular times when passengers desire to take passage. They are not charged with any duties towards those who may be trespassing upon the railroad tracks.

It is most lamentable that the plaintiff's son lost his life, but it cannot be assumed that it was due merely to negligence, however culpable it may have been, and that this negligence amounted to wantonness and willfulness, unless the negligence was that of one of the defendant company's servants charged with some duty in reference to the tracks where the decedent was sitting. The defendant's depot agent could not in any view owe a duty towards the deceased as a trespasser until he discovered his peril; and, as we view it, there was not sufficient evidence to put him on notice that the deceased was in peril. But even if the notice he received from Pittman had been sufficient to put him on notice that the deceased was in peril, and he endeavored to stop the train, although in a negligent manner, or in the wrong way, it was mere negligence or unskillfulness in stopping the train, and it could not be charged against the railroad company as wantonness or willfulness, because he was not under any duty originally to stop the train at all.

[2] As to the engineer, it is perfectly plain that, just as soon as the fact reached his mind and took lodgment that there was a helpless man on the track, he made every effort to stop the train. All his conduct goes toward negating a reckless or wanton state of mind. It might have been a negligent mistake of judgment for him to have mis-

taken, and therefore to have failed to heed, the attempt at warning which the bystanders undertook to give by waving their hands and throwing up their hats, but this does not make his act wanton or willful. The plaintiff failed to show that the defendant's agents acted wantonly or willfully; the defendant showed that they did not. Hence the verdict is contrary to the law, and it is our plain duty to reverse the judgment.

Judgment reversed.

(9 Ga. App. 539)

ZUBER v. SOUTHERN RY. CO. (No. 8,045.)
(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. CARRIERS (§ 20*)—REGULATION—RULES OF RAILROAD COMMISSION—VIOLATION—PENALTIES—NATURE.

The sums which an offended shipper may recover from a delinquent carrier under the several storage rules of the Railroad Commission are not penalties in the strict sense of the word, but are fixed civil punitive liabilities (in the nature of a substitute for punitive damages) which the shipper has the option of suing for and recovering at his election instead of pursuing his common-law remedies for redressing the same delinquency.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

2. CARRIERS (§ 10*)—REGULATION—RAILROAD COMMISSION—NATURE AND POWERS.

The Railroad Commission is an administrative, and not a legislative, body. It has only such powers as the Legislature has expressly, or by fair implication, conferred upon it.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 10.*]

3. CONSTITUTIONAL LAW (§ 60*)—LEGISLATIVE POWERS—DELEGATION—ADMINISTRATIVE BODIES.

Under the Constitution the General Assembly is made the legislative body of the state, and it cannot delegate its powers; but it may confer upon administrative bodies the power to make regulations and to deal in a somewhat legislative way with matters which are quasi legislative, but which are predominantly administrative in their nature.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 60.*]

4. CONSTITUTIONAL LAW (§ 62*)—LEGISLATIVE POWERS—DELEGATION—ESTABLISHMENT OF PENALTIES.

The general power of imposing punishment for wrongs or neglects is a legislative function, and this is true whether the punishment is to be imposed by the infliction of a criminal penalty, or of civil punitive liability. In some cases, when the determination of what would be a just and reasonable penalty depends upon a consideration of so much data or of so many details and exigencies that the Legislature could not intelligently and justly fix the amount of the penalty without further inquiry and investigation than is expedient in the ordinary course of the passage of legislation, it may in general terms declare the punishableness of the thing to be penalized, and leave to an administrative body or officer the ascertainment and declaration of what the amount of the penalty should be.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

5. CONSTITUTIONAL LAW (§ 62*)—LEGISLATIVE POWERS—DELEGATION—RAILROAD COMMISSION—RULES PRESCRIBING PENALTIES.

The question as to what amount of penalty should be assessed against a railroad company for delinquency in furnishing cars and in other respects relative to its duty of receiving, forwarding, and delivering freight promptly is a question involving inquiry into so many facts and conditions capable of accurate ascertainment only "outside of the halls of legislation" as to make it a matter which the Legislature could delegate to the Railroad Commission; provided that the Legislature itself in general terms performed the purely legislative act of declaring expressly, or by fair implication, that the delinquency should be punishable.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

6. CARRIERS (§ 20*)—RAILROAD COMMISSION—RULES PRESCRIBING PENALTIES.

As to the matters dealt with in storage rule 9 of the Railroad Commission, the Legislature declared the general punishableness of the delinquencies there dealt with, and left to the Railroad Commission the working out of the details of the penalty, and therefore the civil punitive liability imposed by that rule is enforceable. Prior to the adoption of the act of 1907 (Laws 1907, p. 72), enlarging the powers of the Railroad Commission, the Legislature had never declared, either expressly or by any fair implication, that the delinquencies dealt with in storage rules 1, 10, and 12 of the commission should be punishable otherwise than by the infliction of the penalty of \$250 imposed by the fourth section of the act approved August 23, 1905 (Georgia Laws, 1905, p. 121); hence so much of those rules as impose an additional civil punitive liability is unenforceable as to matter occurring prior to the passage of the act of 1907.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. W. Zuber against the Southern Railway Company. Judgment of dismissal on demurrer, and plaintiff brings error. Affirmed.

Moore & Pomeroy and W. W. Hood, for plaintiff in error. McDaniel, Alston & Black, for defendant in error.

POWELL, J. The plaintiff's action was dismissed on general demurrer, and only a pure law point is presented, namely, Did the act of August 23, 1905 (Georgia Laws 1905, p. 120), confer upon the Railroad Commission power to enact so much of storage rules 1, 10, and 12 as names and fixes the amount which the shipper may recover from the carrier in the event the latter is delinquent as to the matters dealt with in those rules? The cause of action arose after the passage of the act of 1905, above referred to, and prior to the act of 1907 (Laws 1907, p. 72), enlarging the powers of the commission. The case is controlled by the law as it stood in the latter part of the year 1905, and during the year 1906. It will be difficult to understand the precise question here presented, unless we quote somewhat at length from

both the act of 1905 and the rules in question. The act of 1905 is as follows:

"An act to further extend the powers of the Railroad Commission of this state, and to confer upon the commission the power to regulate the time and manner within which the several railroads in this state shall receive, receipt for, forward and deliver to its destination all freights of every character, which may be tendered or received by them for transportation; to provide a penalty for non-compliance with any and all reasonable rules, regulations and orders prescribed by the said commission in the execution of these powers, and for other purposes.

"Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this act, the Railroad Commission of this state shall be, and is, hereby vested with full power and authority to make, prescribe, and enforce all such reasonable rules, regulations and orders as may be necessary in order to compel and require the several railroad companies in this state to promptly receive, receipt for, forward and deliver to destination all freights of every character which may be tendered or received by them for transportation; and as well such reasonable rules, regulations and orders as may be necessary to compel and require prompt delivery of all freights, on arrival at destination, to the consignee.

"Sec. 2. Be it further enacted by the authority aforesaid, that whenever a shipper or consignor shall require of a railroad company the placing of a car or cars to be used in car load shipments, then in order for the consignor or shipper to avail himself of the forfeitures or penalties prescribed by the rules and regulations of said Railroad Commission, it must first appear that such shipper or consignor made written application for said car or cars to said railroad; provided further, that such Railroad Commission shall, by reasonable rules and regulations, provide the time within which said car or cars shall be furnished after being ordered as aforesaid, and the penalty per day per car to be paid by said railroad company in the event such car or cars are not furnished as ordered, and provided further, that in order for any shipper or consignor to avail himself of the penalties provided by the rules and regulations of said Railroad Commission, such shipper or consignor shall likewise be subject, under proper rules to be fixed by said commission, to the orders, rules and regulations of said Railroad Commission.

"Sec. 3. Be it further enacted by the authority aforesaid, that before any railroad company is subjected to the penalties provided by this act, said Railroad Commission shall require said railroad company to show

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cause therefor; and if sufficient cause is shown then said company shall be relieved from any further liability under this act.

"Sec. 4. Be it further enacted by the authority aforesaid, that for the violation of any such rules, orders or regulations, so established by said commission, the railroad company so offending shall incur a penalty in a sum not exceeding two hundred and fifty dollars (\$250), to be fixed by the jury after suit is brought therefor, under the provisions of existing laws regulating the institution and prosecution of suits for penalties incurred by railroad companies in consequence of violations of the rules and regulations prescribed by said commission."

The rules which are about to be quoted were prescribed under the first section of the act, but it is important to notice, also, the second section because that section and storage rule 9 of the commission adopted in pursuance of it have been the subject of several decisions of the Supreme Court and of this court; and it will be necessary to determine in the course of this discussion how far the decisions which have been made as to rule 9 affect the question raised as to these other rules to which section 2 does not relate. The parts of rules 1, 10, and 12, which are here material, are as follows:

Rule 1: "(a) Upon the arrival at destination of any and all freights, the delivering line shall within twenty-four hours thereafter, give to consignees thereof legal notice of such arrival. For failure to give such legal notice of arrival, the railroad company at fault shall pay to the consignee so offended the sum of one dollar per car per day on car load shipments, and one cent per hundred pounds per day, on less than car load shipments, for each day during which the terms of this rule are not complied with."

Rule 10: "Whenever freight of any character, proper for transportation, whether in car load quantities or less, is tendered to a railroad company at its customary place for receiving shipments, and correct shipping instructions given, such railroad company shall immediately receive the same and issue bills of lading therefor. And when a shipment is thus received, the same must be carried forward at a rate of not less than fifty miles per day of twenty-four hours computed from seven o'clock a. m., of the day following the receipt of shipment. * * * For failure to so receive or transport shipments as hereinbefore provided for, the railroad company at fault shall, within thirty days after demand in writing is made therefor, pay to the shipper so offended, or other party whose interest is affected thereby, the sum of one dollar per car, on car load shipments, and one cent per hundred pounds, subject to a minimum of five cents, on less than car load shipments, for each day or fraction thereof, that the terms of this rule are not complied with."

Rule 12: "Railroad companies are required

to make prompt delivery of all freights upon the arrival thereof at destination. For failure to deliver at freight depot, or to place loaded cars at an accessible point for unloading the same, within forty-eight hours, exclusive of Sundays and legal holidays, computed from seven o'clock a. m., the day after the arrival of same at destination over its line, the railroad company at fault shall pay to the shipper or consignee of such goods, one dollar per day on car load shipments, and one cent per hundred pounds per day on less than car load shipments, for each day or fraction thereof, that such delivery is so delayed."

By rule 9 (which, as has been stated already, does not apply to the case at bar, but which has been before the courts for adjudication several times) the carrier is required to furnish cars for loading within four days after written request, and, in case of failure, allows the offended shipper to recover \$1 per day per car for each day's delay in excess of the free time allowed. The plaintiff in his petition alleged a number of failures on the part of the defendant to comply with the respective terms of rules 1, 10, and 12, and a refusal on the defendant's part to pay the sums which the rules allowed as a result of these failures, and further alleged that his claim had been presented to the Railroad Commission in pursuance of section 8 of the act and had been duly allowed after the defendant had failed to show sufficient cause to relieve it from liability. The trial judge held that the commission exceeded its authority in naming and fixing the amounts which the shipper might recover from the carrier for a violation of the rules in question, and therefore sustained the demurrer to the plaintiff's petition.

[1] The exact nature of this liability which attaches against the carrier and in favor of the shipper on account of a violation of these rules of the Railroad Commission, and which in the second section of the act of 1905 is called a penalty, has never been judicially declared. Some progress towards a definition has been made in the cases of *Southern Ry. Co. v. Melton*, 133 Ga. 277, 65 S. E. 665, and of *Southern Ry. Co. v. Moore*, 133 Ga. 806, 67 S. E. 85, 26 L. R. A. (N. S.) 851, in the first of which it was held not to be a penalty in the sense in which that word is used to express the notion of criminal punishment for wrong; and in the other of which it was held not to be such liquidated damages as to preclude the shipper from resorting to his common-law remedy at his election. See, also, *Southern Ry. Co. v. Atlanta Sand Co.*, 135 Ga. 35, 68 S. E. 807. Giving due effect to all of these cases, it may be said that these rules fix a liquidated sum in the nature of civil punitive damages which an offended shipper may recover from a delinquent carrier by pursuing the course mentioned in the act, but that the remedy thus given is not exclusive, and the shipper may nevertheless at his election bring his common-law action,

in which event he must prove his damages and leave to the jury the assessment of the amount. The question, therefore, narrows to this: Did the commission have the power to provide that a breach of its rules on the part of the carrier should result in the shipper's having the right to recover punitive damages without further proof of bad faith or any of the other elements which usually characterize punitive damages, and to recover them in a fixed amount instead of leaving the amount to the assessment of the jury according to their enlightened consciences?

[2] It is well settled that the Railroad Commission is an administrative, and not a legislative, body. It has only such powers as the Legislature has expressly, or, by fair implication, conferred upon it.

[3] The Constitution makes the General Assembly the legislative body of the state, and it cannot delegate its general legislative powers. Nevertheless, it may confer upon administrative bodies quasi legislative functions which it itself might perform, but could not so adequately perform directly as it could by delegating them.

[4] For example, the matter of declaring that common carriers shall charge reasonable rates is a legislative function, and the matter of declaring what shall be a reasonable rate is a quasi legislative function, and the Legislature, after outlining as its policy for the regulation of rates that they should be established upon a reasonable basis, and having thus dealt with the strictly legislative phase of the matter, might go forward and declare specifically what the rate should be for this or that particular service, thus performing also the quasi legislative function; but it would ordinarily be highly inexpedient for the Legislature to undertake to deal directly and specifically with this latter phase, owing to its limited facilities for acquiring the vast mass of data and of particular and technical details which enter into the fixing of rates. Hence it legitimately delegates this power to the administrative body which possesses these facilities—the Railroad Commission.

To say that wrongful or neglectful conduct shall be penalized is such a legislative function as cannot be delegated by the Legislature. That this is true as to penalties of a criminal nature will not be questioned, and we believe that the same principle applies where a wrong or neglect is penalized by giving the person against whom the wrong or neglect particularly operates the right to recover punitive damages in a civil action. In other words, it is purely a legislative function to authorize the imposition of punitive liability, whether that liability is to be enforced in a civil or in a criminal action. The Legislature may authorize an administrative body or officer to make regulations and may declare it to be punishable for any person to violate those regulations; but, unless the Legislature itself gives its sanction,

at least in general terms, to the imposition of punishment, or of civil redress in the nature of punishment, for an act or general class of acts, no merely administrative board can provide for the punishment of that act or class of acts and supply the details of how and when the penalty or punishment shall be imposed. Cf. *United States v. Grimaud* (U. S. Law Ed. advance sheet, June 1, 1911) 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. —, and cases there cited.

[5] As to the portion of rule 9 of the Railroad Commission in which it is provided that the offended shipper may recover of the delinquent carrier \$1 per day per car for the delay after the specified free time has expired the Supreme Court in the *Melton Case*, supra, held that, since the Legislature had declared that the commission should make the rule on the subject and fill in the details and name the penalty, the rule in this respect was enforceable and the penalty named by the commission collectible. It is plain from a study of the whole opinion in that case (as well as of the opinion in the *Atlanta Sand Co. Case*, supra) that the court took the view that, as to this specified thing of failing to furnish cars after written demand, the Legislature had given not only its sanction that the delinquency should be penalized, but had in terms required the commission to name the penalty as a part of its rule on the subject; and that, the Legislature having performed the strictly legislative function of declaring that the violation of the commission's rule on the subject should be punishable, it did not delegate a legislative duty, but only a quasi legislative duty, which was largely of an administrative character, to the commission when it authorized that body to say how much per day per car that penalty or punitive liability should be. This ruling of our Supreme Court, thus interpreted, is somewhat of an extension of the doctrine so ably set forth by Mr. Justice Lamar in the *Grimaud Case*, supra, but it is an extension which may be justified by the nature of the subject-matter of the penalty.

As to some subjects it might be easy for the Legislature not only to declare that a delinquency should be redressed by civil or criminal penalty, but also for it justly to assess and fix upon the exact amount of the penalty, or at least to set certain limits. As to other subjects, the determination of the amount of the penalty or of the basis on which it should justly be laid may involve such an amount of investigation and a consideration of so many particular exigencies as to make the fixing of the amount of the penalty only quasi legislative and predominantly administrative in character; and the determination of what would be a just and reasonable penalty to allow for a failure to furnish the cars and of what amount of delay or free time should elapse before liability for the penalty should begin would seem to be one of the subjects in which the ad-

ministrative elements predominate. While the fact that the commission has dealt with this subject by laying a uniform penalty and creating a uniform free time as to all classes of freight and as to all classes of carriers might militate against the contention that the fixing of the penalty was a thing which the Legislature could not have easily done directly; still, it must be kept in mind that it is the nature of the subject itself, and not the manner in which it has been dealt with by the administrative body, which determines whether the power to deal with it has been legally delegated or not, and it may readily be seen that the fixing of a just penalty for a violation of the rule in question is a subject which the commission might very naturally have dealt with by entering into the field of particularization and classification. For instance, the commission, instead of saying that the free time for furnishing all classes of cars should be four days, might have said that as to fruit cars one day should be allowed, as to grain cars two days, as to cars for cotton three days, as to cars for lumber four days, as to cars for ordinary merchandise five days, and so on; or it might have classified the railroads, and have said that those say in class A with great facilities for obtaining and furnishing cars should have two days, while those in class C, with small facilities, should have four days, and so on. It might have said that the penalty for failing to furnish fruit cars should be \$4 per day, and cars \$1 per day, and so on, or that the roads of one class should pay one penalty for delinquency, and that the roads of another class differently situated should pay a different amount. As the Supreme Court of the United States declared in *Marshall Field & Co. v. Clark*, 143 U. S. 694, 12 Sup. Ct. 505, 36 L. Ed. 294: "The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation." The fact that the Railroad Commission decided after investigation that the matter of penalizing delinquency as to furnishing cars could be adequately and justly dealt with by a simple and uniform rule on the subject renders that matter none the less a legitimate "subject of inquiry and determination outside of the halls of legislation," to the end that the action of the law which the Legislature itself enacted should be adequately and justly exerted in the general manner intended. This we conceive to be the rationale of the ruling in the Melton

Case, supra, and the reconciliation between that case and the Grimaud Case, supra.

[8] The Melton Case dealt with rule 9 of the commission, which, as may be seen above, was adopted under the express authorization of the second section of the act of 1905. And the validity of that rule and of the penalty, or rather civil punitive liability, provided in it was upheld. The rules involved in the case at bar, so far as the penalty feature is concerned, rest on no such basis. The Legislature did not as to the matters dealt with in the first section of the act (and it must be kept in mind that the rules here in question were adopted under the authority of that section) say anything as to penalty, except in so far as the fourth section of the act lays the criminal penalty of \$250. As to the civil punitive liability which any of these rules impose, the entire act, except the second section, is silent so far as any express language is concerned.

Counsel for the plaintiff in error concede this, but say that the power to impose this punitive liability is by fair and necessary implication given also as to the matters dealt with in section one of the act. They call attention to the fact that by the language of that section as to these matters the commission "is vested with full power and authority to make and enforce all such reasonable rules, regulations, and orders as may be necessary in order to compel and require the several railroad companies" to be prompt in the performance of the duties dealt with in these rules. They stress the words "enforce," "compel," and "require." We think that it is plain that the Legislature intended that the commission should make rules specifying the time within which the railroad companies should perform the various acts necessary to the receipt, forwarding and delivery of freights, and that the time should be so fixed as to make the companies act promptly; but that as to these matters (except as to the solitary case of furnishing cars dealt with specifically in the second section) the Legislature evinced no intention of penalizing delinquencies by imposing any punitive civil or criminal liability other than the penalty of \$250 mentioned in section 4 of the act. If the act be construed in the light of its title, this conclusion becomes only the more irresistible. The title of the act reads thus: "An act to further extend the powers of the Railroad Commission of this state, and to confer upon the commission the power to regulate the time and manner within which the several railroads in this state shall receive, receipt for, forward and deliver to its destination all freights of every character, which may be tendered or received by them for transportation; to provide a penalty for non-compliance with any and all reasonable rules, regulations and orders prescribed by the said commission in the execution of these powers, and for other purposes." The title

speaks of regulations as to "time and manner," and the words "enforce," "compel" and "require" do not appear in that context. The title uses the words "a penalty" it is true; but these words undoubtedly refer to the penalty laid in the fourth section of the act (and it was so expressly held in the Melton Case, supra), and not to the civil punitive liability imposed by these rules. If the act itself had not provided a specific penalty, thus giving a punitive sanction sufficient ordinarily to insure obedience, there might be greater color to the argument that the Legislature in the use of the words "enforce," "compel," and "require," as they appear in the context already quoted, evinced such a clear intention of putting some punitive sanction back of the rules as to authorize the commission to perform the merely administrative function of saying how much that penalty or civil punitive liability should be. But, as it is, the Legislature has named one penalty and has suggested no other.

It seems to us that in the rules now before us the Railroad Commission attempted not only to perform the administrative act of assessing the amount of a penalty, but also to perform the purely legislative function of creating the element of civil punishableness as to things which the Legislature had not declared to be punishable otherwise than criminally. As the Legislature had not paved the way by furnishing in advance the legislative object on which the administrative act was to operate, so much of these rules as lay the penalties in question must fail. As an unfertilized egg, which contains all the elements of the embryonic chicken except that one thing which distinguishes fertile eggs from the unfertile, will not hatch, so these rules, though they contain all the elements of a valid basis for legal action, except the one vitalizing thing of express legislative authorization, are legally sterile, and cannot support a cause of action; and the court did not err in sustaining the general demurrer.

Judgment affirmed.

(9 Ga. App. 555)

CAROLINA PORTLAND CEMENT CO. v.
MARSHALL (No. 3,131.)
(Court of Appeals of Georgia. July 25, 1911.)

(Syllabus by the Court.)

1. TRIAL (§ 25*)—CONDUCT IN GENERAL—RIGHT TO OPEN AND CLOSE.

When the admissions of the defendant in an action, without more, entitle the plaintiff to recover, and the defendant merely seeks to recoup under a contract which he admits to have been fulfilled, the defendant, and not the plaintiff, has the burden of proof, and consequently right to open and conclude the argument to the jury. The admissions of the defendant in his answer would have entitled the plaintiff to a verdict without the introduction of any testimony; consequently the court did not err in holding that the burden of proof was cast

upon the defendant, and that he was entitled to open and conclude the argument in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.*]

2. EVIDENCE (§ 150*)—COMPETENCY—RESULT OF EXPERIMENT.

There was no error in the admission of the testimony which was objected to. The testimony which was repelled was testimony as to experiment, and its admission or rejection was within the discretion of the judge. It cannot be said that this discretion was abused. The charge of the court presented the issue fully and fairly, and the evidence authorized the verdict.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 439; Dec. Dig. § 150.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the Carolina Portland Cement Company against W. J. Marshall. From a judgment for defendant, plaintiff brings error. Affirmed.

Walter T. Johnson and Ryals, Grace & Anderson, for plaintiff in error. Oliver C. Hancock and Miller & Jones, for defendant in error.

RUSSELL, J. [1] 1. One of the points most vigorously stressed, on the consideration of the present writ of error, was the alleged error of the trial judge in holding that under the pleadings the defendant assumed the burden of proof, and was entitled to the opening and conclusion. Some point is made upon the fact that the judge permitted the defendant's counsel to state what meaning was intended to be conveyed by his answer, and that he rendered the decision partly upon the oral statement or admission of the defendant's counsel. Of course, the admissions on the part of the defendant which would entitle him to take the burden of proof and be awarded the opening and conclusion must appear in the pleadings, and the decision is to be made by their contents, and nothing else. However, in the present case the record shows that, if the judge committed error in allowing the oral statement by counsel for defendant, the error was harmless, for by the pleadings it was shown that the defendant admitted every material thing required to authorize the plaintiff to recover under the form of action brought by him.

The petition was as follows:

"To the City Court of Macon:

"The petition of Carolina Portland Cement Company of Atlanta, Georgia, Fulton county, respectfully shows:

"(1) That W. J. Marshall of Bibb county, Ga., is indebted to plaintiff in the sum of ninety-three dollars and forty-eight cents (\$93.48), besides interest, upon an open account which he, said W. J. Marshall, refuses to pay, copy of which is hereto attached.

"(2) That the said W. J. Marshall has not paid the same nor any part thereof.

"Wherefore petition prays that process may issue requiring the said W. J. Marshall to be and appear at the next term of said court to answer petitioner's complaint."

To this was attached a sworn statement of account as follows:

W. J. Marshall, Lizella, Ga., Bought of Carolina Portland Cement Co.

1908.

May 11.	108 bbl. standard cement			
	in cloth.....	1 90	201 40	
	424 sz.	10	42 40	
			243 80	
	Less frt. Sou. 36,280.....		60 42	183 38
	Cr.			
Oct. 7.	By cash		50 00	
Nov. 20.	By 399 mt. sacks re-			
	turned	10	39 90	89 90
				93 48

In the first paragraph of defendant's answer "defendant denies paragraph 1 of plaintiff's petition, except that he admits that he is a resident of Bibb county, Ga.; also defendant admits that he refused to pay the said \$93.48, as alleged in said paragraph 1. Defendant admits paragraph 2 of plaintiff's petition."

The defendant then proceeds to set up in his own behalf an affirmative issue by alleging the breach of an express warranty, and that by reason of the breach he was damaged in various particulars to an amount specified in the answer; but in paragraph 4 of the answer he admits that he bought the cement and used it. The effect, then, of the defendant's answer, while in a sense he denied the indebtedness by reason of the fact that he claimed that the plaintiff owed him more than he owed it, was to admit every fact necessary to be proved by the plaintiff in order to establish its case. He admitted that he resided in Bibb county; that he received the cement; that the contract price was that set forth in the declaration; that he used the cement, and that he had refused to pay for it. It is clear that, unless he established the affirmative defense he was attempting to set up by way of recoupment, the plaintiff must inevitably recover. Therefore the burden of proof was cast upon him, and the plaintiff, not being required to maintain the affirmative of the proposition, was relieved of the necessity of offering any testimony in support of its case as laid.

[2] 2. Though there are several exceptions in the record, this is the only proposition to which it is necessary to make special reference. The evidence in regard to the test to which the dam was subjected by a freshet subsequent to the one in which the dam constructed of the standard cement was washed away was admissible as a circumstance like-

ly to illustrate the value of the cement first used, and the cost of the dam as a whole was one of the factors which would enable a jury to determine what was the probable loss of the defendant in using the worthless cement, if the jury found it to be worthless. The testimony that the standard cement was used with good effect in performing other contracts might have been admitted without error; we think we would have admitted it, but it is well settled that the admission of evidence of experiment is a matter peculiarly within the discretion of the trial judge, and it cannot be said that in this instance that discretion was abused. One of the exceptions to the charge of the court (which is presented in several different ways) is that the court laid down the same rule or measure of proof necessary to establish indirect or consequential damages as it applied in the case of direct damage; but on an examination of the charge as a whole we do not find the exception to be well taken. Judgment affirmed.

(9 Ga. App. 609)

KING v. STATE. (No. 3,140.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 668*)—STATEMENT BY ACCUSED.

In the exercise of his statutory right, the accused is authorized to make any statement to the jury in his defense that he may deem necessary, and, so long as he confines himself to the transaction under investigation, this right cannot be restricted by the trial judge. This does not mean, however, that the accused can occupy the time of the court in making wholly irrelevant statements, entirely inapplicable to the case, and the judge, in his discretion, can interrupt him when he is doing so, and instruct him to confine his statement to the case. *Coxwell v. State*, 66 Ga. 309.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1584-1590; Dec. Dig. § 668.*]

Russell, J., dissenting in part.

2. REVIEW ON APPEAL.

No material error of law appears, and the verdict is fully supported by the evidence.

Error from Superior Court, Early County; W. C. Worrill, Judge.

H. T. King was convicted of carrying a concealed weapon, and he brings error. Affirmed.

Glessner & Park, for plaintiff in error. J. A. Laing, Sol. Gen., by R. R. Arnold, for the State.

HILL, C. J. Judgment affirmed.

RUSSELL, J. (dissenting). I do not dissent from the clear statement of the abstract principle announced by Chief Judge HILL in the first paragraph of the decision, but I

differ from my Associates as to its applicability to the facts appearing in the present record. We all agree in the assertion of the general principle that the defendant has the right to make just such statement as he may see proper in his own behalf, yet that there are some instances in which the court is not only authorized, but may be required, to interfere with defendant's going into matters entirely disconnected with the trial. However, many facts which might not be competent or relevant as testimony might corroborate a defendant's statement or tend to prove its truth. For instance, a man prosecuted for carrying a concealed pistol, as this defendant was, might be able to impress the jury more strongly with the truthfulness of his denial that the pistol was concealed by going into a detailed account as to why he had the pistol at all, and the purpose for which he was carrying it, or by detailing circumstances which would lead a reasonable mind to conclude that it was incredible that under the circumstances he could have had a pistol at all, if (as in the present instance) he denied having a pistol altogether. I think that the statement which the court prevented the accused from making falls within this rule. The reasons why, in my judgment, the law intended that the utmost liberality should be allowed the defendant in the making of a statement are set forth in *Richardson v. State*, 3 Ga. App. 313, 59 S. E. 916.

(9 Ga. App. 633)

GUTHRIE et al. v. STATE. (No. 3,455.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

The evidence is sufficient not only to support a finding that the defendants were guilty of a riot, generally speaking, but also that they committed it in the particular manner and with the particular intent set forth in the accusation.

2. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REFUSAL.

The requests to charge, so far as legal and pertinent, were fairly covered in the general charge to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. RULINGS OF COURT.

No material error appears.

Error from City Court of Nashville; J. G. Cranford, Judge.

S. F. Guthrie and others were convicted of riot, and bring error. Affirmed.

J. P. Knight, W. G. Harrison, and W. C. Lankford, for plaintiffs in error. J. H. Gary, Sol., and Hendricks & Christian, for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 589)

PUCKETT v. SOUTHERN RY. CO.

(No. 3,007.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

CARRIERS (§ 356*)—EJECTION OF PASSENGER.

The damages sued for in this case, if proved, would be recoverable under the decisions of the Supreme Court in *Head v. Georgia Pacific Ry. Co.*, 79 Ga. 380, 7 S. E. 217, 11 Am. St. Rep. 434, and *Georgia Railroad & Banking Co. v. Dougherty*, 86 Ga. 744, 12 S. E. 747, 22 Am. St. Rep. 499. The court erred in dismissing the petition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1423-1432; Dec. Dig. § 356.*]

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by Beller Puckett against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Ennis & Shaw, for plaintiff in error. Maddox, McCamy & Shumate and Geo. A. H. Harris & Sons, for defendant in error.

HILL, C. J. Judgment reversed.

(9 Ga. App. 583)

GILPIN v. SMITH. (No. 2,872.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1005*)—REVIEW—CONFLICTING EVIDENCE.

The evidence on the main point involved (that is, as to whether the defendant bought the property with actual notice) was in such conflict as to make the finding of the jury, approved by the trial judge, conclusive upon this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8949; Dec. Dig. § 1005.*]

2. EVIDENCE (§ 353*)—DOCUMENTARY EVIDENCE—PRIVATE WRITINGS.

Although a paper is signed by mark, and is neither attested nor recorded, it is admissible in evidence when its execution is directly proved by one who saw it signed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404-1431; Dec. Dig. § 353.*]

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action between J. H. Gilpin and N. J. Smith. From the judgment, Gilpin brings error. Affirmed.

E. S. Longley, for plaintiff in error. R. G. Hartsfield, for defendant in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 598)

HERNDON v. STATE. (No. 3,039.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 169*)—ILLEGAL SALE—EVIDENCE.

The case on its merits is controlled by *Sessions v. State*, 6 Ga. App. 336, 64 S. E. 1101 (3),

and by *Plummer v. State*, 8 Ga. App. 379, 60 S. E. 28.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 188; Dec. Dig. § 169.*]

2. NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered testimony is insufficient to require a new trial.

Error from City Court of Dublin; K. J. Hawkins, Judge.

Sam Herndon was convicted of a violation of the liquor law, and brings error. Affirmed.

S. P. New and R. Earl Camp, for plaintiff in error. W. C. Davis, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 607)

GEORGIA S. & F. RY. CO. v. DU BOSE.
(No. 3,127.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(*Syllabus by the Court.*)

CARRIERS (§ 408*)—LOSS OF BAGGAGE—BURDEN OF PROOF.

The evidence authorizes the verdict.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1557-1571; Dec. Dig. § 408.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by A. M. Du Bose against the Georgia Southern & Florida Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Jno. I. Hall and Hardeman, Jones, Callaway & Johnston, for plaintiff in error. Sidney W. Hatcher, for defendant in error.

HILL, C. J. The brief filed for the railway company, plaintiff in error, opens with the following sentence: "There is no error in the charge of the court, or in any ruling of the court upon the trial. A new trial should have been granted because the verdict was contrary to the undisputed evidence." The correctness of the statement contained in the first sentence above quoted is fully concurred in, and no error of law is complained of. A careful consideration of the evidence leads this court to a directly opposite conclusion from that stated in the second sentence above. The plaintiff in error, as the initial carrier, did not successfully carry the burden of proof by showing that the contents of the baggage of a passenger intrusted to its care had not been stolen while the baggage was in its own possession. Besides, the most reasonable deduction from the undisputed evidence was that the contents of the baggage had been stolen by an employé of the initial carrier, and before the baggage had been delivered by the initial carrier to the connecting carrier.

Judgment affirmed.

(9 Ga. App. 594)

WALDEN et al. v. STATE (No. 2,947.)
(Court of Appeals of Georgia. Aug. 4, 1911.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 1070*)—JOINT WRIT OF ERROR—DENIAL OF NEW TRIAL.

Several persons were jointly indicted, jointly tried, and jointly convicted. All but two of the defendants voluntarily complied with the judgment and sentence of the court, and these two filed a joint motion for a new trial, which was overruled, and they brought the case to this court on a joint writ of error from the judgment overruling their motion for a new trial. Held that, having been jointly indicted, jointly tried, and jointly convicted they had the right to bring a joint writ of error to this court to review the judgment overruling their joint motion for a new trial. The fact that the others who were jointly indicted and convicted with them failed to join them in the motion for a new trial, but voluntarily complied with the judgment and sentence of the court, does not affect the right of those who do except.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2700, 2701; Dec. Dig. § 1070.*]

2. CRIMINAL LAW (§ 1186*)—APPEAL—PROOF OF VENUE.

The brief of evidence fails to show any proof of venue, and for this reason alone this court is compelled to grant a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3215-3230; Dec. Dig. § 1186.*]

Error from City Court of Cairo; J. R. Singletary, Judge.

Jerry Walden and others were convicted of crime, and bring error. Reversed.

R. C. Bell and J. Q. Smith, for plaintiffs in error. W. J. Willie, Sol., for the State.

RUSSELL, J. Judgment reversed.

(9 Ga. App. 613)

VAUGHAN v. STATE (No. 3,265.)
(Court of Appeals of Georgia. Aug. 4, 1911.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 874*)—POLLING JURY—WAIVER OF RIGHT.

The right to poll the jury is lost as soon as the jury has dispersed and again becomes a part of the general public; and where the accused in a criminal case consents that the jury may disperse when they have found their verdict, and they do separate and disperse, leaving the verdict in the possession of the foreman to be returned into court next morning, the right to poll the jury is lost, and cannot be asserted by any reassembling of the jury, when the verdict is delivered by the foreman to the clerk of the court in pursuance of the agreement. *Prescott v. City Council of Augusta*, 118 Ga. 549, 45 S. E. 431; *Hopkins v. State*, 6 Ga. App. 403, 65 S. E. 57.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2085-2088; Dec. Dig. § 874.*]

2. REVIEW ON APPEAL.

There is no exception as to any error of law, other than that dealt with in the foregoing headnote, and the verdict is supported by the evidence.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Error from City Court of Franklin; Frank S. Loftin, Judge.

Grady Vaughan was convicted of crime, and brings error. Affirmed.

W. C. Hodnett, for plaintiff in error. D. B. Whitaker, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 583)

FARMERS' & MERCHANTS' BANK v. PIRKLE et al. (No. 2,911.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§§ 76, 82*)—FINAL JUDGMENT.

An entry of default is not a final judgment, nor is a judgment granting or refusing to grant a motion to open a default.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 478; Dec. Dig. §§ 76, 82.*]

2. PREMATURE BILL OF EXCEPTIONS.

The bill of exceptions is prematurely brought; but, owing to the facts presented, leave is granted that the bill of exceptions tendered as a final bill may operate as exceptions pendente lite.

Error from City Court of Hall County; Geo. K. Looper, Judge.

Action by B. E. Pirkle and others against the Farmers' & Merchants' Bank. Judgment for plaintiffs, and defendant brings error. Dismissed.

C. L. Harris and B. P. Gaillard, Jr., for plaintiff in error. A. C. Wheeler, for defendants in error.

RUSSELL, J. Writ of error dismissed, with direction.

(9 Ga. App. 584)

WILSON v. McEACHERN. (No. 2,957.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

BILLS AND NOTES (§§ 129, 149*)—GARNISHMENT (§ 38*)—PROPERTY SUBJECT—POSTDATED CHECK.

A postdated check, or one which bears a date subsequent to that of its actual issue, is payable on or after the day of its date, being in effect the same as if it had not been issued until that date; but in the meantime it is a negotiable instrument, and the drawer thereof cannot be charged as garnishee of the payee, unless it affirmatively appears that at the time of the rendition of the judgment against the garnishee the check had become due, and was still the property of the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 288, 378; Dec. Dig. §§ 129, 149;* Garnishment, Cent. Dig. § 74; Dec. Dig. § 38.*]

Error from City Court of Statesboro; J. F. Brannen, Judge.

Action by D. E. McEachern against Mrs. Zada Ingraham, and attachment levied on J. A. Wilson. Treverse to answer to gar-

nishee sustained and motion for new trial overruled, and he brings error. Reversed.

Fred T. Lanier, for plaintiff in error. R. Lee Moore, for defendant in error.

HILL, C. J. On July 6, 1907, McEachern sued out an attachment against Mrs. Zada Ingraham. This attachment was on the same day levied by service of summons of garnishment upon Wilson, plaintiff in error. His answer denying indebtedness was traversed and the jury sustained the traverse, and the garnishee's motion for a new trial was overruled. In support of the traverse the following facts were proved: In March, 1907, Wilson, the garnishee, being indebted to Mrs. Zada Ingraham in the sum of \$490, paid this indebtedness by cash and a duebill, and on July 4, 1907, he took up this duebill from Mrs. Ingraham, giving her therefor his check on the Bank of Statesboro. There is some slight question in the evidence whether this check was for \$240 or \$283, and also some slight question whether the check was dated on July 4, 1907, or whether it was a postdated check, being dated October 1, 1907. The jury were fully authorized to believe from the evidence that the amount of the check was \$283, and that it was issued and delivered by Wilson to Mrs. Ingraham on the 4th day of July, 1907, and that it was actually dated October 1, 1907. When the summons of garnishment was served on Wilson July 6, 1907, Mrs. Ingraham had the check in question in her possession, and on or about July 12th she made an effort to get the bank upon which the check was drawn to cash the same, but the bank refused to cash it, on the ground that it was postdated. On July 16, 1907, the J. W. Olliff Company, at the instance of Perry Rountree, cashed the check for Mrs. Ingraham, after deducting from the face thereof an account which she owed this firm, and on this date Wilson, the garnishee, took up this check from the firm of J. W. Olliff Company by giving his promissory note therefor for \$283, due October 1, 1907. On the trial the judge, over the objection of the defendant, admitted the testimony of the bank officials that Mrs. Ingraham attempted to have the check cashed, and that the check was for \$283 and was dated October 1, 1907. This evidence was admitted after preliminary proof that the garnishee, Wilson, had been served with notice to produce the check which he had given to Mrs. Ingraham for \$283, and that he had not produced it. Objection was also made to the introduction of an entry from the journal of J. W. Olliff Company, showing that the company had cashed the check in question on July 16, 1907, and that the garnishee had on that day taken up the check and substituted therefor his note due October 1, 1907, for \$283. This entry was admitted

after preliminary proof that the book on which it was entered was the book of original entries kept by J. W. Olliff Company.

The following excerpt from the charge of the court is also excepted to: "I charge you further that if you find, from the evidence in this case, that the garnishee drew a check for the indebtedness existing at the time, on July 4, 1907, in favor of Mrs. Zada Ingraham, on the Bank of Statesboro, and you find that he parted from that check on July 4, 1907, and it was not regularly negotiated, and was dishonored and payment refused, then the garnishee would be liable, and the plaintiff would be entitled to recover in this case." It is insisted that this charge is error and does not state the law applicable to the evidence in the case. There is no merit in the objections made to the admissibility of the testimony in view of the preliminary proof.

The charge of the court objected to did not state the law applicable to the facts, and was calculated to mislead the jury. There was no evidence whatever that the check had been dishonored. The evidence did show that its payment was refused by the bank because the day of its date had not arrived, and it further discloses the fact that the check had been cashed by the J. W. Olliff Company for the payee, Mrs. Ingraham, before the day of its date. Now, a postdated check, or one which bears a date subsequent to that of its actual issue, is payable on or after the day of its date, being in effect the same as if it had not been issued until that date. The failure of the bank to pay the postdated check until the day of its date was not a dishonor of the check. It would not be dishonored unless it was presented on the day of its date and payment was then refused. And the fact that the bank refused to pay a postdated check before the day of its date would not of itself render liable the drawer of the check, who had been served with summons of garnishment before the day of the date of the check. While the drawer of a postdated check can be garnished as debtor of the payee with respect to the debt for which the check was given, no judgment should be rendered against the drawer of the check as garnishee unless it is affirmatively shown that at the time of the rendition of the judgment the check had become due, and was still the property of the original payee. A postdated check payable to the order of the payee is in effect a negotiable instrument, and before this negotiable instrument is due, the maker thereof cannot tell to whom he will owe it at maturity, because his obligation is not to pay it to any particular person, but to the holder at maturity, whomever he may be; and for the court to render a judgment against the garnishee, on such a negotiable instrument, as the debtor of the original payee, necessarily assumes that the payee is the holder of the note or

check when the same fell due, and this the court cannot assume to be the fact, for the instrument may in the meantime and before maturity have been transferred to an innocent bona fide holder for value, who, as such holder, would be protected in his title, notwithstanding the maker of the negotiable instrument had been served with the summons of garnishment requiring him to answer what he was indebted to the payee who may have been the owner of the negotiable instrument at the time of the service of the summons.

The rights of a purchaser for value before maturity and without notice are paramount to those of a garnishing creditor, and the doctrine of *lis pendens* does not apply to negotiable instruments not due, and the summons of garnishment on the maker of such an instrument does not impound the fund in his hands so that the transfer of the instrument in good faith before maturity would not defeat the claim of the creditor. *Mims v. West*, 38 Ga. 18, 95 Am. Dec. 379. The bank upon which the check in question was drawn had the right to refuse to pay it in July, because, by its date, it was not to be paid until the following October; but this was no dishonor of the check. The payee of the check, it being a negotiable instrument, could transfer it before maturity, for value, and if the transferee took it without notice of any defect or defense, or of any summons of garnishment on the maker of the check, and bought it in good faith, paying value therefor, then the maker of the check could not, under the law, have been liable as garnishee. The maker of the check had the right to take it up and pay it in the hands of the transferee, even after the service of summons of garnishment had been made upon him, because the holder of the check was his creditor, and not the original payee. We are inclined to think from the evidence that the jury might have inferred that the J. W. Olliff Company were not in fact bona fide holders of this check, but that in cashing it before its date they were endeavoring to aid Mrs. Ingraham, the original payee, in avoiding the effect of the summons of garnishment which had been issued in the case and served upon the drawer of the check. At least this question was, under all the circumstances, issuable. But the charge of the court ignored entirely the legal effect of the transfer of the check to J. W. Olliff Company, and eliminated from the jury any position which they may have occupied as a bona fide transferee of the check, and in effect instructed the jury that they might find the garnishee liable on the check without reference to the intervening rights of a bona fide purchaser thereof before maturity. In other words, under the charge of the court, the maker of this check may have been called upon to pay not only the check, but also the debt represented by the check, as garnishee, to the garnishing

creditor, and again, as maker of the check, to the bona fide holder thereof. It is well settled that no judgment can be legally rendered against a garnishee unless such judgment when satisfied would protect him against a subsequent suit to recover the same debt.

Because of the error contained in the charge excepted to, as above discussed, we are constrained to grant another trial.

Judgment reversed.

(9 Ga. App. 606)

J. W. McGARRITY & CO. v. THOMAS.
(No. 3,099.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 159*)—APPEAL—BOND—SUFFICIENCY.

Where a defendant in attachment has replevied the property levied upon, giving the statutory bond, and has also filed a traverse to the grounds of the attachment, and the plaintiff in attachment elects to take a general judgment, but does not dismiss the attachment, and the defendant appeals to the superior court, the surety on the replevy bond cannot be surety also on the appeal bond.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 556-578; Dec. Dig. § 159.*]

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action in attachment by E. L. Thomas against J. W. McGarrity & Co. General judgment for plaintiff, and defendants appeal to the superior court. Motion to dismiss appeal sustained, and defendants bring error. Affirmed.

An attachment was levied upon certain personal property, and the defendants replevied the property, giving the replevy bond as provided by the statute, and traversed the grounds of the attachment. The plaintiff thereupon elected to take a general judgment against the defendants, and not a judgment in rem, nor a judgment on the replevy bond; and the defendants entered an appeal to the superior court, furnishing an appeal bond with the same surety thereon that had been previously given on the replevy bond. When the case was called for trial in the superior court, the plaintiff moved to dismiss the appeal, on the ground that the same surety appeared on both the appeal bond and the replevy bond, and this motion was sustained. The judgment dismissing the appeal is assigned as error.

S. C. Townsend, for plaintiffs in error. Patterson & Copeland, for defendant in error.

HILL, C. J. (after stating the facts as above). We think the judgment of dismissal was right, under the general principle decided in *Woodliff v. Bloodworth*, 121 Ga. 456, 49 S. E. 289, and cases there cited. The

plaintiffs in error seek to avoid the effect of this decision and of others announcing the same principle, by insisting that their election in the court below to take a general judgment was tantamount to an abandonment of their attachment, and the abandonment of the attachment carried with it the replevy bond, and the surety thereon was no longer liable, and that, being released from liability on the replevy bond, he became a proper surety on the appeal bond. This would be true if the premise were entirely sound.

The plaintiff did not dismiss the attachment in the court below, but, in view of the traverse to the grounds of the attachment, only took in that court a general judgment in personam. But the appeal which was subsequently entered by the defendants carried with it the entire case and became a de novo investigation in the superior court, and the plaintiff in attachment, notwithstanding the fact that he had taken only a general judgment in the court below, could, on the trial of the appeal, insist on a judgment in rem, as well as on a judgment in personam. Civ. Code 1910, § 5113. And this right kept alive the possible liability of the defendant in attachment and his surety on the replevy bond.

We think, therefore, that under the facts in this case and in view of the contingent liability on the replevy bond resulting from the appeal and the de novo investigation, the court was fully warranted in dismissing the appeal, on the ground that no sufficient appeal bond had been given, because the surety on that bond was also surety on the replevy bond.

Judgment affirmed.

(9 Ga. App. 589)

EBERHARDT v. STATE (No. 2,906.)
(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. **SUFFICIENCY OF EVIDENCE.**
The evidence authorizes the verdict.
2. **CRIMINAL LAW (§ 1088*)—APPEAL—RECORD—INSTRUCTIONS—MOTION FOR NEW TRIAL.**
Requests for instructions to the jury are not a part of the record. Grounds of a motion for new trial, which except to the court's action in refusing to give or in qualifying certain instructions requested to charge, are not sufficient, when the alleged requests are not set forth.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1088.*]

3. **ASSIGNMENTS OF ERROR.**
The assignments of error as to the charge of the court are not meritorious.

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

George Eberhardt was convicted of crime, and brings error. Affirmed.

Sam L. Olive, for plaintiff in error. Thos. J. Brown, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(89 S. C. 378)

MCKAIN v. CAMDEN WATER, LIGHT & ICE CO.

(Supreme Court of South Carolina. July 22, 1911.)

1. NEGLIGENCE (§ 119*)—DEATH OF SERVANT—ACTION—PLEADING.

Where the complaint charged only two specific acts of negligence, the court did not err in sustaining an objection to evidence tending to prove other negligent acts.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

2. TRIAL (§ 83*)—OBJECTIONS TO EVIDENCE.

An objection to evidence, without stating any ground, is unavailable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193-210; Dec. Dig. § 83.*]

3. MASTER AND SERVANT (§ 293*)—DEATH OF SERVANT—PLACE TO WORK—INSTRUCTIONS.

In an action for death of a servant, the court did not err in charging, without qualification, that the master was not required to furnish an absolutely safe place to work, but only a reasonably safe place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1150; Dec. Dig. § 293.*]

4. APPEAL AND ERROR (§ 1032*)—INSTRUCTIONS—PREJUDICE.

An assignment that the court erred in giving a particular instruction cannot be sustained in the absence of a showing of prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4050; Dec. Dig. § 1032.*]

5. MASTER AND SERVANT (§ 295*)—INJURIES TO SERVANT—CARE REQUIRED.

In an action for death of a servant, instructions given held to have properly embodied the principle that, if a person of ordinary care and prudence, under all the circumstances, with knowledge of the danger, would undertake to operate the machinery in question, the injured servant did not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

6. TRIAL (§ 194*)—INSTRUCTIONS—CHANGE ON FACTS.

In an action for the death of a servant, caused by getting his artificial limb caught in certain machinery alleged to have been improperly protected, an instruction, "It might not be negligence for me to jump over that gate out there, but if I had one leg it might be negligence for me to do it," was mere illustration, and was not objectionable as a charge on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-441; Dec. Dig. § 194.*]

7. MASTER AND SERVANT (§ 236*)—INJURIES TO SERVANT—DISABLED SERVANT—CARE REQUIRED.

A servant, laboring under a physical disability, such as the loss of a leg, is required to be more careful in going around machinery than others in possession of all their parts.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 723; Dec. Dig. § 236.*]

8. TRIAL (§ 194*)—INSTRUCTIONS—CHARGE ON FACTS.

A request that a promise by a master to remedy a defect, after notice or protest, tends to rebut the inference of waiver of defect by the servant remaining in the master's service after knowledge, and if the servant continues to discharge his duties, relying on the master's promise to remove the defect, he does not waive the same, the jury being the proper tribunal to determine that question, was objectionable as a

charge on the facts, in violation of Const. art. 5, § 23.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-441, 446-466; Dec. Dig. § 194.*]

Appeal from Common Pleas Circuit Court of Kershaw County; J. W. De Vore, Judge.

"To be officially reported."

Action by Nannie M. McKain, as administratrix of the estate of Richard N. McKain, deceased, against the Camden Water, Light & Ice Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The following are the exceptions referred to in the opinion:

Exceptions.

"The plaintiff excepts to the rulings of the trial court, and to the charge to the jury, and to the judgment entered upon the verdict, upon the following grounds of error:

"(1) In refusing to allow the question, 'Was that protected?' alluding to crank which came within two inches of a guard surrounding fly wheel; the error of law being found: (a) In refusing to allow witness to testify as to an allegation of negligence, the unguarded condition of fly wheel, it being for the jury to determine whether the protection of the crank would not also have been a protection of the fly wheel, whether or not one could be protected without the other. (b) In refusing to allow testimony as to the conditions or surrounding circumstances of the alleged unsafe place where plaintiff's intestate met his death, because of an unprotected and unguarded fly wheel.

"(2) In allowing and permitting the witness Boynton, over plaintiff's objection, to testify as to the terms of a verbal contract between the defendant and the Camden Oil Mill, whose machinery defendant was using when plaintiff was killed. The error of law being found: (a) In allowing testimony as to irrelevant matter calculated to mislead the jury from one of the true issues in this case, whether or not defendant furnished plaintiff's intestate with a reasonably safe place to work. (b) In allowing testimony tending to show that the unsafe place was furnished defendant by the Southern Oil Mill, under terms and conditions which prohibited or excused defendant from making any changes, thereby injecting into the case a foreign issue calculated to mislead, and which could in no way excuse defendant for not performing its legal duty to furnish plaintiff with a reasonably safe place to work.

"(3) In allowing and permitting the witness Eve, over plaintiff's objection, to testify as to the terms of a verbal contract between the defendant and the Camden Oil Mill, whose machinery defendant was using when plaintiff was killed. The error of law being found: (a) In allowing testimony as to irrelevant matter calculated to mislead

the jury from one of the true issues of this case, whether or not defendant furnished plaintiff's intestate with a reasonably safe place to work. (b) In allowing testimony tending to show that the unsafe place was furnished defendant by the Southern Oil Mill, under terms and conditions which prohibited or excused defendant from making any changes, thereby injecting into the case a foreign issue calculated to mislead, and which could in no way excuse defendant for not performing its legal duty to furnish plaintiff with a reasonably safe place to work. (c) In allowing testimony of terms of a contract which witness testifying did not inform plaintiff's intestate of, or know of his own knowledge that plaintiff's intestate derived such information from any other source, the only effect of which could be to bolster up the witness Boynton's testimony to show that he was telling the truth about an irrelevant and undisputed fact.

"(4) In charging without qualification: 'And it is the duty of the master to furnish, not an absolutely safe place for the servant to work in, but a reasonably safe place.' The error of law being found: (a) In charging in effect that if a man of ordinary care and prudence, under all the circumstances, would furnish an absolutely safe place to work in, it would not be negligence to leave undone what said man of ordinary care and prudence would have done.

"(5) In charging: 'I might be negligent in leaving my horse hitched to the buggy out here, without tying him, and if that horse did anybody any injury I would not be liable.' The error of law being found in erroneously defining the proximate cause. If I negligently cease to control a dangerous and unreasoning instrumentality which belongs to me, in a public place, and damage ensues to some one as a direct consequence of my negligence, I am liable.

"(6) In charging that: 'If the master furnishes a place, and it is defective to such an extent that a man of ordinary prudence, care, and reason can see for himself that it is defective, knows it is defective, knows the danger, and, after knowing that, he undertakes to operate, why he assumes that risk. I say that he assumes it, although the master directs him to go and perform that work.' The error of law being found in making knowledge of the danger on the servant's part the sole criterion of his negligence, or assumption of risk, whereas the correct legal principal is that, if a person of ordinary care and prudence, under all the circumstances, would undertake to operate with knowledge, such person does not assume the risk.

"(7) In charging: 'It might not be negligence for me to undertake to jump over that gate out there, but if I had one leg it might be negligence for me to undertake to do it.' The same being a thinly veiled charge up-

on the facts; it being in evidence that plaintiff's intestate only had one leg when he was killed.

"(8) In not charging the seventh request to charge of plaintiff, viz.: 'A promise by the master to remedy a defect, after notice or protest, tends to rebut the inference of waiver of the defect by the servant's remaining in the master's service after knowledge. If the servant continued in discharge of his duties, relying on the master's promise to remove a defect, he could not be said to have waived such defect. The jury is the proper tribunal to determine this question in the case.' Whereas it is submitted that the request stated a correct proposition of law applicable to the facts in this case; it being in evidence that plaintiff's intestate protested to defendant about the unsafe place where he met his death, and defendant promised to remedy the defect."

Clark & Von Treskow, for appellant. T. J. Kirkland, M. L. Smith, and E. D. Blakeney, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained on account of the wrongful acts of the defendant, causing the death of plaintiff's intestate.

The allegations of the complaint, material to the questions involved, are as follows:

"That on or about the 30th day of July, A. D. 1906, and some time prior thereto, the plaintiff's intestate was engaged as a servant and employé by the defendant, and was at the time hereinafter mentioned acting within the scope of his employment.

"That it was the duty of plaintiff's intestate to perform services and labor upon the machinery operated by the defendant, by applying grease thereto and otherwise doing such acts and things as he was directed to do, and as were necessary and proper to run said machinery.

"That on the night of the 13th day of July, A. D. 1906, the plaintiff's intestate, in the discharge of his duties, filled up an oil cup, on the 'eccentric,' and turned to further discharge his duties in and about said machinery. That the floor whereon plaintiff's intestate was walking was greasy and slippery, and his left leg had been amputated below the knee, and plaintiff's intestate used an artificial limb and foot in walking. That defendant had caused plaintiff's intestate to labor and work, until the stump of his left leg, where it rested in the artificial limb, was bruised and sore, and caused much pain, suffering, and difficulty in walking, all of which defendant well knew. That the machinery was running unevenly, and jerking, making it well-nigh impossible for any one to avoid slipping on the greasy floor. That near the 'eccentric,' and where plaintiff's intestate was walking, was a large revolving wheel, unguarded and unprotected by a foot-

board, or guard rail, or in any other way. That plaintiff's intestate's artificial foot caught in said revolving wheel, he was hurled to and through the floor, and his body, head, and limbs were so bruised, mangled, and crushed that he died of the injuries so received. That plaintiff's intestate was ordered and directed to perform the labor and work in which he received the above-mentioned injuries.

"That said Camden Water, Light & Ice Company was in default, and did violate and fail to observe and discharge the plain duty which it owed to the plaintiff's intestate, as its servant and employé, while engaged as aforesaid, under its authority and direction, in this: In carelessly and negligently providing and furnishing to plaintiff's intestate unsafe and defective appliances, in that said Camden Water, Light & Ice Company did carelessly and negligently fail and neglect to provide and furnish ordinarily safe, secure, and proper machinery, free from jerk and jars when running. That the defendant was careless and negligent in ordering and directing plaintiff's intestate to go to an unsafe and dangerous place to work, in the nighttime, in his overworked and weakened condition. That defendant was careless and negligent in allowing and permitting said revolving wheel to be and remain unguarded, thereby furnishing plaintiff's intestate with an unsafe and dangerous place to work."

The defendant denied the allegations of the complaint, and set up the defenses of contributory negligence and assumption of risk.

The jury rendered a verdict in favor of the defendant, and the plaintiff appealed upon exceptions, which will be reported.

We proceed to the consideration of the exceptions.

[1] First Exception:

His honor, the Presiding Judge, thus stated the issues raised by the pleadings, as to the alleged acts of negligence: "The two specific acts of negligence, that I conclude you are to pass upon, under my construction of these pleadings, are these: The first one is that the defendant was careless and negligent in regard to directing the plaintiff's intestate to go to an unsafe and dangerous place to work, in his overworked and weakened condition, etc. That is one act of negligence you are to pass upon; and the other is that the defendant was careless and negligent in allowing and permitting said revolving wheel to be and remain unguarded, thereby furnishing plaintiff's intestate an unsafe and dangerous place to work in. These are the two acts of negligence that will be for your consideration. And plaintiff alleges, by reason of these two acts of negligence—one or both of them—that the intestate was killed." No objection was interposed to this construction of the complaint. In the case of *Spires v. Railway*, 47 S. C. 28, 24 S. E. 992, the rule

is thus stated: "If the complaint alleges specific acts of negligence, then the plaintiff will be restricted to the introduction of such testimony only as would tend to prove the acts of negligence alleged in the complaint." The same principle was recognized in the case of *Jenkins v. McCarthy*, 45 S. C. 278, 22 S. E. 883, wherein the court ruled that a plaintiff who sets up negligence solely in the manner of driving piles will be confined to such issue, and cannot introduce evidence that the piles were not sufficiently driven; that a party alleging a specific act of negligence cannot, after issue joined on that allegation, introduce evidence of any other kind of negligence. These authorities show that this exception cannot be sustained.

[2] Second Exception:

When the defendant's attorney undertook to introduce the testimony mentioned in the exception, the plaintiff's attorney simply said, "We object," but did not state the grounds of objection. The objection was not properly taken, as it failed to state the grounds thereof. *Youghblood v. Railway*, 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824; *Bryce v. Cayce*, 62 S. C. 546, 40 S. E. 948.

Third Exception:

The grounds of objection to the introduction of the testimony mentioned in this exception were thus stated by the plaintiff's attorney: "I object. He cannot bolster up his witness by another, as to an agreement; no evidence of anything Mr. Eve is going to state was communicated to Mr. McKain. This witness never stated to Mr. McKain what the agreement was." His honor ruled that, unless the defendant brought home knowledge to Mr. McKain of the terms of the agreement under which the defendant was operating the machinery, then the testimony would not be competent; thus practically sustaining the objection interposed by the plaintiff's attorneys.

[3] Fourth Exception:

We do not deem it necessary to cite authorities to sustain the proposition which the Presiding Judge charged. Nor can we conceive how it was subject to the error assigned in the exception.

[4] Fifth Exception:

The Presiding Judge was not attempting to define the proximate cause. Another reason why the exception cannot be sustained is because the appellant's attorneys have failed to show that the error assigned was prejudicial.

[5] Sixth Exception:

We desire to call attention to the only error assigned, which was as follows: "In making knowledge of the danger on the servant's part the sole criterion of his negligence, or assumption of risk, whereas the correct legal principle is that, if a person of ordinary care and prudence, under all the circumstances, would undertake to operate with

knowledge, such person does not assume the risk."

The plaintiff's third, fourth, and eighth requests to charge were as follows:

"(3) Where a servant is ordered to do a certain piece of work, if he undertakes to obey the order given, with knowledge of the dangers incident to obeying said order, whether or not he assumed the risk or was guilty of contributory negligence are questions of fact for the jury that would depend upon whether a man of ordinary reason and prudence would undertake to obey a command of that sort, with knowledge of the dangers 'incident to obeying the command.'"

"(4) Since the master is under a special duty to inspect and investigate risks to which the servant is exposed, and since the servant may rely upon the performance of this duty, the fact that the servant proceeds under the orders of the master, in performing an act, whereby he is exposed to unusual danger, renders the master liable for a resulting injury to the servant, unless the risk of the act was fully realized by the servant, and was so apparent that no man of ordinary prudence, situated as he was, would have undertaken it."

"(8) If a master or superior orders an inferior into a situation of danger, and he obeys and is injured, the law will not charge him with assumption of risk, unless the danger was so glaring that no prudent man would have entered into it."

In disposing of each request, the Presiding Judge said: "I charge you that. That is the law, as I have already charged it." Thus showing that he not only charged the requests, but that he construed them as embodying the principles which he had already charged. Therefore the charge, when considered in its entirety, gave the plaintiff the full benefit of the principle for which she contended.

[§. 7] Seventh Exception:

The language of the charge was merely used by way of illustration. Furthermore, it cannot be denied that persons laboring under physical disabilities must be more careful than others in going where they may encounter danger.

[§] Eighth Exception:

The language of the request is, with one or two minor changes, what was said by the court in *Powers v. Oil Co.*, 53 S. C. 358, 31 S. E. 276, upon the question whether, as a matter of law, a servant who relies upon the promise of the master to repair a defective appliance waives his right to insist upon the fact that it was defective by remaining in the service of the master. The Presiding Judge could not have charged the request without violating section 26, art. 5, of the Constitution, which provides that, "Judges shall not charge juries, in respect to matters of fact." The request undertook to say what

force and effect should be given to certain facts, which could only be determined by the jury, unless that mode of trial was waived. Judgment affirmed.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(89 S. C. 352)

In re GADSDEN.

(Supreme Court of South Carolina. July 20, 1911.)

1. ATTORNEY AND CLIENT (§ 57*)—SUSPENSION AND DISBARMENT—PROCEEDINGS.

Where a judgment of the inferior court reflects upon the integrity of an attorney, and review thereof on appeal is prevented by a settlement between the parties, such attorney is entitled to an investigation of his conduct by the Supreme Court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 81, 82; Dec. Dig. § 57.*]

2. ATTORNEY AND CLIENT (§ 53*)—DISBARMENT—EVIDENCE—FRAUDULENT CONDUCT.

In a proceeding for the disbarment of an attorney for the fraudulent procurement of a release of a distributee's interest in an intestate's estate, evidence held to show that the attorney was not guilty of intentional misrepresentation of facts or opinions.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

3. ATTORNEY AND CLIENT (§ 53*)—DISBARMENT—PRESUMPTIONS.

As no one can become an attorney until he has furnished satisfactory proof of good character, the presumption is that members of the bar are of good character, and their dishonesty or depravity must be established by a clear preponderance of evidence.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

4. ATTORNEY AND CLIENT (§ 38*)—DISBARMENT—MISCONDUCT.

The administratrix of an estate being trustee for one entitled to a distributive part in the estate, an attorney representing the administratrix occupies a fiduciary relation to the distributee, and hence a release which he induced the distributee to execute to her part of the estate was invalid, and his act in procuring such release was reprehensible, it appearing that the distributee was an old woman unfamiliar with the affairs, and that most of the estate consisted of stock having only a prospective value, which the attorney represented as being practically valueless, and for the further reason that contracts between a trustee and cestui que trust are presumed to be invalid, save where it is shown that they deal on equal terms.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 51, 61; Dec. Dig. § 38.*]

5. ATTORNEY AND CLIENT (§ 38*)—DISBARMENT—MISCONDUCT.

Where an attorney, without intentional misrepresentation, and for the benefit of his client, who was administratrix of an estate, procured a distributee to release her share in the estate to the administratrix, his conduct, while reprehensible, in that he took a position opposite to the interests of the distributee toward whom he also occupied a fiduciary relation, does not warrant disbarment, for an attorney should not be disbarred unless the evidence shows that his misconduct was due to a

bad or fraudulent motive, or that it was so gross as to show want of integrity.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 51, 61; Dec. Dig. § 38.*]

6. ATTORNEY AND CLIENT (§ 58*)—DISBARMENT PROCEEDINGS—STATUTES.

While Civ. Code 1902, § 2816, provides that an attorney may be removed or suspended who shall be guilty of any deceit, malpractice, or misdemeanor, the statute neither limits the power of courts to disbar or suspend for misconduct not falling within its terms, nor deprives the courts of the power to inflict a less punishment for a misconduct not grave enough to warrant suspension or disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 76-78; Dec. Dig. § 58.*]

"To be officially reported."

In the matter of Philip H. Gadsden, as a member of the bar of South Carolina. Disbarment and suspension refused.

Miller, Whaley & Bissell, for petitioner.
J. Fraser Lyon, Atty. Gen., for the State.

WOODS, J. The matter to be considered and decided in this cause is whether Philip H. Gadsden was guilty of such false representations or other misconduct in procuring from Miss Mary Lawrence an assignment of her interest in the estate of Joseph S. Lawrence to Mrs. E. Charlotte Lawrence as would warrant this court in ordering his name to be stricken from the roll of attorneys, or in inflicting any other penalty.

[1] This issue grew out of the settlement of the estate of Dr. Joseph S. Lawrence, who died at Capon Springs, W. Va., in August, 1899. His family consisted of his wife, E. Charlotte Lawrence, and two minor stepchildren. Diligent search having failed to disclose a will, the widow, E. Charlotte Lawrence, applied for letters of administration, which were granted to her on October 25, 1899. Upon inquiry it was discovered that the only person entitled to take with the widow under the statute of distributions was Miss Mary Lawrence, a half-sister, living at Halcyondale, a small village in the state of Georgia. Philip H. Gadsden was the attorney for Mrs. E. Charlotte Lawrence, and in that capacity he went to the residence of Miss Mary Lawrence and there obtained from her on November 3, 1899, an assignment to Mrs. E. Charlotte Lawrence of all her interest in the estate of her brother for the consideration, as therein expressed, of "love and affection for my sister E. Charlotte Lawrence and other valuable consideration to me paid." Miss Mary S. Lawrence died in 1905; and her heirs and distributees on November 7, 1907, brought an action to set aside the assignment, alleging fraud and misrepresentation in the procuring of the assignment and the mental incapacity of Miss Mary S. Lawrence to execute such a paper. Joseph M. Lawrence, having been thereafter appointed administrator of the estate of Miss Mary S. Lawrence, was made a party plain-

tiff in his representative capacity, and appropriate amendments were made to the complaint. The Charleston Consolidated Railway, Gas & Electric Company, was made a party defendant, but it had no real interest in the controversy, and its answer consisted of a formal denial on information and belief. By her answer Mrs. E. Charlotte Lawrence denied the allegations of misrepresentation and fraud, and of the incapacity of Miss Lawrence, and she set up the statute of limitations as a further defense.

The trial of the cause resulted in a decree of Hon. Robert Aldrich, circuit judge, adjudging the annulment of the assignment on the following findings of fact and of law: "I find as a matter of fact: That at the time the conveyance of interest or release of Miss Mary S. Lawrence, to Mrs. E. Charlotte Lawrence, on the third day of November, 1899, was made, two pregnant statements were made to her calculated to influence her to part with her interest in the estate of her deceased brother Dr. Joseph S. Lawrence, for a trifle or for very slight consideration: First. That her brother died leaving a will under which she took nothing. Secondly. That, even, if there was no will, his estate was insolvent, and she would get nothing in that event as well. That both of these statements were misrepresentations. Third, that at the time of this transaction the defendant Mrs. E. Charlotte Lawrence, who was making the dealing through her attorney and agent, was administratrix of her husband's estate and as such was trustee for the creditors and the heirs, and Miss Lawrence was her cestui que trust, and that the transaction was in violation of the fiduciary relation existing between them. As a matter of law that the said conveyance or release thus procured was fraudulent, null, and void."

Mrs. Lawrence appealed from this decree, assigning errors of both law and fact in the foregoing findings of the circuit court. While the cause was pending on appeal in this court, Mrs. Lawrence, against the protest of Mr. Gadsden and contrary to the advice of counsel who had represented her in the litigation, through other attorneys substituted on the record as her counsel, compromised the suit by the payment of the sum of \$95,000 to the plaintiffs. An order was then made by this court on the consent of the attorneys for the plaintiffs, and the substituted attorneys of Mrs. Lawrence, dismissing the appeal. If the appeal had been sustained, the plaintiffs would have recovered nothing, and, if they had been successful, the property recovered would have been worth to them about \$192,000. Miss Lawrence received only \$500 in connection with the assignment, but the contention of the defendants was that this was a gift, and that the

real consideration was her generosity combined with her conviction of duty induced by Mr. Gadsden's statement that there was a last will by which her brother had left all his property to his wife and stepchildren. After the consent order had been taken for the abandonment of the appeal, Mr. Gadsden filed his petition in this court, in which, after setting out the history of the litigation between Mrs. Lawrence and the administrator of the estate of Miss Lawrence and her heirs, he alleged: "That, if the opportunity for an appeal to and a review by this court be otherwise denied to the petitioner, the judgment and decree of the circuit judge will constitute and remain a permanent and final record and decision disastrously reflecting upon the professional character of the petitioner; that, as petitioner is informed and believes, he has no other adequate remedy or means of redress except by appeal to this honorable court, and while, as aforesaid, petitioner has no pecuniary interest at stake, the petitioner has that at stake which is of more value than pecuniary interest, namely, his good character as an attorney at law and an officer of the courts of South Carolina." The prayer of the petition was: "Wherefore, petitioner prays that this court will retain the record sent upon appeal from the lower court upon which the judgment and decree of the circuit judge are based, and will examine the same in so far as it relates to the actings and doings of this petitioner, and, inasmuch as the dismissal of the said appeal will deprive the petitioner of the opportunity of having this court examine the record in a trial upon the merits, the petitioner appeals, as an officer of the court, to the jurisdiction of the court for such protection as is due to an officer of the court under such circumstances, and he asks that the court will upon such examination of the record pronounce such judgment with respect to the petitioner as the record shall in the opinion of this court demand."

Upon hearing the petition, this court held that Mr. Gadsden, as an officer of the court, had the right to an investigation of his conduct and a judgment thereon at the hands of the court. The Attorney General was requested by the court to appear as *amicus curiae* in the public interest. At the hearing the petitioner submitted the entire record in the original cause, including all the evidence, as his vindication. The only additional evidence offered was the testimony of Mr. Holman, one of the attorneys for the administratrix and heirs of Miss Mary Lawrence, as to the terms of settlement of the original cause made by Mrs. Lawrence. After consideration of the evidence in the light of the able arguments presented in the cause, the court now gives its judgment on the conduct of Mr. Gadsden.

[2] The first and most important question is, Did Mr. Gadsden intentionally misrepresent the value of the estate of Dr. Lawrence

or any other matter in his interview with Miss Lawrence which resulted in the execution of the assignment? The only persons now living who were present at the interview are Mrs. Tarver, one of the plaintiffs, and Mr. Gadsden himself. According to Mrs. Tarver's testimony, Mr. Gadsden told Miss Lawrence in his interview with her that the estate was so indebted that Miss Lawrence would not receive from it as much as the \$500 which he was offering for her interest. She testified further: "Mr. Gadsden and I got in a little dispute about her signing the paper. I was not willing for her to sign it, and we argued quite a while, and he then asked me to read the paper, and I told him I was not a lawyer and could not unravel it. He then read it to me, and when I objected so bitterly to her signing it, he then told me it was only to allow Mrs. E. Charlotte Lawrence to, I would say, manage the property of Mr. Joe Lawrence, and then he stated to us that if there was any will or any proviso made to her that this paper would not interfere with it in the least." Mr. Gadsden testified that he carried with him \$1,000 received from Mrs. Lawrence, believing that to be a fair price to pay for Miss Lawrence's interest. He thus states his representations to Miss Lawrence: "I went to Halcyondale, arriving there in the morning, and was directed to the Tarver house; went up to the house, and inquired for Miss Mary Lawrence. I was asked in, and Miss Lawrence came to meet me. I introduced myself to her by name; told her I had come to see her with reference to her brother's estate, and told her of her brother's death. I told her of the fact of his illness, of his having been abroad, of his death at Capon Springs. I told her of the letter which we had written to Dr. Buist, stating that he had left a will, and also in that letter where he had determined he wanted to be buried, and I told her of the conversation that Dr. Buist had related to me between the doctor and himself, as to his having left his property to his wife and children. I told her practically what I have testified here, as to what I had done to try and find the will, the various efforts I had instituted, and the fact that up to date I had been unsuccessful. I told her of this key that I had, and told her that I felt satisfied that there was a will, but I could not find or had been unable to find it up to that time. I then went on to tell her about her brother's estate, and told her that the doctor, so far as I knew, had left \$10,000 in bonds, about \$16,000 or \$17,000 in cash and something over 9,000 shares of Consolidated stock. I did not state 9,200, but something over 9,000 shares. The stock, I told her, in my judgment had no value. I also told her that a large number of claims had been put in against her brother's estate, and that those claims were coming in every week or so, and that in my judgment the estate had little value. I mentioned some of the claims by name to her. About this

point of the interview Miss Lawrence said to me that she felt satisfied that if her brother Joe had left anything that he wanted it and intended it to go to his wife and children, and that he did not intend to give it to her; that she felt satisfied from what I said that he left a will, and that she hoped the will would be found, and that she certainly did not propose to take advantage of the accident of the loss of the will to claim any part of his estate; that she would feel as if she were taking something she was not entitled to. I had explained to Miss Lawrence that in the absence of a will under our law, she, being a half sister, was entitled to 50 per cent. of the estate. I said that if she felt that way that, in order to carry out the views that she had, it would be necessary that she sign a release or assignment of her interest to Mrs. Lawrence which she said she would very readily do." He further testified that Miss Lawrence signed the paper solely through her desire to carry out what she thought were her brother's wishes with respect to the property as expressed by his will, and that the payment of \$500 was not mentioned until after the transaction had been concluded, when he offered the money on behalf of Mrs. Lawrence in recognition of Miss Lawrence's magnanimous action; that Miss Lawrence at first refused to accept it, but later did so upon Mrs. Tarver's earnest solicitation. He denied the representation imputed to him by Mrs. Tarver that the paper would have no effect beyond allowing Mrs. Lawrence to manage the estate, but admitted the statement that, if a will should be found, the assignment would not defeat any provision for Miss Lawrence.

The complaint itself sustains Mr. Gadsden's version of the representations made by him; for it is therein alleged that the untrue statement made to Miss Lawrence was that the estate of her brother was of "small value," not that it was of no value, and there is in the complaint no allegation of misrepresentation as to the nature and effect of the paper. In this hotly contested litigation, with so great pecuniary interests involved, it seems certain that, if such untrue representations had been made, they would have been alleged in the amended complaint. The legal opinion that the discovery of a will containing a provision for Miss Lawrence would have made the assignment of no effect, though incorrect, cannot be fairly regarded as intentionally false. The evidence tends to the inference that the conviction expressed by Mr. Gadsden that Dr. Lawrence had made a will leaving all his property to his wife and stepchildren had strong support in the facts ascertained by him, and was sincere. George B. Edwards testified that Dr. Lawrence, just before leaving Charleston in the spring of 1899, told him he had made a will in order to protect his wife and stepchildren. Dr. Lawrence wrote his friend Dr. Buist from Italy in April, 1899, referring to

his will; and Dr. Buist testified that in the summer of the same year Dr. Lawrence while at Capon Springs, suffering from his last illness, told him he had made a will appointing Dr. Buist executor, and leaving all his property to his wife and stepchildren. All this was communicated to Mr. Gadsden, and was calculated to induce a belief that Dr. Lawrence intended his wife and stepchildren to have his property, and that he had left a will carrying his intention into effect. It is true that Mr. Gadsden knew that the most diligent search for a will had been made without success; but in a letter dated November 10, 1899, Miss Lawrence wrote to Mrs. Lawrence, "I trust the will which Joe made will be found and everything will be cleared up," thus confirming Mr. Gadsden's statement that he had told her the will could not be found. The finding of the circuit court that Mr. Gadsden's statements as to the will were misrepresentations, if the finding meant that they were known to be untrue, is, we think, contrary to the evidence.

We next inquire into the finding of the circuit judge that Mr. Gadsden represented the estate to be of no value, when, in fact, it was of great value. The real representation, as we have seen, was the expression of the opinion that the estate would be of little value after the payment of debts, not that it would be of no value. Mr. Gadsden testified that he mentioned the items of property of which the estate consisted, and there is no testimony to the contrary. These items were \$19,803.57 in cash, \$10,000 in bonds and 9,200 shares of stock of Charleston Consolidated Railway, Gas & Electric Company, of the par value of \$50 per share. In the beginning of his evidence Mr. Gadsden testified that he represented the cash to be \$16,000 or \$17,000, but he afterwards testified that he had refreshed his memory, and that he knew that he had stated to Miss Lawrence the true amount of the cash from memoranda in his possession at the time. The bonds, admitted to be worth at the time about \$9,000, with the cash of \$19,803.57, made up a known value of \$29,803.57. The representation by Mr. Gadsden that in his opinion the 9,200 shares of stock were of no value requires particular attention. Dr. Lawrence came to Charleston as a promoter in 1896, and after much effort succeeded, in 1899, in bringing about a consolidation of the street car lines and certain other public service corporations under the name of the Charleston Consolidated Railway, Gas & Electric Company. The new company issued mortgage bonds to the amount of \$2,500,000, using the proceeds to acquire the property of other corporations. Its stock issue of 30,000 shares, of the par value of \$50 per share, was to some extent given in exchange for the stock of the merged corporations, but in the main it was issued as promotion fees to the parties interested. The evidence leads to the inference that the 9,200 shares held by Dr. Lawrence were receiv-

ed as compensation for his services as promoter.

There is no evidence whatever that at the date of the consolidation, or at any time prior to the assignment by Miss Lawrence the franchises and other property of the Consolidated Company could have been sold for more than the amount of the mortgage debt. It is no doubt true that the promoters of the scheme hoped that the stock would become valuable, but the evidence from business men apparently disinterested is conclusive that, when Mr. Gadsden's representations were made to Miss Lawrence, the stock could not have been sold or used as collateral. In the year 1900 the company would have defaulted in the payment of the interest on its bonds, had not S. H. Wilson, one of the parties interested, borrowed for it \$60,000 on his personal credit. This state of depression continued until the launching of the exposition in Charleston in 1901. A dividend was not declared until 1903, and that was only one-half of 1 per cent. The first sale of the stock was in 1903 at \$4 per share. After that time the stock steadily increased in value and was worth on the market at the time of the trial about \$30 per share. In view of this summary of the evidence as to the speculative character of the scheme which was the origin and basis of the stock, and as to the estimation in which it was held by the investing public, it seems clear that a business man might have held and expressed the opinion in 1899 with entire sincerity that stock of the Consolidated Company was of no value. The fact mainly relied on to show that the opinion Mr. Gadsden expressed was not sincere is the prosperity of the company, which came afterwards, due to the exposition, the construction of the Navy Yard, and the extraordinary increase in general prosperity. We do not think this evidence warrants the inference of intentional misrepresentation of the value of the stock.

As to the charge of misrepresentation of the amount of the debts, little need be said. Dr. Lawrence was no exception to the rule that men engaged in speculative enterprises usually leave their affairs in a state of complication. The claims presented to the administratrix aggregated more than the cash and the value of the bonds. Even allowing that Mr. Gadsden expected successful resistance to some of the claims, still the record indicates that there was reason to apprehend that, if the stock was worthless, the debts would absorb far the larger part of the cash and the value of the bonds, and leave the estate of little value. After litigation and compromise, the net amount paid in satisfaction of debts was about \$18,000.

[8] In considering the conclusion to be drawn from these conditions, it is to be borne in mind that the law forbids that any person should participate officially as an attorney in the administration of justice until he has

furnished satisfactory proof of good character. The presumption is, therefore, in favor of the integrity of the bar; and on the great issue of the honesty or depravity of an attorney the rule of authority and reason is that the court should require the charge of depravity to be established by the clear preponderance of the evidence. In *re Evans*, 22 Utah, 386, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 894; In *re Newby*, 82 Neb. 235, 117 N. W. 691; *People v. Matthews*, 217 Ill. 94, 75 N. E. 444; 4 Cyc. 915; *Ex parte Wall*, 107 U. S. 285, 2 Sup. Ct. 569, 27 L. Ed. 552; In *re O.*, 73 Wis. 602, 42 N. W. 221; In *re Eaton*, 4 N. D. 514, 62 N. W. 597. The charge of falsehood is not established by mere proof that the statement made was untrue, when the evidence shows that there was reasonable ground for believing it to be true.

On consideration of the entire evidence and the rules of law applicable thereto, we reach the conclusion that Mr. Gadsden must be acquitted of intentional misrepresentation of the facts or of his own opinions in his interview with Miss Lawrence.

[4] Nevertheless, Mr. Gadsden's conduct was by no means free from fault. His offense was in the act itself of taking from Miss Lawrence the assignment which he knew she was induced to make by his representations. His client, Mrs. Lawrence, as administratrix of the estate of her husband, was trustee for Miss Lawrence as a distributee entitled to one-half of the estate, and was charged with the duty of protecting her interests in the estate. Mr. Gadsden, having accepted the responsibility of guiding the administratrix in the discharge of her trust, stood in the same fiduciary relation to Miss Lawrence. He is a man of unusual intelligence who had been at the bar for 10 years, and must have known of the obligation of a trustee not to acquire a personal advantage at the expense of a cestui que trust. He must have known also the repugnance with which not only the courts, but all fair men regard conveyances or transactions obtained by a trustee from a beneficiary of the trust.

Judicial distrust of such transactions runs through the whole history of jurisprudence, and has been expressed with emphasis in a number of cases in this state. The general rule against the validity of such transactions does not depend on a presumption that there was actual fraud or intentional wrong, but on the principle that the trust relation places such obligations on the trustee that he should not occupy that position of opposition to his cestui que trust which trading with him denotes, and on the presumption that the trustee by reason of his superior knowledge of the trust estate occupies such a vantage ground that the parties do not deal on equal terms. There are, it is true, exceptions to the rule, and such transactions may be sustained when there is clear affirmative proof of a fair consideration, perfect candor, and of the ab-

sence of advantage of superior information; in other words, when the cestui que trust deals on equal terms, and is fully advised of what he is doing and the effect of his act. The absence of full information and independent advice is always regarded a strong circumstance against the validity of the transaction. Among the many authorities on the subject, we cite the following: *Butler v. Haskell*, 4 Desaus. 698; *McCants v. Bee*, 1 McCord, Eq. 383, 16 Am. Dec. 610; *Parris v. Cobb*, 5 Rich. Eq. 450; *Way v. Union, C. L. Ins. Co.*, 61 S. C. 501, 39 S. E. 742; *Scottish Am. M. Co. v. Clowney*, 70 S. C. 229, 49 S. E. 569; *Tindall v. Sublett*, 82 S. C. 199, 63 S. E. 960; *Perry on Trusts*, § 194 et seq.

These rules of law are founded on obvious ethical obligations, and they were violated by Mr. Gadsden under circumstances which subject him to censure. The inequality of the parties could hardly have been greater, and was perfectly apparent. Miss Lawrence was a gentle old woman who had always lived in the complete retirement of a somewhat obscure home life, without business associations or experience, and with little knowledge of the world outside of her own narrow environment. The evidence does not lead to the conclusion that she was mentally deficient in the sense of being below the average intelligence of persons of her opportunity and experience; but it establishes beyond doubt that she was evidently without capacity to comprehend a complex business affair, or to co-ordinate the facts and estimate the value of bonds and stocks, or to weigh the evidence as to the alleged will, or to reach unaided a correct conviction as to her own rights and obligations. On all these matters Mr. Gadsden could not fail to know that she relied entirely on his representations and his opinions. Assuming the utmost good faith in his representations and opinions, yet it is impossible to doubt that Mr. Gadsden as a lawyer and a man of affairs, who had fully considered all the facts in his possession, must have been conscious that there was information which might lead other reasonable persons to conclusions different from his own. The fact that the will had not been found after diligent search afforded ground for an inference that Dr. Lawrence had destroyed it. The fact that the stock in the Consolidated Company had been acquired by much pains and labor with the expectation of profit from it, and that the business had been launched but a few months, afforded ground for a competent adviser of Miss Lawrence to caution her against regarding the stock valueless until the corporate scheme had been fully tried. We cannot doubt that the incapacity of Miss Lawrence to see the bearings of these facts on her legal rights and her moral obligations must have been evident to Mr. Gadsden. It certainly was evident to him that full acceptance of his opinion that her brother had died leaving a

will in force expressing his desire that all his property should go to his wife and her children induced the gulleless old lady to believe it was her duty to relinquish her interest in the estate. It is impossible to resist the conclusion that these considerations, so obvious and so convincing of the impropriety of taking the assignment, ought to have deterred Mr. Gadsden from entering into the transaction. Besides, he had a strong reminder of his duty. Mrs. Tarver, the niece of Miss Lawrence, when called in to witness the paper, according to her testimony, earnestly protested against the proposed transaction; according to Mr. Gadsden's testimony the protest was not directed to him, but to Miss Lawrence. The difference is immaterial. It placed Mr. Gadsden in the position of accepting an assignment of her property offered by an untutored woman under a sudden conviction of duty induced by his expression of opinion against the solicitous advice and protest of her closest friend. The conclusion is inevitable that the transaction was invalid, and the conduct of Mr. Gadsden with respect to it reprehensible.

[5] This court would refuse, however, to inflict for such degree of misconduct the extreme penalty of disbarment or suspension from his office as an attorney at law, so humiliating and disastrous, even if it were within its discretion to impose such a penalty, because of two facts, which taken together are of great importance. These facts are: First, the evidence does not prove intentional misrepresentation of facts or of opinion in the interview between Mr. Gadsden and Miss Lawrence; second, the breach of duty grew out of excess of zeal for the interests of a client, and not in pursuit of his own interests. The second fact is of importance when taken in connection with the first.

The general power of courts with respect to the imposition of penalties on attorneys for misconduct is thus stated by that great jurist Mr. Justice Bradley in delivering the opinion of the court in *Ex parte Wall*, supra: "It is laid down in all the books in which the subject is treated that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and in gross cases of misconduct to strike their names from the roll." The severe punishment of disbarment or suspension should not be inflicted when the less punishment of reprimand or fine would accomplish the purpose. *Bradley v. Fisher*, 80 U. S. 335, 20 L. Ed. 646.

[6] Section 2816 of the Civil Code provides that an attorney "may be removed or suspended who shall be guilty of any deceit, malpractice or misdemeanor." The statute does not express any intention to take away or limit the common-law power of courts to disbar or suspend for gross misconduct not falling within the terms of the statute, nor

does it purport to affect the common-law power of courts to inflict a less punishment for misconduct not grave enough to warrant the penalty of suspension or disbarment. In the absence of such express restriction, the inherent common-law power of the courts in these respects remains. *Boston Bar Ass'n v. Greenwood*, 168 Mass. 169, 46 N. E. 568; *In re Smith*, 73 Kan. 743, 85 Pac. 584; *In re Mills*, 1 Mich. 392; *Commonwealth v. Roe*, 129 Ky. 650, 112 S. W. 683, 19 L. R. A. (N. S.) 413; 114 Am. St. Rep. note page 839; 4 Cyc. 906; *Weeks on Attorneys at Law*, 155. We express no opinion as to the power of the legislative department to control the courts in this respect, as the attempt to exercise such power has not been made.

Under the rule laid down in *Duncan's Case*, 64 S. C. 461, 42 S. E. 433, an attorney should not be disbarred or suspended in a case like this, involving fairness in a business transaction, unless the evidence leads the court to the clear conviction that the misconduct was due to a bad or fraudulent motive—that it was so gross as to show a want of integrity. As we have endeavored to demonstrate, the evidence does not produce a clear conviction of moral fraud, and the court will not inflict the penalty of suspension or disbarment.

Some less penalty must be imposed. The mere expression of the opinion of this court that a member of the bar in even a single instance has fallen below the ethical standards of the profession is in itself a serious penalty, and we think none greater should be inflicted in this instance.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(S. C. 326)

BROWN v. GREEN, Sheriff, et al.

(Supreme Court of South Carolina. July 18, 1911.)

HOMESTEAD (§ 209*)—SALE ON EXECUTION—INJUNCTION.

Plaintiff was the owner of a building subject to two mortgages. Defendant obtained a judgment against him, and levied execution thereon. The commissioners made a return that the property exceeded in value \$1,000, and that it could not be divided and the homestead set off without injury to the remainder. *Held*, that plaintiff was not entitled to enjoin the sale on the ground that his homestead would be lost, as under Civ. Code 1902, § 2628, the homestead could not be sold unless more than \$1,000 was bid, but, if more was bid, \$1,000 of the price must be filed with the judge to be applied on a new homestead. Therefore only the equity of redemption would be sold.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 390; Dec. Dig. § 209.*]

Appeal from Common Pleas Circuit Court of Marlboro County; R. W. Memminger, Judge.

"To be officially reported."

Action by George A. Brown against M. B. Green, sheriff, and others, for temporary injunction. From an order vacating an order granting a temporary injunction, plaintiff appeals. *Affirmed*.

McColl, McColl & Le Grand, for appellant. Newton & Owens, for respondents.

HYDRICK, J. Plaintiff brought this action to enjoin the defendant Green, as sheriff, from selling a storehouse and lot in which he claims homestead.

The material allegations of the complaint, which are undisputed, are: That plaintiff is and for some time has been the owner of a certain storehouse and lot in the town of Bennettsville, and is entitled to a homestead therein. On March 18, 1909, he executed a mortgage thereon to secure his bond for \$3,786, with interest thereon from date at 8 per cent. per annum. On June 8, 1909, he executed a second mortgage thereon to secure a debt of \$2,000. Both mortgages were promptly recorded, and the lien of each is superior to that of the judgment of Bird & Co., hereinafter mentioned, and both are still unpaid. In November, 1909, William M. Bird & Co. obtained judgment in Williamsburg county against him for \$276.93, a transcript of which was duly filed and docketed in the office of the clerk of court for Marlboro county, on February 19, 1910, and execution was thereupon issued and directed to the defendant Green, as sheriff. Commissioners were duly appointed to set off the judgment debtor's homestead. They made their return, certifying that the property exceeded in value \$1,000, and that it could not be divided and the homestead set off without injury to the remainder, and appraised it at \$6,000, which is its full value. On the filing of the return, to which no exceptions have been taken, the sheriff served notice on the debtor that, unless he paid into his office the excess of the appraised value of the property above the homestead \$1,000—that is, unless he paid in \$5,000 within 60 days from date of the notice—he would sell the property under the execution. Upon the foregoing facts and the further allegation that, if the sheriff sold the property, his right of homestead would be defeated, the plaintiff asked that the sale be enjoined. The court granted a temporary order of injunction, which it vacated, on motion of defendants.

As far as they went, the proceedings below were in exact conformity to the provisions of section 2628, 1 Code 1902. The complaint did not state a cause of action for injunction. We fail to see wherein the sale will defeat appellant's right of homestead. Under the provisions of section 2628, above referred to, there can be no sale unless more than \$1,000 is bid at the execution sale. If more than

\$1,000 is bid, the sale is made, and the sheriff deposits \$1,000 with the clerk to be applied, under the order of the circuit judge, on application of the judgment debtor, to the purchase of a homestead of that value; and the residue is applied to the payment of the costs and expenses of the appraisal and sale and the executions in the hands of the sheriff, according to law. The fact that the property is covered by mortgages makes no difference, because at a sale of property covered by mortgages under a junior execution, as in this case, only what for the sake of convenience is called the mortgagor's equity of redemption is sold, which is, however, the legal title subject to the lien of the mortgages, and therefore the purchaser is supposed to bid no more than the value of the property over and above the mortgage debts. *Moss v. Bratton*, 5 Rich. Eq. 3; *Norman v. Norman*, 28 S. C. 46, 11 S. E. 1096, and cases cited by the court. Presumptively no bid will be received at such a sale for more than the value of the property over and above the mortgage debts. If the property is worth less than the aggregate value of the homestead and the mortgage debts, as alleged in this case, it cannot be supposed that a bid for more than \$1,000 will be received, and, if not, then no sale will be made. On the contrary, if it is worth more, the judgment creditor has the right to have it sold. Otherwise, the judgment debtor will be allowed to have property in excess of the value of the homestead which cannot be reached by execution.

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 198)

REMBERT et al. v. VETOE et al.

(Supreme Court of South Carolina. July 7, 1911.)

1. WILLS (§ 498*)—MEANING OF WORDS—"HEIRS OF THE BODY"—"ISSUE."

The words "heirs of the body" and "issue" in a will are generally equivalent, and the word "issue" is one of limitation, and not less extensive in its import than the words "heirs of the body."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1087-1089; Dec. Dig. § 498.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3267-3271, 3778-3782; vol. 8, p. 7693.]

2. WILLS (§§ 506, 498*)—CONSTRUCTION—BENEFICIARIES—STATUTES.

Where a devise is to the heir or heirs of the body, or issue, it is necessary to resort to the statute of distribution to ascertain who the beneficiaries are, and in what proportions they take.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1091, 1087; Dec. Dig. §§ 506, 498.*]

3. WILLS (§ 498*)—BENEFICIARIES—STATUTE OF DISTRIBUTION.

The court, in construing a testamentary gift to testator's daughter for life and at her

death to such of her issue as she may leave living at the time of her death, to be equally divided among such issue, must, to determine the issue on the daughter's death, resort to the statute of distribution, and among the grandchildren and great-grandchildren of the daughter who may take are those whose parents were dead at the daughter's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1087-1089; Dec. Dig. § 498.*]

4. POWERS (§ 33*)—EXECUTION—ACTS CONSTITUTING.

Where a donee of a power created by will intends to execute the power, the intention makes the execution operative, and the intention to execute the power is manifested where there has been some reference in the deed or other instrument to the power, or a reference to the property, which is the subject on which the power is to be executed, or where the deed or other instrument executed by the donee will otherwise be ineffectual.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 110-120; Dec. Dig. § 33.*]

5. POWERS (§ 33*)—EXECUTION—ACTS CONSTITUTING.

Testator owning two tracts, one known as the home tract, gave the same to his wife for life, with power to dispose of one-third in any way she might choose. The wife conveyed to a daughter all her right, title, and interest in the home tract, "being the same tract of land wherein an interest was devised to me," to hold the premises after the wife's death, etc. Held, that the deed was an execution of the power, for, though the quoted phrase did not refer to the power, it referred to the property which was the subject on which the power was intended to operate.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 111-113; Dec. Dig. § 33.*]

6. DEEDS (§ 9*)—RESERVATION OF LIFE ESTATES—EFFECT.

A reservation of a life estate by a grantor does not invalidate a deed as an attempt to create a freehold to commence in the future; it being effectual as a covenant to stand seised to uses.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 5; Dec. Dig. § 9.*]

7. APPEAL AND ERROR (§ 959*)—ALLOWANCE OF AMENDMENTS TO PLEADINGS—DISCRETION—REVIEW.

A motion to amend the pleadings is addressed to the discretion of the trial court, and its rulings are not disturbed, in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.*]

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court, of Fairfield County; Ernest Moore, Special Judge.

"To be officially reported."

Action by Sarah Emeline Rembert and others against Carrie Veto and others. From a judgment for plaintiffs, defendants appeal. Modified and affirmed.

The following is the opinion referred to in the dissenting opinion:

"Thereafter the said cause came on to be heard by his honor, Special Judge Ernest Moore, at the regular September (1910) term of the court of common pleas for Fairfield

county, and after said hearing the said judge filed his judgment and decree in said cause, bearing date October, 1910, of which the following is a copy:

"This is an action seeking a sale for partition of certain real estate, described in the complaint, alleged to be owned as tenants in common by the plaintiffs and defendants. Certain issues as to the title to the lands and as to the accountability of certain parties for rents and profits being raised by the pleadings, a jury trial of any legal issues of title having been expressly waived, it was referred to James G. McCants, Esq., to take the testimony upon the issues, and report the same to the court. The testimony having been taken and reported accordingly, the cause came on for hearing before me at the last term of the said court, and after full argument, decision thereupon was reserved for further consideration.

"The lands in question were formerly the property of one Ralph Jones, who died in July, 1854, leaving of force his last will and testament, which was thereafter duly admitted to probate in the said county. One of the principal questions in the case is as to the proper construction of this will, by which, in the residuary clause thereof, the testator devised as follows: "Item 6. All the rest and residue of my estate of any kind and description, real and personal, not hereinbefore disposed of, I devise and bequeath to my beloved wife, Sarah H. Jones, for and during the term of her natural life, with the power to dispose of one-third thereof, while living, in any way she may choose to do; the remaining two-thirds thereof, after the decease of my said wife, I devise and bequeath to my daughter Martha Amanda, to her sole and separate use, during her life, and at her death to such of her issue as she may leave living at the time of her death, to be equally divided among such issue, but if my said daughter should die leaving no issue alive at the time of her death, it is my will that said two-thirds be equally divided among my next of kin at that time living according to the statute of distribution of intestate's estates." While it is doubtless unimportant, yet I have preserved in the above quotation the exact punctuation of the will, which was evidently drawn by a lawyer of some experience and accuracy of expression.

"As a matter of fact, it appears from the evidence that Sarah H. Jones, the widow of the testator, died in October, 1891, and Martha Amanda Robertson, the daughter mentioned in said will, died July 2, 1908, the latter leaving as her issue 2 children, Sarah Emeline Rembert, one of the plaintiffs, and Ruth Mason, one of the defendants, 14 grandchildren (of whom 8 were children of the said Sarah Emeline Rembert, 2 were children of the said Ruth Mason, and 4 were children of Thomas W. Robertson, a predeceased son of the said Martha Amanda Robertson), and

21 great-grandchildren (of whom 20 were grandchildren of the said Emeline Rembert, and 1 a grandchild of the said Thomas W. Robertson). The plaintiffs (except D. W. Ruff, who has purchased the interest in the home tract of land of the plaintiff George English Rembert, a son of the said Sarah Emeline Rembert) include all the Rembert branch of the lineal descendants of the said Martha Amanda Robertson living at the time of her death, and the defendants Ruth Mason and her two children, Edward B. Mason and Ralph W. Mason, represent the Mason branch of such defendants, while all of the other defendants, except Frank W. Vetoe, are children of Thomas W. Robertson, already mentioned as a predeceased son of Martha Amanda Robertson; the said Frank W. Vetoe being the infant son of the defendant Carrie Vetoe, and a great grandchild of the said Martha Amanda Robertson, and living at the time of her death; his said mother being a grandchild of the said Martha Amanda Robertson.

"Since the commencement of this action, Annie Rembert Thomas, being a daughter of the said Sarah E. Rembert, and a plaintiff in this case, has died intestate, and her heirs at law, Samuel P. Thomas, her husband, and Annie Rembert Thomas and Sarah Emeline Thomas, her children, have been substituted as parties plaintiff in her stead.

"The lands in question embrace two tracts described in the complaint; the one containing 1,055 acres, more or less, being called the "Jones Home Place," and the other, containing about 496 acres, being known as the "Piny Woods Place."

"Another question arising in the case is as to the construction and effect of a certain instrument in writing, executed by the said Sarah H. Jones, under date of June 26, 1875, in the form of a deed, by the granting clause of which the said Sarah H. Jones undertakes to convey to the said Sarah E. Rembert the above-mentioned home place in the following terms (certain descriptive matter being omitted as indicated), to wit: "I, Sarah H. Jones, * * * in consideration of the sum of one dollar to me in hand paid by Sarah Emeline Rembert, * * * and of the natural love and affection which I bear to the said Sarah Emeline Rembert and her children, * * * have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Sarah E. Rembert all my right, title and interest in all that piece, parcel or tract of land * * * containing one thousand and fifty-five acres, more or less, being the same tract of land wherein an interest was devised to me in by my husband, Ralph Jones, in his last will and testament;" the habendum and tenendum clause of this instrument being: "To have and to hold all and singular the said premises from and after my death unto the said Sarah Emeline Rembert for and during the term of her natural life, and after her

death to such of her issue as she may leave living at the time of her death, their heirs and assigns, forever;" and the warranty clause thereof being: "And I do hereby bind myself and heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said Sarah Emeline Rembert and her issue from and against me and my heirs, and all other persons lawfully claiming or to claim the same or any part thereof." By an indorsement upon the back of this deed, it appears that Col. Jas. H. Rion was the conveyancer drawing the same.

"The plaintiffs contend that under the provisions of the will above quoted all the lineal descendants of Martha Amanda Robertson, living at the time of her death, took as remaindermen, being denoted by the term "issue;" that the distribution amongst such issue must be per capita; while the defendants maintain that the words "according to the statute of distribution of intestate's estates," which are found in the latter part of said item 6 of the will, must be regarded as qualifying, not only the words "next of kin" immediately preceding the phrase quoted, but also the word "issue," as used in the preceding clause of the same item, and that, therefore, Mrs. Emeline Rembert is entitled to one-third, Mrs. Ruth Mason to one-third, and the children of Thomas W. Robertson, deceased, are entitled to the remaining third; the distribution being per stirpes.

"It is also contended on behalf of Mrs. Sarah Emeline Rembert and her issue in esse (all of whom are before the court) that, as to the one-third interest in the home place, the same was duly conveyed to them by the terms of the above instrument in the form of a deed, which said plaintiffs submit was a valid execution of the power of sale thereof conferred on Sarah H. Jones by the will of Ralph Jones, above quoted.

"Considering now the first question presented for determination, as to the proper construction of the sixth item of the will of Ralph Jones, the settled rule of construction is that the intention of the testator must be ascertained from the language used by him, but that, in so ascertaining the intention, not only the sentence or clause of the sentence to be construed is to be considered, but that the provisions of other clauses or sentences may also be taken into the account in determining the particular intent with which the words in question were used by the testator. The primary rule for ascertaining the intention, however, is that the same must be determined from a consideration of the words used by him in expressing that intention, and a resort to conjecture for the purpose of determining the intention is not permitted. Therefore, it has been properly held that limitations imposed by one clause under one contingency cannot be applied to dispositions made by another clause for a

different contingency. See, *Mobley v. Cummings*, 35 S. C. 101 [14 S. E. 721].

"Now the devise here in question, by its express terms, is to Martha Amanda Robertson for life, and after her death "to such of her issue as she may leave living" at that time, "to be equally divided among such issue." By an immediately succeeding clause in the same sentence, however, separated only by a comma, it is further provided that, "if my said daughter should die leaving no issue alive at the time of her death, it is my will that said two-thirds be equally divided among my next of kin at that time living, according to the statute of distribution of intestate's estates." The argument is that, since the testator has directed the distribution among the *next of kin*, to be made according to the statute of distributions, it must be concluded that he desired the division among the *issue* of his daughter to be made in the same way, although the next of kin referred to are the testator's next of kin, while the *issue* intended are the issue of his daughter; and it is further insisted that no special force can be given to the words "to be equally divided," as applied to the issue of the daughter, for the reason that the same words are used with reference to the division to be made among the next of kin of the testator, in the event of the death of the daughter without leaving living issue.

"Upon well-settled principles of construction, however, it would seem to be clear that by the term "issue," as used in this will, the testator must be held to have intended the lineal descendants of Martha Amanda Robertson, whether children or grandchildren, living at the time of her death; and the words "to be equally divided among such issue" plainly import a division per capita. *Corbett v. Laurens*, 5 Rich. Eq. 801; *Rutledge v. Rutledge*, Dud. Eq. 201; *Allen v. Allen*, 13 S. C. 512, 36 Am. Rep. 716.

"It is true that, whenever, by the terms of description in a devise, resort must be had to the statute of distributions for the purpose of ascertaining the objects of the gift, reference must be also had to the statute to determine the proportions in which the donees shall take, unless a different rule of distribution is provided by the will. *Templeton v. Walker*, 3 Rich. Eq. 548 [55 Am. Dec. 646]; *Collier v. Collier* [8 Rich. Eq.] 555 [55 Am. Dec. 653]. But while this rule applies in all cases where the words "heirs" or "next of kin" are used, it has no application to the use of the term "issue," for that word is not a term depending upon the statute of distributions for an interpretation of its meaning. See *Corbett v. Laurens* and *Rutledge v. Rutledge*, supra.

"By grammatical construction, the words "according to the statute of distribution of intestate's estates" appearing in the will now at bar can be taken only as qualifying the immediately preceding words "my next of

kin at that time living." The words in question naturally relate and apply only to the immediately preceding phrase "next of kin," and have no reasonable relation to the remotely preceding word "issue." To adopt the construction as contended for by the defendants, and interpolate after the word "issue" the phrase "according to the statute of distribution of intestate's estates," would be in effect to add to the will of the testator words which he has not in any way evinced an intention of using in that connection, and which would necessarily destroy the force and effect of the immediately preceding words actually there used by him that the property in question is "to be *equally* divided among such issue." To so interpolate the words mentioned would be practically to strike out of the will words used by the testator, which are apt and fit words to express an intention that the division among the "issue" of his daughter living at her death would be per capita. Even if no reason could be seen for a distinction in the matter of the mode of the division prescribed in the case of a taking by the "issue" of Martha Amanda Robertson, and that provided in the case of the happening of the contingency upon which the "next of kin" of the testator are to take, nevertheless the will must be construed as written, and effect given to the expressed intention of the testator. *Mobley v. Cummings*, supra; *Manigault v. Deas*, Ball. Eq. 298; *Moon v. Moon*, 2 Strob. Eq. 327; *Bowers v. Newman*, 2 McMul. 472.

"It must therefore be concluded that all the lineal descendants of Martha Amanda Robertson, living at the time of her death, are entitled to participate in the division of the 'remaining two-thirds' of the estate of the testator, passing under the residuary devise in said item 6 of the will in question, and that such division must be made among such 'issue' of the said Martha Amanda Robertson per capita, and not per stirpes.

"The next question to be considered is as to whether the instrument styled a deed from Sarah H. Jones to her daughter, the plaintiff Sarah Emeline Rembert, and her issue, is a valid execution of the power conferred upon the said Sarah H. Jones by the will of the testator, Ralph Jones. It is not questioned but that this instrument was duly executed, delivered, and recorded, but it is objected that it makes no reference to such power of disposition given by the will, nor does it purport to be an execution of such power, nor does it specify what interest in or portion of the lands in question is thereby sought to be conveyed.

"Now it is true that Sarah H. Jones had a life estate in the home place of 1,055 acres mentioned in this instrument, and that she had a power of disposition *inter vivos* as to one-third of the fee thereof, but it is also true that she makes no direct reference to this power. But she did undertake to con-

vey "all her right, title and interest" in the tract in question by the granting clause of the instrument executed by her, and by the habendum clause thereof she limits a fee estate in "the said premises" to such of the issue of Sarah E. Rembert as she may leave living at the time of her death, while by the warranty clause she warrants "the said premises" to the said grantees from and against herself and her heirs, and all other persons. The paper, therefore, must be held to have been intended as a conveyance of the fee in these lands, as its terms could not be satisfied by considering it merely as a conveyance of the life estate of the grantor. Furthermore, after thus conveying or attempting to convey all her "interest" in the tract, the grantor proceeds to define what is meant by the word "interest" in that clause of the deed, where she says, in describing the land, "being the same tract of land wherein an interest was devised to me in and by my husband, Ralph Jones, in his last will and testament." In the case of *Moody v. Tedder*, 16 S. C. 563, the use of this very word "interest" was held to manifest an intention by the grantor to execute a power of sale given by will. In that case, which upon the point at issue here closely parallels the one at bar, the grantor had a life estate in the property, coupled with a power of disposal for certain purposes, and she made a conveyance containing no direct reference to the power, but conveying "all her interest and life estate" in the property. In holding this to be a good execution of the power, the Supreme Court of this state says: "It may be true that the word 'interest' was not the technical term to express the idea of a power; but in the ordinary acceptation of the word it was broad enough to cover it, and we think the deed was intended to include the power. The question of the execution of a power is always one of intention, and if the devisee of the power intends to execute it that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative."

"In the case just cited, the court quotes with approval the doctrine as laid down in 1 Sudg. Pow. 419, that, "when a man has a power and an interest, and he creates an estate which will not have an effectual continuance in point of time, if it be fed out of his interest, it shall take effect by force of the power." See, also, 31 Cyc. 1125.

"Applying these principles to the case at bar, it seems to be clear that the grantor intended to convey to the grantees named in the instrument all the *interest* which she could convey under the provisions of the will of her husband, Ralph Jones, for she grants, not only her "right and title," but also all the "interest" which she took under said will, and this could not be satisfied, nor could the apparent purpose to convey a fee-

simple estate be fulfilled, except by considering it as referring to the power of disposition of the one-third interest in the fee thereof given to her by said will. Moreover the terms of the instrument, showing the intention of the grantor to reserve her life estate in the very lands, unquestionably and conclusively evidence the purpose to execute the power given by the will, as otherwise the paper would have been entirely inoperative.

"But it is said that the instrument in question is not effective as an execution of the power, for the reason that (as defendants maintain) an attempt is thereby made to limit a freehold estate to commence in futuro, which cannot be done by way of direct grant, and the defendants also submit that the deed cannot be sustained as a covenant to stand seised to uses, for the reason that it is not supported by a valuable consideration.

"It is considered, however, that even if the written instrument in question cannot be held valid as a deed by which the title passes in present, the grantor merely reserving to herself the use and possession during her life, as was held in the somewhat similar cases of *Merck v. Merck*, 83 S. C. 332 [65 S. E. 347, 137 Am. St. Rep. 815], *Sumner v. Harrison*, 54 S. C. 353 [32 S. E. 572], and *Cribb v. Rogers*, 12 S. C. [564, 32 Am. Rep. 511], it may nevertheless be held effective as a covenant to stand seised to uses, being supported by the consideration of blood relationship between the grantor and grantee, notwithstanding the absence of a valuable consideration, and notwithstanding any limitation of a fee to commence in futuro, which may be contained therein. *Watson v. Watson*, 24 S. C. 235 [58 Am. Rep. 247]; *Chancellor v. Windham*, 1 Rich. 164 [42 Am. Dec. 411]; *Kinsler v. Clark*, 1 Rich. 170.

"But the defendants nevertheless maintain that this deed, considered as a covenant to stand seised to uses, cannot be held as an execution of the power conferred by the will of Ralph Jones, for the reason that (by the terms of the covenant therein) no estate in the lands is created or conveyed until after the death of the said Sarah H. Jones, the donee of the power under the said will, whereas, by the express terms of the will of Ralph Jones, the said donee was empowered to dispose of the said one-third of these lands only "while living." The answer to this position, however, is that the condition of the exercise of the power was merely that it should be exercised by the said Sarah H. Jones "while living"; that is to say, during her lifetime by any instrument then taking effect. The use of the testator of the expression "while living" was merely a declaration that the power could not be executed by a will which becomes operative only at death, but that it could be executed by any mode of conveyance taking effect *inter vivos*. Manifestly the execution of a cove-

nant to stand seised to uses operates as a conveyance in present of the estate thereby created in the lands. The only limitation of the power of disposition given by the will in question was that it should be so exercised that the transfer of the title to the fee-simple remainder after the life estate of Sarah H. Jones should take effect in the lifetime of Sarah H. Jones, by her act. Clearly this requirement was as fully satisfied by the execution of a covenant to stand seised to uses as it could have been by a deed of conveyance in trust for herself for life, with remainder in fee to the grantees named therein. In either case the transfer of the title to the fee-simple remainder, which Sarah H. Jones was empowered to make, would take effect from the date of the execution and delivery of the instrument, which was during the lifetime of the grantor or covenantor, and there was no condition of the execution of the power that she should likewise convey her life estate."

McDonald & McDonald and Ragsdale & Dixon, for appellants. A. S. & W. D. Douglas, for respondents.

GARY, A. J. This is an action for partition.

Ralph Jones departed this life in 1854, leaving in full force and effect his last will and testament, whereby he disposed of the lands described in the complaint. The sixth clause of the will, which gave rise to this action, is as follows: "All the rest and residue of my estate, of any kind and description, real and personal, not hereinbefore disposed of, I devise and bequeath to my beloved wife, Sarah H. Jones, for and during the term of her natural life, with the power to dispose of one-third thereof, while living, in any way she may choose to do; the remaining two-thirds thereof, after the decease of my said wife, I devise and bequeath to my daughter, Martha Amanda, to her sole and separate use, during her life, and at her death to such of her issue as she may leave living at the time of her death, to be equally divided among such issue, but if my said daughter should die leaving no issue alive at the time of her death, it is my will that said two-thirds be equally divided, among my next of kin at that time living, according to the statute of distribution of intestate's estates."

The widow, Sarah H. Jones, died in October, 1891, and Martha Amanda Robertson, the daughter mentioned in said clause, departed this life on the 2d of July, 1908. Martha Amanda Robertson had three children, to wit, a son, Thomas W. Robertson, who predeceased her, and two daughters, Sarah Emeline Rembert and Martha R. Mason, who survived her. She also left 14 grandchildren and 21 great-grandchildren, 28 of whom were descendants of Sarah Emeline Rembert. At the time of Martha Amanda

Robertson's death, in 1908, there were in esse four children and one grandchild of Thomas W. Robertson, then deceased.

In discussing the proper interpretation of the word "issue," in the sixth clause of the will, his honor, the circuit judge, says: "Upon well-settled principles of construction, it would seem to be clear that, by the term 'issue' as used in this will, the testator must be held to have intended the lineal descendants of Martha Amanda Robertson, whether children or grandchildren, living at the time of her death; and the words 'to be equally divided among such issue' plainly import a division per capita. It must therefore be concluded that all the lineal descendants of Martha Amanda Robertson, living at the time of her death, are entitled to participate in the division of the 'remaining two-thirds' of the estate of the testator, passing under the residuary devise in said 'item 6' of the will in question, and that such division must be made among such 'issue' of the said Martha Amanda Robertson per capita, and not per stirpes."

The circuit judge relies upon the following cases to sustain his conclusion, namely, *Rutledge v. Rutledge*, Dnd. Eq. 201; *Corbett v. Laurens*, 5 Rich. Eq. 301; *Allen v. Allen*, 13 S. C. 512, 36 Am. Rep. 716. In the case of *Rutledge v. Rutledge*, supra, it was held that the issue of a child, who died in the lifetime of the surviving tenant for life, took equal shares with the children of the marriage, as they were alike comprehended under the word "issue." In the case of *Corbett v. Laurens*, the court ruled that, upon the authorities cited in *Rutledge v. Rutledge*, all the descendants of the life tenant, grandchildren as well as children, were embraced by the term "issue," and took per capita. But, in neither of these cases was the question raised as to the necessity to resort to the statute of distributions for the purpose of determining who were comprehended under the word "issue." And the case of *Allen v. Allen*, 13 S. C. 512, 36 Am. Rep. 716, while sustaining the conclusion that the issue take per capita, lays down the principle that when the word "heirs" is used, it is necessary to resort to the statute of distributions, and that those who would not be entitled to take as heirs under the statute would not have the right to participate in the division of the property.

In that case the rule is thus stated: "The general rule is that, where there is a gift to a class of persons, without any direction as to the proportions in which the individuals of the class are to take, all who can bring themselves within the class are entitled to participate in the distribution which must be per capita. But where the gift is to a class, the individuals of which can only be ascertained by a resort to the statute of distributions, then the provisions of the statute must also be resorted to, for the purpose

of ascertaining the proportions in which the donees are to take, unless in the instrument by which the gift is made a different rule of distribution shall be prescribed. *Templeton v. Walker*, 3 Rich. Eq. 543, 55 Am. Dec. 646. If, therefore, the gift is to a class of persons, designated as heirs of a particular person, then, as it is necessary to resort to the statute to ascertain who are the individuals composing the class, resort must also be had to the statute to determine how, or in what proportions, such individuals shall take. This is upon the presumption that the donor having, by implication at least, referred to the statute as to the persons who are to take also intended that reference should be had to the statute to determine the proportions in which they should take, unless he expressed a different intention. But when he prescribes a different mode of distribution, then no such presumption can arise, and the distribution must be made in the manner prescribed." See, also, *Brantley v. Bittle*, 72 S. C. 179, 51 S. E. 561, and *Carolina B. & Ina. Co. v. Caldwell*, 86 S. C. 331, 68 S. E. 640.

It is, however, contended that, although it may be necessary to resort to the statute when a devise is to the "heirs" or "heirs of the body," no such necessity exists, when the word "issue" is used by the testator. In determining this question, it will be well to state the reasons upon which the rule is founded, requiring that those words should be interpreted in the light of the statute. Chancellor Harper, in *Lemacks v. Glover*, 1 Rich. Eq. 141, used this language: "In England, when the term 'heirs' or 'heirs of the body' is taken to mean a class of persons, these cannot, in any manner or respect, take as heirs, or heirs of the body. Whether construed children, issue or descendants next of kin, etc., they must be always different persons from the heirs; not so with us."

In the case of *Templeton v. Walker*, 3 Rich. Eq. 543, 55 Am. Dec. 646, it is said: "Our act of 1791 is an act of descents, as well as distributions, and determines at once who shall be the heirs of the real estate of an intestate, and the distributees of his personalty." "The term 'heirs' is inapplicable to the succession to personal estate, and even as to real estate we have no other heirs, except *hæredes facti* of our statute of distributions. *Seabrook v. Seabrook* [McMull. Eq. 201]. In the case under consideration the Court of Appeals, in equity; could not have attained the conclusion that the 'heirs of the body' of the tenant for life took as purchasers, within the rules as to the remoteness of limitations, otherwise than by construing these terms to mean the descendants of the tenant for life, living at the time of her death, or something equivalent. *No one can take as heir of the body of another, unless he fulfills the description, and is not*

only such a person as would take the real estate of that other under our act of distributions, but likewise a lineal descendant." (Italics ours.) The court also says: "We do not go to the statute to discover who are children, next of kin, etc., but we are obliged to look there to find out who are heirs of the body, descendants, or relations entitled to take; and the cases which actually occur, we commonly find them, not strictly a class, but individuals standing in various degrees of kindred to the intestate or first taker, and entitled to unequal shares of the estate."

The rule is thus stated in *Dukes v. Faulk*, 37 S. C. 255, 16 S. E. 122, 34 Am. St. Rep. 745: "When the words 'heirs of the body' occur in a devise, accompanied by the words 'share and share alike,' or 'equally,' or 'in equal parts,' or kindred words, and also the words 'their heirs, executors, administrators, and assigns,' then we must look to the statute of distributions of our state for the parties who shall answer the description, and therefore take the devise, but that the method of distribution is fixed by the devise itself to be per capita, and not per stirpes, and that the estate is one of purchase, and not of descent. It seems to us that the 'heirs of the body' must be persons, not only who answer the requirement of lineal descendants of the parent stock, but, also, such persons who would stand, at the date of the death of the life tenant, as an heir, under the provisions of our statute of distributions." (Italics ours.) Continuing, the court, in commenting on the case of *Lemacks v. Glover*, 1 Rich. Eq. 141, used this language: "The will of Peter Sinkler gave the use of certain property to his sister, Jane Glover, for life; Mrs. Glover, at the time of her death, had but one child, Dr. Glover; testator, after the death of the life tenant (Mrs. Glover) bequeathed such property 'to the heirs of her body, to them and their heirs and assigns, forever.' Mrs. Glover died 51 years after her brother's death. She had four other children born to her, all of whom, but one (Mrs. Lemacks), died before Mrs. Glover, the life tenant, and all were survived by children. The question was made as to the distribution. It was held that Dr. Glover took one share. Mrs. Lemacks one share, and each grandchild, who was the child of a deceased child, took one share each. Both Mrs. Lemacks and Dr. Glover had children, but they were denied participation in the estate. Why? Because, at the death of Mrs. Glover, the life tenant, although her lineal descendants, they were not her heirs, under our statute of distributions; their respective parents, Dr. Glover and Mrs. Lemacks, were alive, and were such heirs." (Italics ours.)

The case of *Kerngood v. Davis*, 21 S. C. 183, shows that it is necessary to resort to the statute of distributions, when the devise is to heirs of the body. In that case the court says: "The terms of the devise here

being 'to heirs of the body' imposed the necessity of referring to the statute to ascertain who were such 'heirs,' and if the devise had stopped there the children of Henry W. would undoubtedly have taken in the manner prescribed by the statute. That is to say, they would have represented their father, and taken together, per stirpes, his share—one-seventh part of the estate—besides their distributive portion of the share of their deceased aunt, Carolina. But the superadded words 'share and share alike' imply equality of division, and we think made the exceptional case 'when the instrument creating the gift, indicates the intention of the donor'—citing *Templeton v. Walker*, 3 Rich. Eq. 543, 55 Am. Dec. 646; *Allen v. Allen*, 13 S. C. 531, 36 Am. Rep. 716. In *Deveaux v. Deveaux*, 1 Strob. Eq. 283, it is said: "The first duty is to ascertain how many of the claimants before the court come within the description given in the will; and the second is to discover whether all who do come within the description can be allowed, by the rules of law, to partake of the bounty intended. These are very distinct inquiries, though often confounded." (Italics ours.)

[1] The words "heirs of the body" and "issue" are generally equivalent in a will. *Whitworth v. Stuckey*, 1 Rich. Eq. 404. "Issue" is a word of limitations, and not less extensive in its import than the words "heirs of the body." *Williams v. Gause*, 83 S. C. 265, 65 S. E. 241; *Arlidge v. Arledge*, 86 S. C. 237, 68 S. E. 549.

[2, 3] The foregoing authorities show, first, that it is necessary to resort to the statute, when the devise is to the heirs or heirs of the body; that the words "heirs of the body" and "issue" have practically the same import in a will; that no good reason can be assigned why the necessity is not as great to resort to the statute in a case where the gift is to the "issue," as when it is to "heirs of the body." Therefore only those grandchildren and great-grandchildren of Martha Amanda Robertson whose parents were not in esse at the time that Martha Amanda Robertson died are to be construed as issue in contemplation of law; and those alone who would have taken under the statute are embraced within the term "issue." The exceptions raising this question are sustained.

The next question that will be considered is whether the power conferred upon Sarah H. Jones to dispose of one-third of the real and personal property while living, in any manner she may choose to do, was properly executed.

The lands in question embrace two tracts; one containing 1,055 acres, more or less, known as the "Home Place," and the other containing about 496 acres, known as the "Piny Woods Place." On the 26th of June, Sarah H. Jones executed an instrument of writing in the form of a deed, whereby she undertook to convey to Sarah Emeline Rem-

bert, her daughter, the home place in manner and form as follows: "I, Sarah H. Jones, * * * in consideration of the sum of one dollar to me in hand paid by Sarah Emeline Rembert, * * * and of the natural love and affection which I bear to the said Sarah Emeline Rembert and her children * * * have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Sarah E. Rembert all my right, title and interest in all that piece, parcel or tract of land, * * * containing one thousand and fifty-five acres, more or less, being the same tract of land wherein an interest was devised to me in by my husband, Ralph Jones, in his last will and testament;" the habendum and tenendum clause of this instrument being: "To have and to hold all and singular the said premises, from and after my death, unto the said Sarah Emeline Rembert, for and during the term of her natural life, and after her death, to such of her issue as she may leave living at the time of her death, their heirs and assigns, forever;" and the warranty clause thereof, being: "And I do hereby bind myself and heirs, executors and administrators to warrant and forever defend, all and singular, the said premises, unto the said Sarah Emeline Rembert and her issue, from and against me and my heirs, and all other persons lawfully claiming or to claim the same or any part thereof."

[4] The rule as to the execution of a power is thus stated in *Blagge v. Miles*, 1 Story, 426, Fed. Cas. No. 1,479: "The authorities on this subject may not all be easily reconcilable with each other, but the principle furnished by them, however occasionally misapplied, is never departed from; that if the donee of the power intends to execute the power that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other determination. If it is doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power." In that case Mr. Justice Story stated, as the result of the English authorities, that three classes of cases have been held sufficient to manifest an intention to execute the power: (1) Where there has been some reference in the deed or other instrument to the power; (2) or a reference to the property, which is the subject upon which it is to be executed; (3) or where the provision in the deed or other instrument executed by the donee of the power would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation except as an execution of the power. See, also *Bilderback v. Boyce*, 14 S. C. 528; *Moody v. Tedder*, 16 S. C. 557; *Lee v.*

Simpson, 134 U. S. 572, 10 Sup. Ct. 631, 33 L. Ed. 1038. The foregoing language is quoted with approval in *Mims v. Hair*, 80 S. C. 460, 61 S. E. 968.

[5] Conceding that the words "being the same tract of land, wherein an interest was devised to me by my husband, Ralph Jones, in his last will and testament," have no reference to the said power, nevertheless they have reference to the property, which was the subject upon which the power was intended to operate; and the deed would be ineffectual to convey all the "right, title and interest" of Sarah H. Jones in the land, if the execution of her deed cannot be referred to the power contained in said will.

[6] We deem it only necessary to cite the following authorities to sustain the proposition that the reservation of a life estate by the grantor did not invalidate the deed as an attempt to convey a freehold to commence in futuro; it being effectual as a covenant to stand seised to uses: *Chancellor v. Windham*, 1 Rich. 161, 42 Am. Dec. 411; *Kinsler v. Clark*, 1 Rich. 170; *Dinkins v. Samuel*, 10 Rich. 68; *Cribb v. Rogers*, 12 S. C. 564, 32 Am. Rep. 511; *Jacobs v. Insurance Co.*, 52 S. C. 110, 29 S. E. 533; *Sumner v. Harrison*, 54 S. C. 353, 32 S. E. 572; *Cook v. Cooper*, 59 S. C. 560, 38 S. E. 218; *Merck v. Merck*, 83 S. C. 329, 65 S. E. 347, 137 Am. St. Rep. 815.

[7] The next assignment of error is because the circuit judge permitted the plaintiffs to amend their complaint, so as to allege damages as the result of waste committed by Ruth Mason. Motions to amend are addressed to the discretion of the circuit judge, and his rulings are not the subject of appeal, unless there is an abuse of discretion, which has not been made to appear in this case.

The foregoing conclusions dispose of all questions presented by the exceptions, except those relating to the accountability of the plaintiff Sarah Emeline Rembert for rents of the home place. The appellant's attorneys have failed to satisfy this court that the preponderance of the testimony is against the findings of fact by the circuit judge touching this question.

Judgment modified.

JONES, C. J., and HYDRICK, J., concur.

WOODS, J. (dissenting). I dissent, and think the judgment of the circuit court should be affirmed for the reasons therein stated.

(89 S. C. 266)

DEVLIN et al. v. DEVLIN et al.
(Supreme Court of South Carolina. July 11, 1911.)

1. TRIAL (§ 191*)—INSTRUCTIONS—INVOLVING FACTS.

A charge, in a suit to set aside a deed for fraud and undue influence exercised by the

grantee, who occupied a fiduciary relation towards the deceased grantor, that, if there was a fiduciary relation between the parties, the deed was presumptively fraudulent, and the burden was on the grantee to show that the deed was free from fraud, and that the grantor executed it of her free will, was not a charge on the facts, but merely stated a correct principle of law applicable to the assumed facts.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.*]

2. DEEDS (§ 196*)—VALIDITY—FRAUD AND UN-DUE INFLUENCE—PRESUMPTIONS.

Where a relation of trust and confidence existed between a grantor and grantee, the presumption is against the validity of the conveyance, and the grantee has the burden of rebutting it, though generally fraud is not presumed, but must be proved by the party alleging it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593; Dec. Dig. § 196.*]

3. DEEDS (§ 203*)—VALIDITY—EVIDENCE.

In a suit by an heir of a deceased grantor to set aside a deed on the ground of fraud and undue influence exerted by the grantee, who occupied a fiduciary relation to the grantor, the withholding of the deed from record until after the grantor's death may be considered by the jury in determining the issue.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 203.*]

4. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in a suit to set aside a deed on the ground of fraud and undue influence and non-delivery, if there was no evidence of want of delivery, the error in a charge on the subject of delivery was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

5. DEEDS (§ 208*)—NONDELIVERY—EVIDENCE.

Proof that a deed was antedated and that the grantee had not obtained possession of it until 10 days before the death of the grantor, who might then have been in extremis, affords some grounds for an inference of nondelivery of the deed.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 208.*]

6. JURY (§ 99*)—QUALIFICATION—POWER OF COURT TO EXCUSE JURORS—DISCRETION.

The action of the court on the fourth trial of a case in inquiring of jurors if they had formed any opinion, and in excusing two who stated that their opinion was of such a nature that evidence was necessary to remove it, though they could render a verdict according to the law and evidence, was within its discretion, and the court on appeal will not disturb it.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 438-448; Dec. Dig. § 99.*]

Appeal from Common Pleas Circuit Court of Abbeville County; C. C. Featherstone, Special Judge.

"To be officially reported."

Action by W. P. Devlin and another against R. H. Devlin and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Wm. N. Graydon and D. H. Magill, for appellants. F. B. Gary, Wm. P. Greene, and Grier & Park, for respondents.

HYDRICK, J. This action was brought for the partition of two tracts of land among the heirs of Sallie M. Devlin, and involves the validity of two deeds, alleged by the de-

fendant R. H. Devlin, to have been executed and delivered to him by Sallie M. Devlin, on March 31, 1905, 10 days before her death, which occurred April 10, 1905, under which he claims to be the sole owner of both tracts. Plaintiffs allege that these deeds were never in fact executed and delivered; but if so, that they were obtained by fraud and undue influence practiced upon the grantor by the grantee. The verdict and judgment were in favor of plaintiffs.

Sallie M. Devlin was an unmarried woman, between 65 and 70 years of age. For many years she lived on one of the tracts in dispute, near her brother, the defendant R. H. Devlin. She had confidence in him and trusted him to a considerable extent with the management of her affairs, in which he was her general adviser and often acted as her agent. She was fond of him and of his family. He in turn was kind to her and considerate of her and her interests, and devoted much of his time to looking after her welfare and business. Some of the witnesses said that she always spoke of him in terms of affection, and said that he was her sole dependence, and that she intended for him and his family to have her property. The testimony tends to show that the same cordial relations did not exist between her and her only other brother, the plaintiff W. P. Devlin, though the relations between them were not exactly unfriendly. The relations between her and one or more of her sisters, while not unfriendly, were a little cool. She seemed ordinarily fond of her other sisters, and more fond of the youngest than of any of the others. She was in failing health for a year, or perhaps longer, before she died. Her decline was most marked and rapid after the first of the year 1905. From that time till her death, she was almost continually under the care of a physician. At times she suffered intense physical pain, which for the time unnerved her, and for which morphine was occasionally administered, though there was no evidence that she was under the influence of that drug when the deeds were executed. Some of the plaintiffs testified that defendant had such influence over her; that when he was present she treated them indifferently, while she treated them affectionately when he was not present.

The deeds bear date January 5, 1905, although, according to the testimony of defendant's witnesses, they were not actually executed until March 31, 1905. The defendant's son, who drew them, testified that they were antedated according to the direction of the grantor, because she said she had given the land to the defendant on that day. The consideration expressed is \$600 for the 86-acre tract, and \$2,500 for the 370-acre tract. There was testimony that they were worth twice that amount. Defendant admits that no consideration was in fact paid, other than

the kindness which he had previously shown to his sister, and the time and attention which he had devoted to her and her affairs. The deeds were drawn by one of defendant's sons and witnessed by two others, one of whom was grantor's physician, then paying her a professional visit, and, according to their testimony, there was no one present when they were executed, except the grantor and grantee and members of his family, and a negro girl, who was a servant of the grantor. There was testimony that the grantee's son, who drew the deeds, left his aunt's house on the night of March 30th, accompanied by a negro, and went to his home in Verdery, several miles distant, where he procured blanks and prepared the deeds and sent them back to his aunt's by the negro, who arrived there between 2 and 3 o'clock that night.

On the morning after the funeral, defendant left his home at daylight and drove 10 miles to Abbeville, arriving there a little after sunrise, and went to the residence of his attorney to consult him about the deeds, the existence of which had not been made known to any one outside of his immediate family, notwithstanding inquiries had been made of him by his brother and several of his sisters as to what disposition their sister Sallie had made of her property. They were not informed of the deeds, until they were spread upon the records, on April 19, 1905. In response to their inquiries, he told them that he paid her the consideration expressed in the deeds. On being asked what she had done with the money, he said it might be in bank somewhere, or it might be sewed up in a featherbed, or she might have given it to his sons. The evidence contains a good many other circumstances which are relied upon by the plaintiffs to show fraud and undue influence, but the foregoing statement of it is sufficient to show clearly that there was no error in refusing defendant's motion for nonsuit and for the direction of a verdict in his favor, made upon the ground that there was no evidence tending to show fraud or undue influence in procuring the deeds.

The court charged the jury that, where confidential relations exist between persons, the law looks with suspicion upon any transaction between them, whereby the superior gains an advantage to himself over the other, and, if a fiduciary relation existed between Miss Sallie Devlin and the defendant when the deeds were executed, they were presumptively fraudulent, and the burden was upon the defendant to show that the transaction was free from fraud, and that the grantor executed them of her free and independent will and judgment, without being improperly or unduly influenced to do so by him.

The appellant contends that this was error (1) because it was a charge on the facts, telling the jury what weight to give the evidence; (2) because the law does not pre-

sume fraud, but requires him who alleges it to prove it; (3) because it transferred the burden of proof from the plaintiffs, who allege fraud, to defendant, and required him to prove a negative; (4) because proof that one person is merely the agent of another does not establish such a relation of trust and confidence as will raise a presumption against or cast a suspicion upon transactions between them.

[1] We cannot see that the charge in any way involved the facts. It merely stated a principle of law that proof of the existence of a relation of trust and confidence between parties gave rise to a presumption as to certain transactions between them.

[2] No doubt, as a general proposition, the rule is, as stated by appellant, that fraud will not be presumed, but who alleges it must prove it. But that rule, like all general rules, has its exceptions, and the principle announced in this case is one of the exceptions. When the facts proved or the relation established raise a presumption against the validity of the transaction assailed, unless the presumption is rebutted, the transaction must fall. Hence the effect of the presumption is to shift the burden of proof. The mere fact that one has been the agent of another will not of itself raise a presumption against or cast suspicion upon transactions between them wholly disconnected with the subject of the agency. But where, by reason of the relationship, the agent acquires particular knowledge with regard to the subject of the agency, or gains a peculiar and special influence over his principal, transactions between them with regard to the subject of the agency in which the agent gains an advantage over his principal fall within the rule. The presumption will be strong or weak according to the character and situation of the parties, and the character of the relationship between them. These principles are well settled by our own decisions.

In *Way v. Insurance Co.*, 61 S. C. 501, 39 S. E. 742, the relation was that of husband and wife. In *Tindal v. Sublett*, 82 S. C. 199, 63 S. E. 990, it was that of principal and agent, coupled with that of mother-in-law and son-in-law, with whom the mother-in-law resided. In *Craddock v. Weekly*, 85 S. C. 329, 67 S. E. 308, it was applied in a transaction between an aged and widowed mother and her daughters and their husbands. In that case it was held that the evidence rebutted the presumption. In this case the relation between the parties was not only that of principal and agent in a general way, but it was also that of an aged sister and a brother, in whom she had great confidence and upon whom she felt dependent for advice in the management of her affairs. The principle is applicable wherever there is a relation of trust and confidence, no matter from what cause it arises.

[3] The defendant requested the court to

charge: "That at the time the deed here in question is alleged to have been executed any person procuring a deed had 40 days in which to record the deed, and if the defendant had said deed recorded with 40 days after its execution that circumstance can have no legal weight in this case." The court properly refused to charge that the circumstance could have no weight, because withholding them from record until after the death of the grantor was a circumstance which the plaintiffs had the right to have the jury consider, and the charge requested would have withdrawn it from their consideration. The immediate record of the deeds would, just like any other act of the parties in connection with the transaction, have afforded a circumstance for the consideration of the jury, whose province it was to draw the proper inferences from all the facts and circumstances.

[4, 5] Appellant alleges error, in that the court charged on the subject of the delivery of deeds when there was no evidence of want of delivery. If so, the error was harmless. But there was reasonable ground for an inference that the deeds were not delivered in the lifetime of the grantor. The fact that they were dated in January, and admitted by defendant not to have been in his possession until March 31, 1905, just 10 days before the death of the grantor and when she may have been in extremis, affords reasonable ground for such an inference.

[6] The record shows that the case had been tried three times; this being the fourth trial. The court therefore inquired of the jurors if any of them had formed any opinion as to the case. Two of them said they had, and that their opinion was of such a nature that it would require evidence to remove it, though they both thought they could render a verdict according to the law and evidence. The court, nevertheless, excused them. Matters pertaining to the trial rest in the sound discretion of the trial court, and this court will not interfere, unless it is made to appear that that discretion has been abused. We think it was wisely exercised in this case. Parties to an action have no right to any particular juror or jurors. They have not the right to select, but merely the right to reject any number for cause, and the number allowed by statute peremptorily.

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 419)

COFIELD v. E. A. JENKINS MOTOR CO.
(Supreme Court of South Carolina. Aug. 1, 1911.)

DAMAGES (§ 124*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

The measure of damages recoverable by an agent obtaining an exclusive agency within

specified territory to sell the motor cars of a manufacturer, allowing him a specified discount from the catalogue prices on cars sold, for the action of the manufacturer in selling cars within the territory, is the specified discount from the catalogue prices of the cars so sold.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

Appeal from Common Pleas Circuit Court of Richland County; Geo. E. Prince, Judge.

"To be officially reported."

Action by James Cofield against the E. A. Jenkins Motor Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Robt. Moorman, for appellant. S. G. Finley and Nelson, Nelson & Gettys, for respondent.

HYDRICK, J. For valuable consideration, defendant gave plaintiff the exclusive agency to sell its motor cars in a certain territory for a specified time, and agreed to allow him a discount of 10 per cent. from the catalogue prices on all cars sold. During the life of the contract, defendant, knowing that it was acting in violation of its terms, sold four cars in plaintiff's territory worth, at catalogue prices, \$5,300. *Held*, in an action for breach of the contract, that the measure of plaintiff's damages was 10 per cent. of the catalogue prices of the cars so sold by defendant.

Affirmed.

JONES, C. J., and GARY, A. J., concur.

(89 S. C. 347)

MERCK et al. v. MERCK et al.

(Supreme Court of South Carolina. July 18, 1911.)

1. WITNESSES (§ 159*)—COMPETENCY—"TRANSACTION" WITH DECEDENT—PARTICIPATION OF WITNESS.

Code Civ. Proc. 1902, § 400, excludes testimony of a party in interest as to any transaction between such witness and a person deceased against a party prosecuting or defending as assignee or heir of the decedent. Defendant in partition, who claimed as an assignee of a decedent as against heirs of the decedent, offered as a witness to prove the execution of a deed by the decedent to one of the defendants a party who had purchased from that defendant and conveyed to himself. *Held*, that while a witness was not disqualified under the section because of interest from testifying as to transactions with a deceased person, at which he was present without being a participant, the term "transaction" was very comprehensive, meaning the carrying on or through of any matter or affair, and that as the witness had witnessed the deed and given it validity this was a transaction between him and the deceased grantor in which the witness had participated; and hence he was incompetent to testify to the execution of the deed.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 669; Dec. Dig. § 159.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7060-7062; vol. 8, pp. 7818, 7819.]

2 EVIDENCE (§ 374*)—DOCUMENTS—PROOF OF EXECUTION—HANDWRITING.

Under the general rule that whenever witnesses to a deed are dead or inaccessible, or deny the execution in their presence, other evidence may be introduced, a party claiming under a deed, one of the witnesses to which is hostile and the other incompetent to testify, may introduce evidence of the handwriting of the subscribing witnesses, and of the grantor, and his admission that he had conveyed the lands, and evidence of its possession and control by the grantee, and as to the recording of the deed, are likewise admissible in substitution of the testimony of the subscribing witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1591; Dec. Dig. § 374.*]

Appeal from Common Pleas Circuit Court of Pickens County; Ernest Gary, Judge.

"To be officially reported."

Action by Daniel M. Merck and others against Lawrence C. Merck, W. B. Mann, and others. Judgment for plaintiffs, and defendant Mann appeals. Reversed and remanded for new trial.

J. P. Casey, for appellant. Breazeale & Long, Cothran, Dean & Cothran, and J. M. Boggs, for respondents.

WOODS, J. The opinion in the former appeal (Merck v. Merck, 83 S. C. 329, 65 S. E. 347, 137 Am. St. Rep. 815) contains a detailed statement of the issues in this action for partition. For the purposes of this appeal, it is sufficient to say that the title of the defendant Mann, who claims to be the exclusive owner of the land in dispute against the heirs of Blumer Merck, depends on the validity of an alleged deed from Blumer Merck to L. C. Merck, his son, through whom Mann claims. On the second trial before the jury, on the legal issue of title, the circuit judge directed a verdict in favor of the plaintiffs, and the defendant Mann appeals.

The defendant offered M. F. Hester as a witness to prove the execution of the deed from Blumer Merck to Lawrence C. Merck. The evidence of Hester was excluded, on the ground that he had purchased the land from Lawrence C. Merck and had conveyed it to the defendant Mann, and was thus disqualified to testify as to the execution of the deed to Lawrence C. Merck, under section 400 of the Code of Procedure of 1902. The contention of appellant's counsel is that the witnessing of a deed in the manner prescribed by law is not a transaction or communication between the witness and the grantor. So far as we can discover, the only cases seeming to support this contention are Collins v. Collins, 101 N. C. 114, 7 S. E. 687; In re Young's Will, 123 N. C. 358, 31 S. E. 626; and Bates v. Officer, 70 Iowa, 343, 30 N. W. 608. These cases, however, depend in some measure at least upon the terms of the state statutes with respect to the proof of wills. Except as affected by such statutes, the North Carolina cases seem irrecon-

cilable with later cases in that state. See Witty v. Barham, 147 N. C. 479, 61 S. E. 372, and Harrell v. Hagan, 150 N. C. 242, 63 S. E. 952. The Supreme Court of Iowa seem to have adopted a laxer rule than other courts in permitting interested parties to testify under such statutes as we are now considering.

[1] There are numerous cases in this state and elsewhere holding that a witness is not, under section 400, disqualified because of interest from testifying as to transactions and communications with a deceased person, at which he was present without being a participant. Roe v. Harrison, 9 S. C. 279; Hughey v. Elchelberger, 11 S. C. 36; Kennemore v. Kennemore, 26 S. C. 251, 1 S. E. 881; Sullivan v. Latimer, 38 S. C. 158, 17 S. E. 701; Colvin v. Phillips, 25 S. C. 228; Moore v. Trimmer, 32 S. C. 512, 11 S. E. 548, 552; Sloan v. Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551.

It cannot be doubted that evidence from an interested person of such communications and transactions, even where he is not a participant, is within the evil which the statute was intended to prevent; and such evidence has been held admissible because not within the letter of the statutory inhibition. It has never been held in a case in this state that testimony as to an act of the witness contributing to the legal effect of the transaction or communication was admissible. Here it was necessary to the validity of the deed that as a part of the transaction the deed should be witnessed, and that the witnesses should subscribe their names as witnesses. "Transaction" is a very comprehensive term, meaning the carrying on or through of any matter or affair. When one witnesses a deed and thereby gives it vitality, we do not see how the conclusion can be escaped that he is a participant in the transaction. To give any other construction to the statute, it seems to us would emasculate it, and open the door to the fraud and imposition which it was intended to prevent. We think the true rule is that laid down by the New York Court of Appeals, after a review of all the New York authorities: "It has now been limited to this extent at least: That all conversations or transactions between persons since deceased and a third party, in the presence or hearing of the witness, may not be testified to by such witness if he by word or sign participated in the transaction or conversation, or is referred to in the course of it, or was in any way a party to it." Hutton v. Smith, 175 N. Y. 375, 67 N. E. 633. The same conclusion is reached in the note to Mollison v. Rittgers (Iowa) 29 L. R. A. (N. S.) 1179, after a review of many authorities. We think there was no error in not permitting the witness Hester to testify to the execution of the

deed, and the exceptions on that point must be overruled.

[2] We are of the opinion, however, that the circuit judge erred in excluding evidence of the handwriting of the persons whose names are on the paper as subscribing witnesses. The defendant Mann was in this plight: Mrs. L. C. Merck, one of the persons whose names were subscribed as witnesses to the alleged deed from Blumer Merck to L. C. Merck, was hostile, and upon being put on the stand testified in effect that the deed was not delivered. The other witness, Hester, was excluded because disqualified by interest. Under these conditions the defendant Mann had a right to introduce other testimony tending to prove the execution of the deed; and evidence of the handwriting of the witnesses, of the grantor's acknowledgment of the validity of the deed after its execution, and of any other facts tending to show that the deed had been executed, was clearly admissible. Land titles would be very insecure if they should fail whenever the subscribing witnesses might deny that they witnessed the execution of a deed, or might become for any cause incompetent to testify to its execution. It is true in proving a deed the subscribing witnesses must be produced or their absence accounted for, but manifestly the title cannot be made to depend entirely on their testimony. Whenever the witnesses are dead or inaccessible, or have become incapacitated, or deny the execution in their presence, or for any cause are unable or unwilling to prove the execution, then other evidence may be introduced. This is a principle of general recognition. *Pearson v. Wightman*, 1 Mill Const. 336, 12 Am. Dec. 636; *Congdon v. Morgan*, 14 S. C. 594; *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555; *Brucke v. Hubbard*, 74 S. C. 144, 54 S. E. 249; *Buchanan v. Simpson*, 105 Ga. 393, 31 S. E. 105; *Greenleaf on Evidence*, vol. 1, p. 762; 11 A. & E. Ency. 598.

On this principle the court erred, also, in holding that the admissions of Blumer Merck that he had conveyed the land to his son, L. C. Merck, were not admissible as evidence of the execution of the deed, but only to show the character of the possession. Such admissions, together with testimony as to the handwriting of the grantor, and of the witnesses, as to the independent possession and control of the land by the grantee and as to the recording of the deed, were all admissible, either to support the testimony of the subscribing witnesses that the deed had been executed or in substitution of the testimony of the subscribing witnesses, if that testimony, without fault of the party in interest, was not available, or was adverse.

There must be a new trial on this ground. Whether the testimony which the defendant Mann may be able to offer on the subject of

the execution of the deed will be of such character that it will constitute some evidence of the complete execution of the deed, and so entitle the defendant Mann to have the issue of complete execution submitted to the jury, is a question which cannot be anticipated. As the case is to go back for a new trial, we refrain from any discussion or expression of opinion as to the facts, further than to say that we think there was a scintilla of evidence for the consideration of the jury on the issue of estoppel.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause be remanded to that court for a new trial.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(89 S. C. 414)

SEGUSKY v. WILLIAMS.

(Supreme Court of South Carolina. July 31, 1911.)

1. APPEAL AND ERROR (§ 105*)—APPEALABLE ORDER—NONSUIT.

An order granting a nonsuit is appealable. [Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 717-723; Dec. Dig. § 105.*]

2. MALICIOUS PROSECUTION (§ 6*)—WARRANT OF ARREST.

A warrant to arrest one charged with disposing of property under lien states no crime; therefore cannot support an action for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 6; Dec. Dig. § 6.*]

Appeal from Common Pleas Circuit Court of Greenville County; John S. Wilson, Judge.

"To be officially reported."

Action by Lewis Segusky against J. H. Williams. There was a nonsuit, and plaintiff appeals. Affirmed.

H. K. Townes and Brown Martin, for appellant. Wilton H. Earle, for respondent.

HYDRICK, J. [1] This appeal is from an order granting a nonsuit in an action for malicious prosecution. Respondent's contention that the order is not appealable is untenable. *Bowen v. Johnson*, 87 S. C. 264, 69 S. E. 294.

[2] The affidavit upon which the warrant was issued states nothing more than that, at the time and place mentioned, "Lewis Segusky did dispose of property under lien, and removing same, all of which is contrary to the form of statute." The warrant is as follows: "Arrest and bring before me Lewis Segusky under lien charged with disposing property and the witnesses for the state herein named." The warrant states no crime, and therefore cannot support an action for malicious prosecution. *Whaley v. Lawton*, 57 S. C. 256, 35 S. E. 558; *Alken v. Cotton*

Mills, 85 S. C. 180, 67 S. E. 166. In *Whaley v. Lawton*, the court said: "A mere sale or disposal of personal property covered by a lien is not sufficient to constitute a criminal offense, but it must be accompanied by a failure to pay the debt secured by the lien, or a failure to deposit with the clerk the amount of such debt within 10 days."

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 391)

**SOUTHERN RY., CAROLINA DIVISION,
v. HOWELL**

(Supreme Court of South Carolina. July 26, 1911.)

1. JURY (§ 13*)—RIGHT TO JURY TRIAL—ISSUES—LEGAL OR EQUITABLE.

A plaintiff may not by framing his complaint so that his action would be cognizable only in equity under the old procedure, defeat defendant's constitutional right to trial by jury, but whether the issues are legal or equitable must be determined from all the pleadings.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 85-83; Dec. Dig. § 13.*]

2. JURY (§ 13*)—RIGHT TO TRIAL BY JURY—ISSUES AT LAW.

A defendant, in an action to enjoin the maintenance of a fence as a continuing trespass, who claims title to the land in dispute, based on defenses which were legal in their nature before the adoption of the reformed procedure, is entitled to a jury trial; the reformed procedure not abolishing differences between legal and equitable actions and defenses.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 54-58; Dec. Dig. § 13.*]

3. JURY (§ 13*)—RIGHT TO TRIAL BY JURY—ISSUES AT LAW.

A defense of estoppel in pais interposed in an action to enjoin the maintenance of a fence as a continuing trespass is a legal and not an equitable defense, and, where the facts relied on to create the estoppel are disputed, the issue must be submitted to the jury.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 54-58; Dec. Dig. § 13.*]

4. EASEMENTS (§ 30*)—ABANDONMENT.

An easement may be lost by abandonment.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 77-79; Dec. Dig. § 30.*]

5. EASEMENTS (§ 37*)—ABANDONMENT—QUESTION FOR JURY.

Whether one has abandoned an easement is a question of fact and intention for the jury.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 94; Dec. Dig. § 37.*]

6. APPEAL AND ERROR (§ 169*)—QUESTIONS REVIEWABLE—QUESTIONS NOT DECIDED IN TRIAL COURT.

A question not considered by the circuit court is not properly before the Supreme Court on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; R. W. Memminger, Judge.

"To be officially reported."

Action by the Southern Railway, Carolina Division, against J. L. Howell. From a judgment for plaintiff, defendant appeals. Reversed.

Simpson & Bomar, for appellant. Sanders & De Pass, for respondent.

HYDRICK, J. This is the second appeal in this case. The first is reported in 79 S. C. 281, 60 S. E. 677.

In 1874, John Bankston Davis conveyed to the Spartanburg & Asheville Railroad Company a right of way 200 feet wide, measuring from the center of the railroad, through a tract of land owned by him at or near Campobella. The deed was not recorded until after the controversy herein arose. Davis died in 1888, leaving a will wherein he devised the whole tract, including the right of way, to his niece, the wife of I. W. Wingo. In 1896, Mrs. Wingo conveyed it to her husband. On December 27, 1900, Mr. Wingo conveyed a part of the tract to defendant. The deed to defendant describes the lot conveyed as containing 5 acres and a fraction, and extending to a line 50 feet from and parallel to the railroad. Some time after defendant bought, he inclosed his lot with a fence, and thereby prevented the railroad company and its patrons from using that part of the right of way conveyed to him and inclosed within his fence. This action was brought to enjoin the maintenance of the fence as a continuing trespass. All the defenses originally set up by defendant have been abandoned, except two, to wit, estoppel in pais, and abandonment by plaintiff's predecessor in title of the easement in that part of the right of way inclosed. The court ruled that the defense of estoppel was equitable in its nature, and therefore presented only an equitable issue which should be decided by the court and not by a jury; and that the defense of abandonment was analogous, and made no issue upon which the defendant had the right of trial by jury. The appeal questions this ruling.

[1] It will not be necessary to notice the complaint in detail to determine whether, in form, it is an action for the recovery of the possession of real estate, as contended by appellant, or whether it is only an action in equity for injunction, as contended by respondent, and, therefore, one of equitable cognizance. It has been decided by this court too often to require citation of the cases that a plaintiff cannot, by framing his complaint so that his action would, under the old procedure, be one cognizable only by a court of equity, select the forum in which the issue shall be tried, and thereby defeat a defendant's constitutional right of trial by jury. The complaint alone does not necessarily determine the character of the issues—

whether they are legal or equitable—or the mode of trial to which the parties are entitled. Those are questions which must be determined from an examination of all the pleadings in the case.

[2] Now, in this case, the defendant claims title to the land in dispute, based upon the defenses mentioned. If they present issues which, before the adoption of the reformed procedure, were legal in their nature—that is, issues which were cognizable by a court of law—then the defendant was entitled to have them decided by a jury. *Adickes v. Lowry*, 12 S. C. 108; *Chapman v. Lipscomb*, 18 S. C. 222; *Holliday v. Hughes*, 54 S. C. 115, 31 S. E. 867; *Alston v. Limehouse*, 61 S. C. 1, 39 S. E. 192, and cases cited.

It is not surprising that some confusion has arisen from expressions which are frequently found in the text-books and decided cases, characterizing estoppel in pais as equitable in its nature. It had its origin chiefly, if not wholly, in the courts of equity, and, at first, it was available only in that forum. Naturally, therefore, it has always been spoken of as equitable, and so it is, not only in its origin, but also in its nature. But, in various ways, many of the maxims and principles which originated in the courts of equity became engrafted upon the common law. Sometimes it was done by statute, but not infrequently it was accomplished merely by the adoption of them by the common-law courts, so that, in time, many of them were as available to litigants in those courts as to those in courts of equity. It was this tendency which finally resulted in the adoption of the reformed procedure and the amalgamation of the courts of law and equity. But an examination of the cases above cited shows that that great reform wrought no change in the inherent differences which previously existed between legal and equitable actions and defenses, or in the mode of trying them. Those which were legal—that is, cognizable by the courts of law—are still so, and those which were equitable still retain that character, and each must be tried by its appropriate tribunal.

[3] As far back in the history of the administration of the law in this state as 1792, we find the doctrine of estoppel in pais administered by the law courts. In *Lessee of Tarrant v. Terry*, 1 Bay, 241, it was allowed to avail the defendant in an action of ejectment to try title to land. From that time to the present, our Reports show that the principle has been administered by the law courts as a defense in actions to recover possession of land. *Marines v. Goblet*, 31 S. C. 153, 9 S. E. 803, 17 Am. St. Rep. 22; *Scarborough v. Woodley*, 51 S. C. 329, 62 S. E. 405; *Railroad Co. v. Cotton Mills*, 52 S. C. 24, 61 S. E. 1089, 62 S. E. 1119. It was also recognized in the first trial in this case. That it is a legal defense, in an action like this,

which the defendant has the right to have submitted to a jury, was expressly decided by this court in *Sullivan v. Moore*, 84 S. C. 429, 65 S. E. 108, 66 S. E. 561, where the court said: "The appellant's first contention is that the issue of estoppel is equitable in its nature, and therefore should have been tried by the court, and not submitted to the jury on the issue of legal title. The position is not tenable." The court then quotes at length from the opinion of the Supreme Court of the United States in *Drexel v. Berney*, 122 U. S. 241, 7 Sup. Ct. 1200, 30 L. Ed. 1219, to show that the doctrine is cognizable, at law as well as in equity, and that, "in order to justify a resort to the court of equity, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law. In other words, the case must be one where the forms of law are used to defeat that which, in equity constitutes the right. Such a case is one for equitable interposition." See, also, *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Odlin v. Gove*, 41 N. H. 465, 77 Am. Dec. 773; *Putnam v. Tyler*, 117 Pa. 570, 12 Atl. 43; *Snow v. Hutchins*, 160 Mass. 111, 35 N. E. 315. In *Townes v. City Council*, 52 S. C. 408, 29 S. E. 855, the court said: "An estoppel in pais is a mixed question of law and fact. When the facts relied on to create an estoppel are admitted, or undisputed, or ascertained by the proper tribunal, then whether such facts create an estoppel is a question of law for the decision of the judge; but when the facts relied on to create an estoppel are disputed, then the case must go to the jury, under proper instructions from the court as to what constitutes an estoppel, leaving it to the jury to determine whether the evidence establishes or not the facts necessary to create an estoppel." In this case, as in that, the facts relied on to create the estoppel were disputed, and should have been submitted to the jury.

[4] That an easement may be lost by abandonment is a principle too well established to admit of argument.

[5] Whether a party has abandoned his right to an easement is a question of fact and intention proper for the decision of a jury. *Parkins v. Dunham*, 3 Stro. 224; *Lorick v. Ry.*, 87 S. C. 71, 68 S. E. 931, and cases cited.

[6] Whether a railroad company can lose a part of its right of way by abandonment is a question which was not considered by the circuit court, and therefore not properly before this court.

Reversed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 463)

KENNEDY et al. v. HILL.

(Supreme Court of South Carolina. July 24, 1911. On Rehearing, Sept. 6, 1911.)

1. PARTNERSHIP (§ 305*)—DISSOLUTION—CONTRACT—INSTRUCTION.

Where a partnership contract provided that the capital should be \$105,000; that plaintiffs together had contributed \$25,000, and that defendant had contributed \$80,000, it was error for the court on dissolution to take the then present value of the assets as shown by an inventory instead of the amount stated in the contract as the original capital as a basis for distribution.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 703-705; Dec. Dig. § 305.*]

2. PARTNERSHIP (§ 308*)—DISSOLUTION—DISTRIBUTION—CAPITAL AND PROFITS.

Partnership articles provided that the capital should be \$105,000; that defendant had contributed $\frac{80}{105}$ thereof, and the two plaintiffs $\frac{25}{105}$; and that in the event of dissolution the stock and other assets were to be taken at their actual value and divided in the same proportion between plaintiffs and defendant. It appeared on dissolution that the gross value fixed by appraisal was \$139,856.97, and that the debts were \$28,869.18, leaving net assets \$110,987.79, and a net profit of \$5,987.79. *Held*, that the assets for distribution being insufficient to liquidate both the capital and profit account the depreciation of assets valued under the contract at \$110,987.79 should be apportioned between capital as stated in the contract at \$105,000, and profits as ascertained under the contract at \$5,987.79 and funds realized by the receiver applied to capital and profits in the proportion that \$105,000 bore to \$5,987.79.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 700; Dec. Dig. § 303.*]

3. PARTNERSHIP (§ 306*)—DISSOLUTION—INTEREST.

Where, in the formation of a partnership, plaintiffs agreed to pay interest to defendant on \$45,000, in order to give them an equal interest in the profits, plaintiffs' liability for such interest ceased on the date of the dissolution of the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 706-709; Dec. Dig. § 306.*]

4. PARTNERSHIP (§ 308*)—DISSOLUTION—INDIVIDUAL ACCOUNTS—INTEREST.

On dissolution of a firm, the individual accounts of the partners bore interest from the date of dissolution, and should be regarded as assets in the hands of the receiver, applicable to capital and profits in the same proportion that the original capital bore to the ascertained profits.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 308.*]

5. PARTNERSHIP (§ 325*)—DISSOLUTION—EARNINGS BY RECEIVER.

Funds earned by a receiver after dissolution of a firm should not be credited to the capital account, but should be paid into the general fund to be applied with other assets to capital and profits, according to the proportion that the original capital bore to the profits earned.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 757-767; Dec. Dig. § 325.*]

6. PARTNERSHIP (§ 346*)—DISSOLUTION—RECEIVERS—COST OF RECEIVERSHIP.

Where, on dissolution of a firm, a receiver was required because of irreconcilable differences between the partners, it was within the

discretion of the court to require one of the partners to pay the costs of the receivership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 820; Dec. Dig. § 346.*]

Appeal from Common Pleas Circuit Court of York County; J. C. Klugh, Judge, and Ernest Moore, Special Judge.

"To be officially reported."

Suit by Chris L. Kennedy and another against W. L. Hill, for dissolution and settlement of the firm of Hill, Kennedy & Co. From a decree settling the account and providing a scheme for dissolution, both parties appeal. Modified and affirmed.

Geo. W. S. Hart and Witherspoon & Spencers, for W. L. Hill. Finley & Jennings, and J. Hardin Marlon, for C. L. and P. B. Kennedy.

WOODS, J. In this action for the dissolution and settlement of a partnership between the plaintiffs and the defendant, a receiver was appointed on account of irreconcilable differences and disputes between the partners, and the assets are now in his hands. The questions to be determined relate to the distribution of the assets between the plaintiffs and the defendant. The record contains two reports of Mr. J. Lyles Glenn as referee, decrees by Judge Klugh and Special Judge Moore, and numerous exceptions to these reports and decrees. We shall not state the various steps in the protracted litigation, nor refer in detail to the many exceptions, for the reason that it is conceded on all sides that the rights of the parties and the method of stating the accounts depend on the construction of the partnership contract.

Before the partnership was formed the defendant had been conducting a mercantile business at Sharon for about 15 years. The plaintiffs Chris L. Kennedy and Porter B. Kennedy, under the firm name of Kennedy Bros., had been engaged in the mercantile business at the same place for about 3 years. The two concerns were merged into a new partnership, and a formal written agreement was signed on June 14, 1906, in which it was recited that the partnership had been actually formed on May 20, 1903. The following provisions of the partnership contract bear upon the questions at issue:

"Life of partnership: The partnership is to expire by its own limitation on the 1st day of January, 1907; provided, that it shall be incumbent upon the member or members desiring a dissolution of the partnership at that time to give written notice, not less than thirty days prior to the 1st day of January, of such desire; and the effect of the failure to give such notice shall be to extend the life of the partnership for one year; and so, from year to year, the partnership may be dissolved on any 1st day of January, commencing with January of 1907, by the giv-

ing of such written notice, by any one or more of its members, thirty days prior to the 1st day of January, the failure to give such notice to result in extending the life of the partnership for one year.

"Capital stock: The capital stock of the firm is to be one hundred and five thousand dollars. * * *

"Division of profits: The profits and losses are to be equally divided. W. L. Hill has contributed eighty thousand dollars to the capital stock, and C. L. and P. B. Kennedy twenty-five thousand dollars. C. L. Kennedy and P. B. Kennedy are to pay W. L. Hill interest at eight per cent. per annum on forty-five thousand dollars; that is to say, interest on \$22,500 that W. L. Hill loans to each of them (out of \$80,000) to give them an equal interest in the profits. * * *

"Dissolution: In the event of dissolution the stock and other assets are to be taken at their actual market value, W. L. Hill to receive $\frac{80}{100}$ and the two Kennedys $\frac{25}{100}$. Provision must of course be made for the indebtedness of W. L. Hill and Kennedy Brothers, that was outstanding when the partnership was formed.

"Where moneys of the new firm are used for that purpose, a strict account must be kept; and the accounts so paid shall bear interest at the rate of eight per cent. per annum (to be paid by the party for whose benefit the moneys are so used). For convenience it is agreed that the interest shall be computed from the end of the month in which the moneys are so used, upon the aggregate of the sums so paid."

Under the clause first quoted W. L. Hill gave due notice of his desire that there should be a dissolution on January 1, 1907. The partners undertook to make the dissolution settlement, but fell into disputes about the meaning of the contract; and the plaintiffs brought this action for a settlement under the orders of the court. It will be observed that under the contract the Kennedys had together only $\frac{25}{100}$ interest in the capital, while they had together two-thirds interest in the profits. Hence it was to their advantage that as little as possible of the firm assets should be regarded capital and as much as possible profits. Hill, on the other hand, was interested to make the capital as large as possible and the profits as small as possible. Nearly all the entanglement of this complex cause unwinds on the adjudication of this point. The main question, then, is what portion of the assets now in the hands of the receiver shall be regarded capital and what portion profits.

[1] Judge Klugh held that the property put into the new firm, consisting of the assets of the Kennedy and Hill mercantile establishments, was shown by the evidence to be worth only \$84,000, and that therefore that sum and not \$105,000, as stated in the contract, should be taken as the original capital. Carrying out this view he held the contribu-

tion of Hill to the capital stock to have been \$64,000 and that of the Kennedys \$20,000. He held, further, that the net assets in the hands of the receiver should be applied to the repayment of the capital stock of \$84,000 and the remainder regarded as profits and paid out to the parties in equal shares as provided by the partnership contract.

We are unable to agree to the first conclusion, for the reason that it seems to us to be a substitution of that which the court thought it would have been prudent for the parties to agree to for the agreement which they actually made. They expressly agreed that the capital stock should be \$105,000, and recited in the contract that "W. L. Hill has contributed \$80,000 to the capital stock and C. L. and P. B. Kennedy \$25,000." There is no evidence of fraud or imposition in this valuation of the property, nor is there any dispute that the property was actually received by the firm. Judicial authority can no more alter the contract by substituting what seems to be a true valuation for that agreed upon by the parties than it can refuse to enforce or undertake to reform a contract for the purchase of land on the ground that the price agreed on was beyond the real value of the property. The contract may have been improvident, but persons who are *sui juris* cannot have relief from their agreement on that ground.

[2] We think there was also error in holding that the entire assets must be applied to the repayment of the capital stock. Such a conclusion is inconsistent with the following provision of the contract: "In the event of dissolution the stock and other assets are to be taken at their actual market value, W. L. Hill to receive $\frac{80}{100}$ and the two Kennedys $\frac{25}{100}$." This indicates that the partners did not contemplate that dissolution and settlement of the affairs of the firm should be made by reducing the assets to cash by sale or otherwise; but, on the contrary, that the stock and other assets should be taken, that is, listed and appraised at their market value, and a settlement of the firm affairs made on that basis. The design of the partners and the purpose to be gained in this taking of stock was the ascertainment of the value of the whole and the value of the share of each partner. The only ultimate end to be attained by this ascertainment of values was to enable the partners to divide the assets among themselves. It was contemplated that, when the total market value had been fixed by the taking of the stock and other assets, it should be the basis for the ascertainment of the rights of the partners with respect to partnership matters, including profits and losses.

This seems clearly to be the meaning of the contract as written, and it was the interpretation placed on it by the partners themselves; for when they undertook to make the settlement they commenced by taking stock. Unfortunately they could not agree,

and the court is deprived of the benefit of an appraisal of the property at its market value made by the partners on January 1, 1907, the date fixed for dissolution. But the circuit court very wisely ordered an appraisal by three disinterested persons. That appraisal must be regarded as taking the place of the estimate the parties themselves were to make, subject of course to correction by adding any omitted items of either assets or liabilities, or by correcting any clear mistake of fact. The gross value of the assets as fixed by the appraisal was \$139,856.97. The deductions made by the appraisers, together with the debts of the firm not taken into account by them, aggregated \$28,869.18. This left as the assets on hand as valued by the appraisers, \$110,987.79. The net profit at the date of dissolution was, therefore, \$5,987.79. These are the figures reported by Mr. Glenn in his statement of the accounts on the principle which we have adopted. They were obtained by an appraisal made as soon as possible after dissolution, and represent as nearly as possible what would have been the result of the settlement among the partners according to the scheme contemplated by the contract.

It is admitted that the assets which the receiver will have for distribution will not be sufficient to liquidate both the capital and profit account. So that it is necessary to determine how the funds in the hands of the receiver shall be distributed. The general rule is that stated by Special Judge Moore, namely, that the assets must be applied to the payment of the capital stock until it is refunded and the remainder only distributed as profits. The rule is not without exceptions, however, and is subject to the contract of the partners when creditors are not interested. In this case, as we have endeavored to show, the partners contracted to ascertain the relative proportion of capital and profits by a valuation of the assets at the date of dissolution, and not by actual reduction into cash. The depreciation of the assets valued under the contract at \$110,987.79, due to the failure of the partners to settle under the contract, must be apportioned between the capital as stated in the contract as \$105,000 and the profits as ascertained under the contract as \$5,987.79. The funds realized by the receiver from the assets must therefore be applied to capital and profits in the proportion that \$105,000 bears to \$5,987.79.

[3] In adjusting the individual accounts of the partners the charge of interest on \$45,000 which the Kennedys were to pay to Hill "to give them an equal interest in the

profits" should cease on January 1, 1907, the date of dissolution. The profits having ceased to accrue at that time, this interest charge was likewise at an end.

[4] As to other items, the individual accounts of the partners owing at the time of dissolution should bear interest from the date of the dissolution; and these accounts should be regarded as assets in the hands of the receiver applicable to capital and profits in the proportion above indicated.

[5] Judge Moore properly held that no interest should be allowed on the capital contributed by the partners; but he also held that certain interest on the funds earned by the receiver should be credited to the capital account. Under the view we have taken, the interest so earned falls into the general fund to be applied along with the other assets to capital and profits according to the proportion above stated.

[6] It was within the discretion of the circuit court to require the defendant to pay the costs of the receivership, and we think the record shows that the discretion was justly exercised.

The judgment of this court is that the decrees of Judge Klugh and Special Judge Moore be modified to conform to the conclusions herein stated, that the cause be remanded to the circuit court for such further proceedings as may be necessary.

JONES, C. J., and GARY, A. J., concur.

Order Dismissing Petition for Rehearing.

PER CURIAM. The point referred to in the petition was considered by the court before the decree was filed, but it seemed to require no special mention. The defendant, it is true, testified that the ginnery was worth only \$2,250, but he did not testify that there had been any depreciation after the appraisal; and the impartial judgment of the appraisers fixing the value at \$3,000 was properly adopted by the circuit court in preference to the estimate of an interested party. Since the receiver has had the rent of the ginnery the charge of \$3,000 to the defendant will, of course, bear interest only from the date on which he takes possession.

It might have been more logical to require the receiver to dispose of the ginnery along with the other assets, but it does not appear that any substantial injustice will result from assigning it to the defendant at \$3,000, and the court is unwilling to disturb the circuit decrees on that point.

The petition for rehearing is dismissed, and the order staying the remittitur is revoked.

(90 S. C. 186)

MYERS v. BURNSIDES.

(Supreme Court of South Carolina. Aug. 10, 1911.)

APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS—CONCLUSIVENESS.

Findings supported by evidence are not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Appeal from Common Pleas Circuit Court of Richland County; L. W. G. Shipp, Judge.

Action by David Myers against Mecker M. Burnsidess, executrix. Judgment for defendant, and plaintiff appeals. Affirmed.

B. B. Evans, for appellant. D. W. Robinson, for respondent.

HYDRICK, J. This is an action at law to recover possession of real estate, which plaintiff claims as heir of Baron De Kalb Myers. By consent, the issues were tried by the court upon the testimony which was taken and reported by the master. The court found:

(1) That the evidence did not warrant the finding that title was ever in Baron De Kalb Myers.

(2) That plaintiff is an illegitimate son of Baron De Kalb Myers, and therefore not his heir.

(3) That plaintiff is estopped by the judgment of the court of common pleas for Richland county in the case of Josephine Moore v. Jane Myers et al., to which action he was a party, and in which it was adjudged that he was illegitimate, and not an heir of Baron De Kalb Myers, and had no interest in the land in dispute in that action, which is the same land herein sued for.

These findings are all supported by the evidence, and are therefore not reviewable by this court.

Affirmed.

(39 S. C. 401)

HUMPHREY v. PALMER et al.

(Supreme Court of South Carolina. July 31, 1911.)

1. JURY (§ 59*)—SUMMONING—JURY COMMISSIONERS—DISCRETION OF TRIAL COURT—IN GENERAL.

The determination whether the relationship of a jury commissioner to party litigant is such as to impair the proper discharge of his duties, rests in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 268-272; Dec. Dig. § 59.*]

2. JURY (§ 59*)—SUMMONING—JURY COMMISSIONERS—DISCRETION OF TRIAL COURT—ABUSE.

The deceased wife of one of the jury commissioners who drew the jury was the daughter of plaintiff, and the children of the commissioner were plaintiff's heirs. The names in the jury box were selected in 1906, and the cause of action did not arise until 1910. Act Feb. 7, 1902 (23 St. at Large, p. 1068) § 3 provides that the jury box shall be kept securely locked with three

locks, having different keys, all held by different county officers. Section 4 of the same act gives jury commissioners the right to reject names drawn from the box in certain cases, and section 6 requires the drawing to be public. Held, that as under this statute a party has the right to be present at the drawing he should ascertain whether a jury commissioner related to another party improperly performs his duty; and hence it was not an abuse of the discretion of the trial court to overrule an objection to the entire venire, there being nothing to show that the commissioners improperly influenced its selection.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 268-272; Dec. Dig. § 59.*]

Appeal from Common Pleas Circuit Court of Florence County; T. S. Sease, Judge.

"To be officially reported."

Action by S. L. Humphrey against George G. Palmer and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Willcox & Willcox, for appellants. J. W. Ragsdale, for respondent.

WOODS, J. When this action of damages for assault and battery was called for trial, defendants' counsel, in the form of a challenge to the array of petit jurors, objected to trial of the case before the jury on the ground of the relationship and close personal association between the plaintiff and Charles T. Haynie, treasurer of Florence county, who as one of the jury commissioners had participated in the drawing of the jury. The court took evidence on the point, from which it appeared that Haynie was the son-in-law of the plaintiff; that his wife, who was the only child of the plaintiff, was dead, and that her children, as the grandchildren of the plaintiff, would in case of his dying intestate inherit his property; and that the intimacy which usually flows from such a relationship existed between the plaintiff and Haynie. Haynie testified that he knew of the pendency of the action, but did not regard it, or even have it in mind, when he participated in the drawing of the jury. The court refused to sustain the objection to the jury, taking the precaution, however, to examine each juror on his voir dire.

[1] The general rule on the subject is thus stated in *State v. Perry*, 73 S. C. 199, 53 S. E. 169: "The correct rule is that the consanguinity or affinity must be such as would reasonably lead to the presumption that the jury commissioner would thereby be affected in such manner as to impair the proper discharge of his duties, and this fact must be determined by the presiding judge in the exercise of a sound discretion. It would tend to retard the trial of cases very much to adopt any other rule." This does not mean that the discretion of the circuit judge is absolute, without respect to the closeness of the relationship. In the case under consideration, if the decision of the circuit court depended on an opinion of the circuit judge

that the close relationship here shown was not sufficient to lead to the presumption that the jury commissioner would be affected by it in selecting the names of jurors to be placed in the box, we think this court would be obliged to hold that there had been an abuse of discretion.

But in the recent case of *State v. Smith*, 71 S. E. 830, not yet officially reported, the court said: "It may be well to remark that the trial judge in exercising his discretion is not restricted to the consideration of the degree of relationship only. The court may inquire whether the case had arisen and whether the officer knew of its pendency when the jury was drawn. These and other pertinent inquiries in addition to the fact of relationship may well enter into the exercise of the discretion of the court." In this case there are other facts besides the degree of relationship which must be looked at in the light of the statute law on the subject in considering whether there was an abuse of discretion.

[2] The important fact is to be first considered that the names in the jury box had been selected and placed therein, written on folded slips, in December, 1909, under the statute which so requires; whereas, the cause of action did not arise until September, 1910. It was therefore impossible that the names in the box could have been chosen with any view to this case; and there could be no abuse of discretion in holding that the defendant could not have been prejudiced by the participation of Haynie in selecting the names and placing them in the jury box.

The following provisions of the statute safeguard the box after it is made up against the corruption or misconduct or partiality of any one or two of the jury commissioners: "That of the list so prepared, the county auditor, county treasurer and clerk of the court of common pleas, shall cause the names to be written, each on a separate paper or ballot, so as to resemble each other as much as possible and so folded that the name written thereon shall not be visible on the outside, and shall place them, with the said list, in a strong and substantial box, without apertures or openings when closed (to be known as the "jury box"), to be furnished to them by the county supervisor of their county for that purpose, and of such size and shape as that, when such separate papers or ballots shall have been folded and placed therein as above required, they may be easily shaken up and about and well mixed therein, and it shall be the duty of the clerk of the court to keep such box in his custody. The said jury box shall be kept securely locked with three separate and strong locks, each lock being different and distinct from the other two and requiring one key peculiar to itself in order to be unlocked and the key to one of said three locks shall be kept by the county auditor himself,

the key to another of said three locks by the county treasurer himself, and the key to the third of said three locks by the clerk of the court of common pleas himself, so that no two of them shall keep a similar key or similar keys to the same lock, and so that all three of them must be present together at the same time and place in order to lock or unlock and open said jury box." Act 1902 (23 St. at Large, p. 1066).

In directing the drawing of jurors to serve at any term of the court, the act, by section 4, confers on the jury commissioners no right of *selection*, but does confer the discretion to *reject* in these words: "If there shall be drawn from said jury box a ballot containing the name of any person not between the ages of twenty-one and sixty-five years, or not of good moral character, or who has died, or who has removed from the county or is otherwise disqualified to serve as a juror, such ballot shall be destroyed and such name struck from the said list and another ballot drawn."

But the act also contains, in section 6, the following very important provision as to the publicity of the drawing of the jury: "That the said drawing shall be made openly and publicly in the office of the clerk of the court of common pleas, and the county auditor, the county treasurer and the clerk of the court of common pleas shall give ten days notice of each of said drawings by posting in a conspicuous place on the courthouse door, or by advertisement in a county newspaper, a notice of the place, day and hour of such drawing: Provided, That in case any term of court is to be held within less than twenty days after the approval of this act, such jurors may, nevertheless, be drawn without such notice."

No provision similar to this was contained in the acts under which it was decided, in the case of *State v. McQuaige*, 5 S. C. 429, that an objection to the jury on similar grounds should be sustained. Under the law as it then stood, there was no way for a litigant, or any person interested as one of the general public in the purity of the jury box, to ascertain whether the jury commissioners in drawing the names from the box had in fact exercised any right of rejection of any juror drawn. The statutory requirement of publicity now in force in giving everybody the opportunity to be present at the drawing of the names from the box imposes upon interested parties the obligation to avail themselves of the protection which the public drawing affords. The actual drawing from the box under the contrivances of the statute is entirely mechanical, except for the discretion lodged in the commissioners to reject or select a name after it is drawn. Any one present at the drawing could discover whether it was in fact mechanical, and also whether the commissioners actually exercised the discretion

(28 S. C. 396)

to reject any name. If a commissioner within the close relationship from which partiality is presumed should participate in the exercise of any act of discretion in rejecting or accepting a name drawn from the box, then there would be cause of complaint and ground of objection to the jury, but not otherwise. And, if the parties litigant had no right to be present and ascertain the facts, the court might well presume, without proof, that the commissioners did exercise the discretion of rejecting or accepting names. But when the party complaining knows of an objectionable relationship of one of the commissioners, and has the right to be present and inspect the drawing, it is his duty to avail himself of the right by attending at the drawing and objecting to the participation of such commissioner. If his objection be disregarded, then it is his duty to show to the court that fact, and the fact that the commissioner objected to acted with the other commissioners in exercising the discretion of rejecting or accepting a name drawn out, or in some way influencing the result of the drawing.

Applying the rule laid down in *Jeffers v. Jeffers*, 71 S. E. 810, recently decided, it would seem to follow that it is the further duty of a litigant to use reasonable diligence to ascertain before the drawing whether one of the commissioners is related to the parties in interest, so that he may be present at the drawing and protect his rights.

The publicity statute should be given full force as a law made, not only to secure the purity of the jury box, but to enable parties to ascertain any facts which would give ground of complaint against the fairness of the drawing, and make them plain to the court.

Summarizing the considerations entering into the exercise of judicial discretion, we think it is clear that there was no abuse of discretion in refusing to hold the jury not a legal one for the trial of this case. The objection on account of the relationship to one of the parties was not to the making up of the jury list or placing it in the box, but to the drawing only; the defendant had a right to be present at the drawing and object to Haynie's participation, and then ascertain whether the board of which he was a member exercised the discretion of accepting or rejecting any name drawn, or only performed the mechanical function of drawing the names from the box; and no evidence of objection to Haynie's participation or of the exercise of any discretion to reject or accept was furnished to the court.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

YOE v. SAVANNAH RIVER POWER CO.
(Supreme Court of South Carolina. July 26, 1911.)

1. ELECTRICITY (§ 9*)—ERECTION OF POLES—ACTION FOR TRESPASS—NONSUIT.

Where a town purchased a part of a tract of land on which to erect an electric light plant, and was given the right to enter on any land of the grantor for any purpose incident to or connected with the use, construction, or operating of the water and electric light plant to be erected on the parcel purchased, and the town entered into an agreement with defendant power company, agreeing to give defendant the necessary right of way for a pole line from its plant to the town, and on the refusal of plaintiff, who had acquired the rights of the town's grantor, to give defendant a right of way, the line was erected over plaintiff's land by the agents and servants of the town without her consent, it was error in an action against defendant for the trespass to grant a nonsuit, since the jury might have inferred that the town, in building a line across the plaintiff's land, was acting as defendant's agent.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 9.*]

2. APPEAL AND ERROR (§ 1053*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in the admission of evidence was not prejudicial to plaintiff, where the case was taken from the jury by nonsuit.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4183; Dec. Dig. § 1053.*]

Appeal from Common Pleas Circuit Court of Greenwood County; John S. Wilson, Judge.

"To be officially reported."

Action by Belle Yoe against the Savannah River Power Company. From an order of nonsuit, plaintiff appeals. Reversed.

Cothran, Dean & Cothran and H. C. Tillman, for appellant. Grlier & Park, for respondent.

HYDRICK, J. [1] This appeal is from an order of nonsuit in an action for damages for trespass on land. The trespass consisted in the erection of a line of poles on plaintiff's land on which electric light wires were strung. Some years ago, the town of Greenwood built its own electric light plant. For that purpose, and, also, for use in connection with a system of waterworks, it purchased from B. F. Yoe, in 1898, three acres of land about two miles from the town; same being part of a tract of 230 acres owned by Yoe. In 1904 Yoe conveyed 71 acres of the same tract to plaintiff, which is the tract on which the alleged trespass was committed. The deed to the town, after the grant of the right to use and divert the water courses on the whole tract, and to construct and lay thereon dams and water conduits, proceeds as follows: "And may enter upon said lands, or any part thereof, for such said purpose, or for any other purpose incident to or connected with the use, construction, maintenance or operating a water and electric light plant to be erected on the parcel of three acres of land above mentioned and

described, and also such other rights and privileges as may or shall be necessary to the full use and enjoyment of the said plant, and the said maintenance and operating the same, with full right, at any time therefor, to enter upon my said adjoining lands, or any part thereof." Under this grant, a line of poles was erected from the power house on the lot conveyed to the town. The line erected on plaintiff's land extends in the opposite direction—from the power house to defendant's plant on Savannah river. Finding it cheaper to take electricity from defendant than to develop it by its own plant, the town entered into an agreement with defendant to furnish it, agreeing to give defendant the necessary right of way for a pole line from its plant to the town. Agents of defendant tried to get from plaintiff a right of way through her land. After her refusal to grant it, the line was erected without her knowledge or consent by the agents and servants of the commissioners of public works of the town, under the supposed license, above recited, contained in the deed from Yoe. For the erection of the line, defendant furnished the necessary materials, such as insulators and wire, and perhaps the poles—although the witness was not certain whether these were furnished by defendant or the town.

[2] The ground upon which the nonsuit was granted was that there was no testimony that defendant had committed the trespass. From the facts and circumstances stated, the jury may have inferred that, in building the line across plaintiff's land, the town was acting as defendant's agent—especially as there was no testimony that the town had agreed with defendant to build any part of the line, or that it had, in fact, built any other part of it. The only testimony on that point was that the town was to give defendant the necessary right of way.

It is not necessary to consider the exceptions assigning error in the admission of evidence. As the case did not go to the jury, the plaintiff was not prejudiced by the rulings questioned.

Reversed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 387)

McBRAYER v. VIRGINIA CAROLINA CHEMICAL CO.

(Supreme Court of South Carolina. July 26, 1911.)

1. MASTER AND SERVANT (§§ 101, 102*)—MASTER'S DUTY—SAFE PLACE TO WORK.

The master must furnish his servant with a safe place to work, as well as a safe method of doing it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 180-184; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 190*)—VICE PRINCIPAL.

A general foreman, with authority to employ and discharge men and direct them where and how to work, represented the employer in directing laborers, engaged in digging down a large pile of phosphate rock, to cut a deep trench in the pile, and in directing them where to cut it, so as to make the employer liable for his negligence in so doing.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

3. MASTER AND SERVANT (§ 245*)—CONTRIBUTORY NEGLIGENCE.

To constitute contributory negligence in obeying a master's orders, it is not sufficient that the employé believe the act required to be hazardous, unless the danger is so obvious that one of ordinary prudence would not incur it; the servant being entitled to rely upon the master's judgment, if there is ground for reasonable difference of opinion as to danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 778-788; Dec. Dig. § 245.*]

4. MASTER AND SERVANT (§ 219*)—ASSUMPTION OF RISK—OBEYING MASTER'S ORDERS.

In determining whether a servant assumed the risk of obeying his employer's orders and continuing in service after knowledge of danger in doing so, the degree of danger, the extent of the employer's appreciation thereof, and the necessity of doing the work should be considered, there being no absolute rule to determine the question, though generally the employé does not assume the risk, unless the danger is so obvious that one of ordinary prudence would not incur it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

5. MASTER AND SERVANT (§ 288*)—INJURIES—JURY QUESTION—ASSUMPTION OF RISK.

If the evidence as to whether an employé assumes the risk of injury from obeying an order is susceptible of more than one inference, the question is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

6. MASTER AND SERVANT (§ 286*)—INJURIES—JURY QUESTION—NEGLIGENCE.

In an action for personal injuries, while engaged in digging down a pile of ground phosphate rock, by the pile falling on plaintiff, evidence held to make the question of negligence one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

7. MASTER AND SERVANT (§ 289*)—INJURY—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In an employé's action for personal injuries, while digging down a pile of ground phosphate rock, by the pile falling upon him, whether plaintiff was negligent held a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

8. MASTER AND SERVANT (§ 288*)—INJURIES—JURY QUESTION—ASSUMPTION OF RISK.

In an employé's action for personal injuries, while digging down a pile of ground phosphate rock, by it falling upon him, whether plaintiff assumed the risk held a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1068; Dec. Dig. § 288.*]

Appeal from Common Pleas Circuit Court of Cherokee County; W. B. Gruber, Special Judge.

"To be officially reported."

Action by Joseph McBrayer against the Virginia Carolina Chemical Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

N. W. Hardin and Sanders & De Pass, for appellant. Butler & Hall, for respondent.

HYDRICK, J. Plaintiff was injured while working in defendant's fertilizer factory. At the time of his injury, he was engaged with other laborers in digging down a large pile of material composed of ground phosphate rock mixed with sulphuric acid. The pile was from 25 to 30 feet high and about 100 feet long, and originally shaped somewhat like a railroad fill or embankment, with sloping sides; the loose material being dumped on it from above. Owing to a difference in the character of the phosphate rock used, some parts of the pile were dense and hard, while others were more yielding and loose, like sand, and would therefore more readily slide down from the pile, as the supporting mass beneath was removed. Plaintiff and another laborer were digging it down with picks, so that others could shovel it into the wheelbarrows and carry it to the mixers. The pile had been cut into for some distance from the bottom, until its side for some distance up had become nearly, if not quite, perpendicular. Plaintiff was working under the direction of John Byers, who was defendant's general foreman of work, with authority to employ and discharge hands, and direct them what to do and where and how to work. He had authority to direct how the pile was made, and how it should be dug down and removed. Byers ordered plaintiff to dig a trench at a particular place in the pile, and plaintiff proceeded to do so, but stopped, saying it was dangerous; Byers ordered him to go on digging. He said he thought there was danger, but waived his own judgment and relied upon that of the foreman, and obeyed his orders. While digging the trench, the pile fell on him, and he was injured. The court granted a nonsuit, on the ground that plaintiff's injury was caused by his own contributory negligence, and was the result of a risk which he assumed.

[1, 2] It is the duty of the master to furnish his servant with a safe place to work, and also a safe method of doing the work. Under the circumstances stated, Byers was the representative of the master in ordering the plaintiff to cut the trench in the pile, and in telling him where on the pile to cut it. If, in doing so, he was guilty of negligence which resulted in plaintiff's injury, defendant would be liable, unless the plaintiff was guilty of contributory negligence, or

unless his injury was the result of a risk which he assumed.

[3] In *Stephens v. Railway*, 82 S. C. 549, 64 S. E. 604, the rule as to when a servant will be guilty of contributory negligence in obeying an order of the master is thus stated: "To show contributory negligence, it is not sufficient that the employé receiving the order should have misgivings, and believe the act required to be hazardous, unless the danger is so imminent and obvious that a man of ordinary prudence would not incur it. If there is ground for reasonable difference of opinion as to the danger, the servant is not bound to set up his judgment against that of his superior, whose orders he is required to obey, but he may rely on the judgment of such superior. The matter is thus well stated by Mr. Justice Holmes, in *McKee v. Tourtellotte*, 167 Mass. 69, 70, 44 N. E. 1071, 1072 (48 L. R. A. 542): 'When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But if against this judgment is set the judgment of a superior, one, too, who, from the nature of the callings of the two men and of the superior's duty, seems likely to make the more accurate forecast, and if to this is added a command to go on with the work and to run the risk, it becomes a complex question of the particular circumstances whether the inferior is not justified as a prudent man in surrendering his own opinion and obeying the command. The nature and degree of the danger, the extent of plaintiff's appreciation of it, and the exigency of the work, all enter into consideration, and no universal rule can be laid down.' The numerous authorities sustaining this statement of the law are collated in the note in *Houston, etc., Ry. Co. v. De Walt*, 97 Am. St. Rep. 877." *Lyon v. Railway*, 84 S. C. 391, 66 S. E. 282; *Lowe v. Railway*, 85 S. C. 372, 67 S. E. 460, 137 Am. St. Rep. 904.

[4, 5] A similar rule prevails with regard to the assumption of risk in obeying an order of the master, and in continuing in the service after knowledge of risk or danger, or of defects in the machinery or appliances or place to work furnished by the master. If the evidence is susceptible of more than one inference, it is a question for the jury. *Bussey v. Railroad Co.*, 52 S. C. 438, 30 S. E. 477; *Mew v. Railway*, 55 S. C. 90, 32 S. E. 828.

[6-8] In this case the evidence tending to show negligence on the part of defendant, and contributory negligence and assumption of risk on the part of plaintiff, was susceptible of more than one inference. It was therefore error to grant the nonsuit. This case is distinguished from *Martin v. Royster Guano Co.*, 72 S. C. 237, 51 S. E. 680, because in that case there was no testimony that the foreman ordered Martin to work at the particular place at which he was injured, or

that he ordered him to remain there and work after he became apprehensive of danger.

Reversed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 388)

ALLWORDEN v. NELSON et al.

(Supreme Court of South Carolina. July 24, 1911.)

MUNICIPAL CORPORATIONS (§ 657*)—STREETS—VACATION—"STREETS WITHIN SAID LIMITS."

The city of Columbia having been laid out, the title to the land and streets vested in commissioners, for the use of the state, as provided by Act March 22, 1786 (4 St. at Large, p. 751). By Act Dec. 19, 1816 (6 St. at Large, p. 53), the commissioners were required to convey to the Columbia Academy all the unsold land lying in the outer town of Columbia east of B. street, south of S. street, west of H. street, and north of L. street; and also such lots or squares as include the marsh north of S. street, and eastward of the town; and that "the streets within said limits" be vested in trustees, who should have power to dispose of them, reserving a right of way to such persons as might become owners of lots, squares, or portions of lands within such limits. *Held*, that the description of some of the lots to be conveyed as lying south of S. street, and others as lying north of the street, did not imply an intention to exclude that street lying between the lots so conveyed, but that the words "the streets within said limits" included that part of S. street lying between the lots north and south of it designated in the act, and therefore passed a title to such part of the street, which was thereafter subject to conveyance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 657.*]

Appeal from Common Pleas Circuit Court of Richland County; Robt. Aldrich, Judge.

"To be officially reported."

Action by George V. Allworden against P. H. Nelson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. S. Nelson and J. Tom Gettys, for appellant Nelson. Christie Benet, for appellant City of Columbia. W. M. Shand and H. N. Edmunds, for respondent.

HYDRICK, J. Plaintiff and defendant P. H. Nelson entered into a written contract for the sale of a lot in the city of Columbia. Mr. Nelson wants to comply with the contract, but, having some doubt of plaintiff's title, he refused to do so, in order that the validity of the title might be adjudicated. He bases his refusal to accept the title on the ground that the lot is a part of one of the streets of the city, which is therefore made a party that its right to claim the lot as part of one of its streets may also be adjudicated.

The issues of law and fact were referred to the master, who reported that plaintiff's title was good, and recommended that he have judgment for specific performance.

From a decree of the circuit court confirming the master's report, both defendants have appealed.

As originally laid out, the city of Columbia consisted of a tract of land two miles square, with two principal streets, running through the center of the town at right angles; each being 150 feet wide. One of these was Senate street. The title to the land and streets was vested in commissioners, for the use of the state. 4 St. at Large, p. 751.

By an act of the Legislature passed in 1816 (6 St. at Large, p. 53) the commissioners were "authorized and required to convey to the Columbia Academy all the unsold lots and squares of land lying in the outer town of Columbia, east of Bull street, south of Senate street, west of Harden street, and north of Lower Boundary street; and also all such lots or squares as include the marsh north of Senate street and eastward of the town; and that the streets within the said limits be, and they are hereby, vested in the said trustees, who shall have power to dispose of the same, reserving always the right of way to such persons as now are, or hereafter may become, the owners of lots, squares, or portions of land within the said limits."

The validity of plaintiff's title depends upon the proper construction of the language of the statute above quoted. It appears from the evidence that the lots lying north and south of Senate street were conveyed by the commissioners to the trustees of the Columbia Academy according to the directions of the act, and presumably also all that portion of Senate street lying between the lots so conveyed and east of Winn (now Gregg) street, including the lot in controversy, which fronts on Gregg street; and that the same has come by mesne conveyances to the plaintiff. The sole question for decision is whether the words "the streets within said limits" in the act above quoted include that part of Senate street lying between the lots north and south of it designated in the act. It is contended that the description of some of the lots to be conveyed as lying south of Senate street, and others as lying north of that street, expresses, by implication at least, the intent to exclude the street lying between the lots so conveyed.

The section, read as a whole, shows that such an inference was not intended. It is manifest that the method of description referred to was adopted merely because all the unsold lots and squares south of Senate street and east of Bull street were to be conveyed; while north of Senate street the conveyance was to include only "all such lots or squares as include the marsh." But the fact that title to the streets within the limits described was to be conveyed and vested in the trustees, with power to dispose of the same,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shows clearly an intention that the land within the boundaries described was to be conveyed, not as city lots, accessible to streets, but as an entire body of land; the only reservation being a right of way to such persons as were then, or might thereafter become, the owners of lots within said limits. No claim on the part of any such owner appears in this case. It follows, therefore, that the words "the streets within said limits" include all the streets within the boundaries covering the land conveyed as an entire tract, and the testimony shows that the lot in question was included in that boundary. This construction is strengthened by the construction given to the act and the conveyances thereunder by the parties interested. Because as far back as the memory of some of the oldest citizens of Columbia goes—certainly as far back as 1852—at least a part of the land included in the description given in the statute, including the part of Senate street here in controversy, has been under fence and occupied as a farm, until the year 1901, when the plaintiff conveyed 75 feet of the southern half of what was formerly Senate street, east of Gregg street, for a distance of 390 feet (together with other streets within the boundaries mentioned) to the city for a street. During all these years, no claim was made, so far as the evidence shows, by the city or by any individual, that the lot in question was a part of Senate street.

The construction which we have placed upon the statute of 1816 makes it unnecessary to consider the contention of plaintiff that the city of Columbia is now estopped from claiming the lot in question as a part of Senate street.

Judgment affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 161)

CRAIG v. AUGUSTA-AIKEN RY. CO.

(Supreme Court of South Carolina. July 7, 1911.)

1. RAILROADS (§ 312*)—ACCIDENTS AT CROSSING—PERSONS ON HIGHWAYS.

It was error, in an action by one who, while in a helpless state of intoxication, was run over at a railroad crossing, to instruct the jury that the railroad company was not bound to keep a lookout.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 983-1001; Dec. Dig. § 312.*]

2. TRIAL (§ 106*)—ARGUMENTS OF COUNSEL—DISCRETION OF TRIAL COURT.

In an action against a railroad company by one injured at a crossing, the refusal of the court to allow plaintiff's counsel to comment upon an order setting aside the verdict in a former trial, and the action of the court in prohibiting plaintiff's counsel in his argument from making further comments on the failure of defendant's attorneys to introduce in evidence

the testimony of one of their witnesses at a former trial, was not an abuse of discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 267; Dec. Dig. § 106.*]

Appeal from Common Pleas Circuit Court of Aiken County; Thos. S. Sease, Judge.

"To be officially reported."

Action by M. C. Craig against the Augusta-Aiken Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The exceptions were as follows:

"(1) Because his honor, the presiding judge, erred in modifying and altering the plaintiff's fifth request to charge, which is as follows: 'Fifth. That if the motorman discovers, or by reasonable lookout ahead could have seen, a person on the track at a public crossing in an apparently helpless condition from drunkenness or other cause, or if he sees on the track an object, or could have seen it by keeping a reasonable lookout, which from all appearances may be a human being lying in an apparently dangerous position, unable to avoid danger, it is his duty to resolve all doubt in favor of the preservation of life, and immediately to use every available means short of imperiling lives to stop the car in time to avoid an injury, and if from all the circumstances the motorman should have resolved doubt in favor of life and stopped his car, but negligently failed to do so, then the company would be liable in damages, even though the motorman might have thought that the object on the track was something other than a human being.' His honor's modification was as follows: 'And I put in the words "Knew he was there." In addition to that, I also charge you and modify that request by charging you: "That, if the motorman on this particular car knew that this man was there in a helpless condition, then he owed him due care."' It is respectfully submitted that his honor erred in making the modification herein. (1) Because the request was a sound proposition of law and should have been charged as it stood. (2) Because he erred in charging that the duty of the motorman to exercise ordinary care depended on the fact whether he knew such person was on the track in a helpless condition; whereas, he should have charged them that it is the duty of the motorman in charge of the train, on approaching a public crossing where people are likely to travel, to exercise ordinary care in keeping a lookout ahead for persons on the track at said crossing in a helpless condition, and if he could have seen such person by reasonable care, but failed to do so, they would be just as liable in damages as though the person had in fact been seen.

"(2) Because his honor, the presiding judge, erred in modifying plaintiff's sixth request to charge, which is as follows: 'Sixth. Failure of a motorman operating a

car to perform his duty in keeping a reasonable lookout ahead on its tracks in front of its car at a public crossing renders the company liable for injuring a human being lying on the track in an apparently helpless condition from drunkenness or other cause. The fact that the motorman did not see him in time to stop his car is no excuse, for the company would still be liable in damages, if he, by keeping a reasonable lookout ahead, could have discovered him in time to have stopped the car and avoided the injury.' His honor modified the same as follows: 'I charge you that, also modifying that by saying if the motorman of this particular car knew that he was there in a helpless condition, it was his duty to keep a lookout for him.' There is error in said modification for the following reasons: (1) Said request stated a sound proposition of law and should have been charged as it stood. (2) It was error to instruct the jury that the motorman was bound to keep a lookout for a person at a public crossing only on condition that he knew that he was there; whereas, the law is that the motorman, on approaching a public crossing or traveled place, is bound to exercise ordinary care in keeping a reasonable lookout ahead for helpless beings on the track, and this duty he must perform whether he knew the person was there or not; and if he could have seen such person by ordinary care, but failed to do so, then the company would still be liable for any injury sustained as the proximate result of such negligence.

"(3) Because his honor modified the plaintiff's seventh request, which is as follows: 'Seventh. That if the jury believe from the evidence that the plaintiff was put off the defendant's car by its agents and servants, and left in a dangerous position in the nighttime, where it might reasonably be supposed injury would result, while in such a condition from drunkenness or other cause that he was unable to appreciate danger, or to avoid it, and such servants knew, or ought to have known, of his condition from all the circumstances, then the defendant company could not successfully plead contributory negligence on the part of such person.' His honor modified the same by leaving off this clause, 'even if he was lying on the track in a drunken condition.' It is respectfully submitted that the request as it stood as a whole was a sound proposition of law, and that plaintiff should have been allowed the benefit thereof, for it is a principle of law that, where the dangerous situation of a person is brought about through the wrongful acts of another, the latter cannot charge the former with negligence for what his own wrong has brought about.

"(4) Because his honor, the presiding judge, erred in modifying the plaintiff's tenth request to charge, which is as follows: 'The jury is further charged that if they find from the evidence that the defendant knew,

or as reasonably prudent men ought to have known from all the circumstances, that the plaintiff was in such a condition as to be unable to take care of himself from any cause, or was likely to become helpless, but, notwithstanding the same, ejected and left him in an apparently dangerous position on its railway track, where it was probable that he might sustain injury from other cars passing along the same, and if any injury resulted under these circumstances you cannot find that the plaintiff was guilty of contributory negligence for being on the track in such a condition.' His honor modified the same as follows: 'I charge you that with this modification, that if you find from the evidence that the defendant knew that the plaintiff was in such a condition as to be unable to take care of himself from any cause, but notwithstanding the same ejected him and left him in an apparently dangerous position on its railway track where it was probable he might sustain injury from other cars passing along and over said railway track, and injury resulted under these circumstances, you cannot find that the plaintiff was guilty of contributory negligence by being on the track in such a condition. I charge you that, in addition to the charge that if the motorman on this car knew that this man was or would be in a helpless condition, then he owed him due care, and not only due care, but he owed him the duty of course not to willfully injure him.' His honor erred in modifying the same for the following reasons: (1) That said request was a sound proposition of law and should have been charged as it stood. (2) That said modification deprived the plaintiff of one phase of the law, namely, that if the defendants, as reasonably prudent men, ought to have known from all the circumstances that the plaintiff was unable to take care of himself, or was likely to become so, then they would be liable for wrongfully ejecting him in a dangerous place under these circumstances; whereas, his honor's modification made the duty of the company depend on actual knowledge—that is, the defendants must have known that the plaintiff was in such a condition.

"(5) Because his honor violated section 26, art. 5, of the Constitution of 1895, by charging on the facts when he submitted the defendant's second request to charge, which is as follows: (2) The jury is further charged that, if you find that the plaintiff's injury was not the proximate result of any negligence or fault on the part of the defendant's agents or servants, but was the proximate result of his own carelessness and negligence in going upon the track of the defendant and lying down thereon in an intoxicated condition or otherwise, then your verdict should be for the defendant.' For it is submitted that he intimated his opinion to the jury that the plaintiff had done certain acts and could not recover if the injury

was 'the proximate result of his own carelessness and negligence in going upon defendant's track and lying down thereon in an intoxicated condition or otherwise,' for it is submitted that he should not have stated the fact that the plaintiff went upon the defendant's track and lay down thereon in an intoxicated condition or otherwise.

"(6) Because his honor, the presiding judge, erred in not modifying the defendant's fifth request to charge, which is as follows: 'The jury is further charged that, if you find that the plaintiff was a trespasser down drunk or asleep upon defendant's track, then the defendant owed him no duty except not to willfully injure him, so I charge you that if the plaintiff was a trespasser on the defendant's track, and the motorman did all he could to avoid injuring him after he discovered him, then the plaintiff cannot recover.' For it is respectfully submitted that, as hypothetical facts fitting the true facts in the case were used in this request, it is the duty of the court to explain to the jury what a trespasser in law was, and his failure to explain the same could not but help mislead the jury; and he should have also advised the jury of the different duties that the motorman is bound to exercise when approaching a person in a helpless condition at a crossing as distinguished from a person drunk or asleep on the track at some other place than a crossing.

"(7) Because his honor, the presiding judge, erred in charging the defendant's eighth request, which is as follows: 'While a traveler on a public highway that crosses a railway track has the right to be at and upon such crossing for the purpose of passing over the same in the due course of travel, if in the exercise of that care and diligence required by law at such places, he has no right to make a camping ground or bed of such crossing and to rest or go to sleep thereon. A person undertaking to so use the highway at the point where the railway track crosses it would be as much a trespasser relatively to the railroad company as though he were camping or sleeping upon the track at a place other than the crossing, and relatively to such trespasser upon the track of a railway company, even though it be at a public crossing, there is no duty on the part of the trainmen to take special precaution to avoid injuring such trespasser upon its track until the presence of the trespasser becomes known. It is not enough that the trespasser might have been seen by the engineer or motorman in time to have avoided injuring him, but it must be made to appear that he was seen.' His honor modified this, but in such manner as not to change the effect of the request, which is as follows: 'I charge you that, and that is the law, of course, modified by the charge that I have already made as to special notice. If this motorman had special notice, as al-

leged in the complaint, that this man was on the track, it was his duty to keep a lookout and avoid injuring him, if by the use of ordinary care and prudence he could have avoided injuring him.' It is respectfully submitted that said request and the modifications thereof are both erroneous.

"(8) Because his honor violated section 26, art. 5, of the Constitution of 1895 of South Carolina, by inferring for the jury what facts would practically amount to negligence as would bar the plaintiff's recovery when he instructed them in this language: 'He has no right to make a camping ground or bed of such crossing and to rest or go to sleep thereon. A person undertaking to so use the highway at the point where the railroad track crosses it would be as much a trespasser relatively to the railroad company as though he were camping or sleeping on the track at a place other than the crossing.' For it is submitted that the law required his honor to charge what duties the railroad owes to helpless people at a public crossing, or other place along its track, and, if he infers that certain acts or conduct on the part of a person at a public crossing constitutes a trespass, he has drawn an inference for the jury in violation of the law. Secondly. It was error to instruct the jury 'that a person undertaking to so use the highway at the point where the railroad track crosses it would be as much a trespasser relatively to the railroad company as though he were camping or sleeping on the track at a place other than the crossing.' For it is respectfully submitted that it is the duty of a carrier to exercise ordinary care in approaching a public crossing so as to avoid injuring persons in an apparently helpless condition on said railway crossing, while the law charged by his honor should have been applicable only to a trespasser at some other place on the track than a crossing or traveled place.

"(9) Because his honor, the presiding judge, erred in charging the defendant's ninth request, which is as follows: '(9) If you believe that, after being lawfully ejected from the car, plaintiff was removed, or himself walked to a safe distance from the track, and the car moved on with its passengers, and the plaintiff subsequently came back upon the track at that place or some other place and lay upon the same in an insensible state of intoxication, whether on or off a public crossing, I charge you as matter of law he was a trespasser, and as such the defendant owed him the duty alone not to willfully or wantonly injure him.' For it is respectfully submitted that his honor violated section 26, art. 5, of the Constitution of 1895, prohibiting judges from charging on the facts, for the reason that he thereby drew a conclusion for the jury as to what a trespasser is when he told them as matter of law what would constitute a trespasser; whereas, he should have defined a trespasser,

and leave it to the jury to say from the facts and circumstances whether such person was a trespasser. Secondly. Because his honor erred in stating the degree of care that a carrier owes to a person lying down insensible on its track at a public crossing. He should have advised them that the carrier under these circumstances is bound to exercise ordinary care in approaching the public crossing so as to avoid injuring a person in a helpless condition thereon, and it would owe this duty whether it knew the party was there or not.

"(10) Because his honor, the presiding judge, erred in refusing to allow counsel for the plaintiff, in his argument to the jury, to either read or comment upon the order of Judge Watts setting aside a verdict at a former trial, for it is submitted that said order was a part of the record in this case, and plaintiff's attorneys had full right to comment upon and explain to the jury any of the records in said case under proper instructions from the court as to their weight.

"(11) Because his honor, the presiding judge, erred and committed an abuse of discretion in stopping plaintiff's counsel in the midst of his argument to the jury and prohibiting him from making further remarks or comments on the failure of the defendant's attorneys to introduce in evidence the testimony of one of their witnesses, Conductor Grimes, taken at the previous trial, and which the plaintiff's counsel had offered to allow in evidence under the rules applicable to the same. For it is submitted that plaintiff's counsel, so long as he does not abuse or use improper language, had full right to comment upon the withholding of any testimony from the jury by the opposite side."

J. B. Salley, Boykin Wright, and George T. Jackson, for appellant. Croft & Croft, for respondent.

GARY, A. J. This is an action for actual and punitive damages, alleged to have been sustained by the plaintiff through the negligence and wantonness of the defendant. The complaint alleges that on the 22d of September, 1906, the plaintiff became a passenger on the defendant's car at Augusta, Ga., for the purpose of being carried to Langley, S. C.; that, soon after the car had started, the plaintiff became so incapacitated as to be utterly helpless, and was forcibly ejected and left in a dangerous place by the defendant; that the defendant warned its servants to look out for the plaintiff, while operating its other cars over said track; but that they negligently and wantonly failed to keep a proper lookout for the plaintiff, in consequence of which one of its cars ran over his arm, thereby rendering amputation necessary. The defendant denied the allegations of negligence and wantonness, and for a defense alleged: "That, at the time men-

tioned in the amended complaint, plaintiff was a passenger on a car of the defendant's railroad in Aiken county, S. C., and being guilty of disorderly conduct, and drawing a knife, and therewith threatening the agents of defendant, and cursing, to the terror, annoyance, and vexation of a large number of other passengers on said car, the conductor of said car stopped his train, where such offense was committed, and ejected said plaintiff from said car, using only such force as was necessary to accomplish such removal." The defendant also set up the defense of contributory negligence. The jury rendered a verdict in favor of the defendant, and the plaintiff appealed upon exceptions, which will be reported.

[1] The first question that will be considered is whether there was error, on the part of his honor the presiding judge, in charging the jury that if the plaintiff was injured at a highway crossing, while in a helpless condition of intoxication, the defendant was not bound to keep a lookout, and owed him no duty (except not to injure him willfully or wantonly), unless it knew that he was in a helpless condition.

In the case of *Jones v. Railroad*, 61 S. C. 556, 39 S. E. 758, the court stated the principle as follows: "Even though the use of the track by the public as a walkway was not for such length of time nor of such character as to give a legal right to so use the track, and even though the evidence fell short of showing any positive consent to such use by the company, yet if there was evidence tending to show knowledge of and acquiescence in such use, without protest, such evidence would tend to show that the railroad company had much reason to expect the presence of persons on the track, who were there, not as bald trespassers, but using it with the knowledge and acquiescence of the (railroad) company. Under such circumstances, it would be the duty of the railroad company to keep a reasonable lookout, or to give warning of the approach of the train, or generally to observe ordinary care, under the circumstances, to avoid injury."

This language was quoted with approval in the case of *Sentell v. Railway*, 70 S. C. 183, 49 S. E. 215, in which the court held that: "Where a person is sitting on the end of a cross-tie, with his head in his hands, and his feet in a path along the track, which pedestrians had been using as a walkway for more than 20 years, without objection of the railway company, at a point on the track, at which he could have been seen by the engineer, for some distance before reaching him, it is proper to refuse a nonsuit, and to submit to the jury the questions of the relation of the deceased to the company, and whether there was negligence on part of engineer in striking him with his engine, and whether it was duty of engineer to keep a lookout." (Syllabus.)

If, as is alleged, the plaintiff in the pres-

ent case was on the highway crossing at the time of the injury, then there was even a greater necessity for the defendant to keep a proper lookout than in the cases just mentioned.

The exceptions raising this question are sustained.

[2] Exceptions 10 and 11 cannot be sustained, as it has not been made to appear that there was an abuse of discretion on the part of the presiding judge.

These conclusions practically dispose of all the questions involved.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

JONES, C. J., and WOODS and HYDRICK, J.J., concur.

(39 S. C. 303)

STATE v. KELLY.

(Supreme Court of South Carolina. July 14, 1911.)

1. INDICTMENT AND INFORMATION (§ 176*)—REQUISITES—DATE OF OFFENSE.

Act March 2, 1909 (26 St. at Large, p. 64) § 11, imposing a greater penalty for a second or any subsequent offense, does not change the rule that, where time is not of the essence of the offense, it is not necessary to prove the precise day alleged in the indictment, but proof that the offense was committed on any other day before the finding of the indictment sustains a conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 548; Dec. Dig. § 176.*]

2. INDICTMENT AND INFORMATION (§ 176*)—REQUISITES—DATE OF OFFENSE.

Where time is made an essential element of an offense by being made descriptive of it, the state must prove it as alleged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 548; Dec. Dig. § 176.*]

3. INTOXICATING LIQUORS (§ 174*)—ILLEGAL SALES—SEPARATE OFFENSES.

Each sale of whisky is a separate and distinct offense for which accused may be convicted.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 194; Dec. Dig. § 174.*]

4. CRIMINAL LAW (§ 739*)—FORMER JEOPARDY—QUESTION OF FACT.

Where two or more offenses of the same character are alleged in different indictments, the question whether they are the same or different offenses may become a question for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1710; Dec. Dig. § 739.*]

5. CRIMINAL LAW (§ 1163*)—APPEAL.

Where indictments charged sales of whisky on October 15th and on June 23d following, respectively, and the extent of a variance in the proof as to the date alleged in the first indictment was not disclosed, and the record did not show whether the indictments were found at the same or at different terms of court, accused, complaining of a conviction under the

first indictment, had the burden of showing that the variance was prejudicial to him.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1163.*]

6. CRIMINAL LAW (§ 1163*)—FORMER JEOPARDY—QUESTION OF FACT.

Where indictments charged sales of whisky on October 15th and June 23d following, respectively, and the extent of a variance between the proof as to the date alleged in the first indictment was not shown, and the record did not state whether the two indictments were found at the same or at different terms of court, accused could not complain of a charge that the jury might convict under the first indictment on proof of a sale on any day previous to the filing thereof without showing prejudicial error, which he could not, if the first indictment was found at one term and the other at a subsequent term.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1163.*]

7. CRIMINAL LAW (§ 1211*)—INDICTMENT AND INFORMATION (§ 114*)—PUNISHMENT—SECOND OR SUBSEQUENT OFFENSE—STATUTES.

An indictment need not allege that the offense charged is a second or subsequent offense to authorize the court to impose an increased punishment for a second or subsequent offense authorized by Act March 2, 1909 (26 St. at Large, p. 64) § 11, nor is proof of that fact beyond the record of the former conviction before the court, the two indictments having been tried on succeeding days before the same court, essential to justify the imposition of such punishment.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1211;* Indictment and Information, Cent. Dig. §§ 301-307; Dec. Dig. § 114.*]

Appeal from General Sessions Circuit Court of Sumter County.

"To be officially reported."

W. P. Kelly was convicted of selling whisky, and he appeals. Affirmed.

John H. Clifton, for appellant. P. H. Stoll, for the State.

HYDRICK, J. This case was submitted at the November term, 1910. The appeal was dismissed without consideration of the merits, because appellant's attorney filed no argument. 71 S. E. 29. At the June term, 1911, appellant's attorney moved the court to reinstate the appeal. Having satisfactorily excused his failure to file an argument, the motion was granted, and he was allowed to file an argument.

The appeal was heard on the following agreed statement of facts: "That the defendant, W. P. Kelly, was tried on June 30, 1910, for selling whisky on October 15, 1909, and was tried on July 1, 1910, for selling whisky on June 23, 1910; the dates of the alleged sales being set out in the indictments, as above. There was a variance as to the date alleged in the indictment alleging October 15, 1909. The defendant was given an alternative sentence in the case tried June 30, 1910, and was sentenced in the case tried July 1, 1910, to one year's imprisonment; this offense being treated as the second or subsequent offense under Acts 1909, p. 64.

It is admitted that the counsel for the defendant contended in each case that, by reason of the act of 1909, the date of sale was material, and that it must be proved, and that the date of sale determined the second or subsequent offense, and not the trial of the offense. The trial judge held to the contrary. It is further agreed that, during the trial, commenced June 30, 1910, the following occurred: 'Mr. Clifton (during argument by the solicitor): We object to what the grand jury did. That is a one-sided investigation. The Court: The fact remains that the grand jury presented him. Mr. Clifton: We object to discussing what the grand jury did in the matter, because the defendant had no opportunity of meeting the witnesses there. We are willing to meet them all before this jury. Solicitor: I say the grand jury have done their duty, and the question is now up to you to decide.' It is agreed that the two cases against the defendant, Kelly, are to be heard on appeal together. It is further agreed that sentence in each case was pronounced on the same day, July 9, 1910, and that there was no allegation in either indictment that the offense therein referred to was a first, second, or subsequent offense, and that this objection was made by defendant's counsel before sentence."

Section 11 of the act of 1909 reads as follows: "Any person who violates any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, be fined in a sum not less than one hundred dollars nor more than five hundred dollars, or imprisoned at hard labor for a period of not less than three months, nor for more than one year; and for the second or any subsequent offense, upon conviction thereof, shall be imprisoned at hard labor for not less than one year nor more than five years."

To prevent confusion, we will dispose of the two cases separately.

Case Tried June 30, 1910.

[1] The first exception assigns error in not charging that, under the act of 1909, it was necessary for the state to allege and prove a particular date, because the act provides for an increase of the punishment for the second or any subsequent offense. That provision of the act does not change the well-settled rule that, where time is not of the essence of the offense charged, it is not necessary to prove the precise day alleged in the indictment, but proof that the offense was committed on any other day before the finding of the bill will be sufficient to sustain a conviction. *State v. Anderson*, 3 Rich. 172; *State v. Prater*, 59 S. C. 271, 37 S. E. 933; *State v. Green*, 61 S. C. 12, 39 S. E. 185.

[2] But, where it would not otherwise be so, time may be made an essential element of the offense by being made descriptive of it; in that event, the state must prove it as al-

leged. *State v. Van Buren*, 86 S. C. 297, 68 S. E. 568. But in the administration of the law, and in the application of that rule of evidence, care must always be taken to properly safeguard the right of the citizen that he shall neither be put in jeopardy nor punished twice for the same offense.

[3] In this state, each sale of whisky is a separate and distinct offense for which the guilty party may be convicted and punished. *State v. Cassety*, 1 Rich. 90; *State v. Anderson*, 3 Rich. 172; *State v. Steedman*, 8 Rich. 312.

[4] Therefore, when two or more offenses of the same character are alleged in different indictments, whether they are the same or different offenses may become a question of fact, to be tried by a jury, if demanded. *State v. Dewees*, 76 S. C. 72, 56 S. E. 674.

[5] It is stated in the record that there was a variance in the proof as to the date alleged in this indictment. But the extent of the variance is not stated. The proof of sales may have varied from the date alleged only one or two days, or as many weeks. The evidence is not before us, and we cannot say that the variance was prejudicial to any right of appellant. The burden is upon him to show that it was. Neither does the record state when the indictments were found—whether at the same or at different terms of court.

[6] The court charged that the jury might convict on proof of a sale on any day previous to the finding of the bill. If the bill in this case was found at the spring term and the other at the summer term, clearly the defendant was not prejudiced by that instruction. It is not only incumbent upon an appellant to show error, but he must also show that he was prejudiced by it. In *State v. Hunter*, 71 S. E. 823, filed July 3, 1911, the defendant was tried on two indictments at the same time, both of which were found at the same term. One charged him with selling liquor on the 11th and the other on the 15th of the same month. He was convicted on both. There was such a variance in the evidence that it would have been sufficient to sustain a conviction on either indictment. Therefore it was held that both convictions could not be sustained, and that it was proper to impose sentence in only one case.

The second exception complains of error and prejudice in the ruling of the court as to the remarks of the solicitor during his argument. We see nothing in either which could have prejudiced appellant's case.

Case Tried July 1, 1910.

The first and second exceptions in this case make the same point that was disposed of under the first exception in the other case.

[7] The third exception assigns error in imposing the punishment provided by the statute for a second or subsequent offense in

this case, when there was no allegation in the indictment that it was a second or subsequent offense, and no proof of that fact. It is not necessary that the indictment should contain such an allegation. *State v. Parris*, 71 S. E. 808, filed July 3, 1911. The record of the former conviction was before the court, and, the defendant having been convicted for both offenses before the same judge, no further proof was necessary.

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(39 S. C. 415)

SMITH v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. July 31, 1911.)

1. CARRIERS (§ 185*)—LIABILITY OF TERMINAL CARRIER—PRESUMPTIONS.

Where the terminal carrier received and delivered a part of a shipment, the presumption was that it received the entire shipment, and, to escape liability, it must rebut the presumption.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 837; Dec. Dig. § 185.*]

2. EVIDENCE (§ 171*)—SECONDARY EVIDENCE—CONTENTS OF WRITTEN INSTRUMENTS.

The testimony of a consignee, suing a terminal carrier for failure to deliver all the property described in the bill of lading, that in reliance on the bill he paid a draft drawn on him by the shipper, was admissible as against the objections that the draft was the best evidence, since parol evidence of a writing which is only collateral to the issue is admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 460, 528; Dec. Dig. § 171.*]

3. CARRIERS (§ 228*)—TERMINAL CARRIER—ESTOPPEL—EVIDENCE.

Where the terminal carrier delivering to the consignee 127 hogs, while the bill of lading called for 157, sought to escape liability for the shortage by proving that the car contained only 127 hogs when received by it, evidence that the consignee in reliance on the bill of lading paid a draft drawn on him by the shipper for 157 hogs, was relevant on the issue of estoppel to deny the bill of lading.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 959; Dec. Dig. § 228.*]

4. CARRIERS (§ 52*)—BILL OF LADING—ESTOPPEL.

A carrier issuing a bill of lading for a specified quantity of freight is estopped to deny the receipt of such freight as against a consignee in good faith relying on the statement of the bill of lading, paying a draft drawn on him by the shipper for the quantity of freight designated in the bill of lading.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 150, 151; Dec. Dig. § 52.*]

5. CARRIERS (§ 173*)—CONTRACTS BY INITIAL CARRIER—LIABILITY OF CONNECTING CARRIER.

Where a traffic agreement between initial and connecting carriers made them partners in the carriage of freight or agents of each other, the connecting carrier is estopped from denying the recitals in a bill of lading in any case the initial carrier is estopped.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 781; Dec. Dig. § 173.*]

6. PARTNERSHIP (§ 49*)—PRINCIPAL AND AGENT (§ 22*)—TRAFFIC ARRANGEMENTS BETWEEN CARRIERS—EVIDENCE.

A bill of lading issued by an initial carrier for through shipment, which discloses a traffic arrangement between it and the connecting carrier so as to make them partners in the transaction or agents of each other, is inadmissible against the connecting carrier to establish such relation because the bill is only the declaration of the initial carrier that such relation exists.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 67-73; Dec. Dig. § 49.* *Principal and Agent*, Cent. Dig. § 40; Dec. Dig. § 22.*]

7. CARRIERS (§ 185*)—INITIAL AND CONNECTING CARRIERS—TRAFFIC ARRANGEMENTS—EVIDENCE.

That a shipment was accepted and forwarded on a through rate does not prove the existence of a traffic arrangement between the initial and connecting carriers such as to make them partners in the transportation of the goods or as agents of each other, but it may be considered in connection with other evidence on the issue.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 848; Dec. Dig. § 185.*]

8. CARRIERS (§ 173*)—CONNECTING CARRIERS—LIABILITY.

A connecting carrier which has no traffic arrangement with an initial carrier so as to make the carriers partners or agents of each other, is not estopped by the recitals of a bill of lading issued by the initial carrier and it may show that the bill of lading erroneously states the quantity of freight received for transportation, the common law not imposing on the connecting carrier any liability for mistakes of the initial carrier in issuing bills of lading.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 781; Dec. Dig. § 173.*]

9. CARRIERS (§ 172*)—INTRASTATE COMMERCE—STATUTES—APPLICABILITY.

Act May 13, 1903 (24 St. at Large, p. 1), making connecting carriers agents of each other applies only to intrastate shipments.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 99, 743-746; Dec. Dig. § 172.*]

10. CARRIERS (§ 20*)—LOSS OF FREIGHT—STATUTORY PENALTY.

Under the statute authorizing the recovery of a penalty for a carrier's failure to pay loss of freight, one must show that the loss occurred while the freight was in possession of the carrier, and that he is entitled to the full amount of his claim.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 43, 44; Dec. Dig. § 20.*]

Appeal from Common Pleas Circuit Court of Abbeville County; John S. Wilson, Judge.

"To be officially reported."

Action by Enoch Smith against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Frank B. Gary, for appellant. Wm. N. Graydon, for respondent.

HYDRICK, J. On January 28, 1909, M. A. Butler shipped a car load of hogs from Morrison, Tenn., to plaintiff at Columbia, S. C. The car passed over the lines of four connecting carriers, defendant being the last. The receiving carrier, the Nashville, Chat-

tanooga & St. Louis Railway, issued a bill of lading, receipting for 157 hogs. When the car arrived at destination, it contained only 127 hogs. Plaintiff filed a claim with defendant for \$150, for the loss of 30 hogs at \$5 each, the value stipulated in the bill of lading, in case of loss. Defendant failing to pay the claim, this action was brought to recover the amount, together with \$50, the statutory penalty for failure to pay the claim within the time prescribed by the statute.

[1] Having received and delivered part of the shipment, the presumption arose that defendant received the entire shipment. *Walker v. Railway*, 76 S. C. 308, 56 S. E. 952; *Bradley v. Railroad Co.*, 77 S. C. 317, 57 S. E. 1101. But the presumption may be rebutted. *Bradley v. Railway*, supra; *McMeekin v. Railway*, 85 S. C. 381, 67 S. E. 745. Defendant undertook to rebut it, and discharge itself from liability by proving that the car contained only 127 hogs, when received by it, and introduced testimony tending to prove that fact. Plaintiff contended that defendant was estopped to deny the recital in the bill of lading that the car contained 157 hogs.

[2] Over defendant's objection, plaintiff was allowed to testify that, in reliance upon the bill of lading, he paid a draft made on him by Butler for 157 hogs. The contention that this evidence was incompetent, because the draft was the best evidence, cannot be sustained. The contents of the draft were not involved in the testimony. The mention of the draft was merely incidental, as showing the method of payment. But it was competent for plaintiff to say that he paid for 157 hogs, without reference to the mode of payment. Besides, parol evidence of a writing which is only collateral to the issue is admissible. *Elrod v. Cochran*, 59 S. C. 467, 38 S. E. 122.

[3] The other ground of objection that the evidence was irrelevant is also untenable. It was relevant upon the issue of estoppel.

[4] If defendant had issued the bill of lading, it would have been estopped to deny that the car contained 157 hogs, as against a consignee or transferee of it, who, in good faith relying upon the representation therein contained, had incurred loss or liability. *Thomas v. Railroad Co.*, 85 S. C. 537, 64 S. E. 220, 67 S. E. 908.

[5] If there was a traffic arrangement between defendant and the initial carrier which would make them partners in the carriage of goods, or agents of each other, defendant would be estopped under the same facts which would raise an estoppel, if it had issued the bill of lading itself. *Bradford v. Railroad Co.*, 7 Rich. 207, 62 Am. Dec. 411; 6 Cyc. 478. The act of the agent is the act of the principal. The bill of lading points to such an agreement.

[6] It does not purport to be an agreement only between the receiving carrier and the shipper, but it states that it is made between

the receiving carrier and its connecting lines of the first part and the shipper of the second part; and it recites that the receiving carrier "*and its connecting lines as common carriers transport live stock only as per above tariff.*" Throughout the agreement the receiving carrier and its connecting lines are referred to as the party of the first part. There are other features of the contract which point in the same direction. The bill of lading would, therefore, be evidence against the carrier which issued it that its connecting carriers were its agents. But it is no evidence against a connecting carrier, because it is only the declaration of the initial carrier that such relation exists.

[7] Neither does the fact that the shipment was accepted and forwarded on a through rate prove the existence of such relation, though that is a circumstance which may be considered in connection with other evidence upon the point. *Bradley v. Railroad Co.*, supra.

[8] Where no such relation is proved as would entail liability on the connecting carrier for the conduct of the receiving carrier, the former is not estopped by the recitals in a bill of lading issued by the latter. In *Lewis v. Railroad Co.*, 25 S. C. 249, it was held that the initial carrier could not, without special authority, make a contract binding upon the terminal carrier. The common law does not impose liability on a connecting carrier for the mistake of the initial carrier in issuing a bill of lading. *Reynolds v. Railway*, 81 S. C. 383, 62 S. E. 445.

[9] The act of 1903 (24 St. at Large, p. 1) makes connecting carriers agents of each other, but that act applies only to intrastate shipments. *Venning v. Railway*, 78 S. C. 42, 58 S. E. 983, 12 L. R. A. (N. S.) 1217, 125 Am. St. Rep. 768. The burden was upon the plaintiff to prove the facts necessary to raise the estoppel. Having failed to prove the necessary relation between the receiving carrier and defendant, it follows that the court erred in charging the jury that if defendant accepted the shipment under the bill of lading, it was estopped to deny the recital therein.

[10] The court also erred in charging that, if plaintiff filed his claim with defendant's agent at Columbia, and defendant failed to pay it within 90 days, plaintiff was entitled to recover the amount of the claim and interest thereon, and \$50 as penalty for defendant's failure to pay the claim within the time prescribed. Under the terms of the statute, plaintiff was not entitled to recover the penalty, unless he recovered the full amount of his claim; nor unless the claim was "for loss or damage to property while in the possession of such common carrier." *Venning v. Railway*, supra; *McMeekin v. Railway*, supra.

Reversed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 398)

FARMERS' & SPINNERS' CO. v. ATLANTIC COAST LINE R. CO.

(two cases).

MIDDLETON & RAVENEL v. SAME

(two cases).

(Supreme Court of South Carolina. July 31, 1911.)

1. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS—LEGAL ACTIONS.

In legal actions, the Supreme Court cannot review the findings of the circuit court unless there is no evidence to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. EQUITY (§ 405*)—MASTER'S RULINGS—EXCEPTIONS.

A ruling of the master in chancery not excepted to is the law of the case.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 405.*]

3. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—RULINGS OF MASTER.

Error of the circuit court in overruling the ruling of a master in chancery in an action for damages for delay in transportation that defendant could show under the general denial that the delay was caused by an unusual amount of business was not prejudicial to defendant where the court in fact considered that defense, and sustained the master's finding that it was not sustained.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1039.*]

4. CARRIERS (§ 176*)—FREIGHT—CONNECTING CARRIERS—DELAY IN DELIVERY.

The fact that a part of a delay in delivering freight occurred while it was in the possession of a terminal company at destination, would not relieve the delivering carrier from liability though such carrier charged and collected for delivery at the place of delivery and actually delivered it there, under Act May 13, 1903 (24 St. at Large, p. 1), making connecting carriers agents of each other, and making either liable for all damages for delay in delivery, etc., caused by any of them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 766-774; Dec. Dig. § 176.*]

5. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS—DAMAGES.

Where it was found, in an action for damages for delay in delivering cotton, that the price tended to decline from the time of the delivery until the cotton was actually sold, and that the loss sustained by plaintiff was greater than that actually proved, error in instructing that the measure of damages was the difference between the market price of cotton on the day the shipment should have been delivered and the day it was delivered was not prejudicial to defendant railroad company.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

Appeal from Common Pleas Circuit Court of Charleston County; Robt. Aldrich, Judge.

"To be officially reported."

Actions by the Farmers' & Spinners' Company and by Middleton & Ravenel against the Atlantic Coast Line Railroad Company. From judgments for plaintiffs, defendant appeals. Affirmed.

Mordecai & Gadsden and Rutledge & Haggood, for appellant. Legare & Holman, for respondents.

HYDRICK, J. These actions were brought to recover damages for unreasonable delay in the transportation and delivery of cotton consigned to plaintiffs, who are engaged in the business of buying and selling cotton. The complaint contained the usual allegations in such cases. The answer was a general denial.

[1] It will be observed that these are actions at law, in which this court has no jurisdiction to review the findings of the circuit court, unless there is no evidence to support them, and none of them are questioned on that ground. The issues of law and fact were referred to the master, whose report, in favor of plaintiffs, was confirmed and made the judgment of the court.

The master ruled that, under the general denial, defendant could avail itself of the defense that the delay was caused by a sudden and unusual press of business, arising from exceptional causes, which it could not reasonably be expected to have anticipated. But, having admitted the evidence on that issue he held that it failed to establish the defense. The plaintiffs did not except to the ruling of the master that the defense was available to defendant under the pleadings. The defendant did except to his finding that it was not sustained by the evidence. The circuit court sustained the master's finding, but held, also, that the defense could not avail defendant, because it had not been pleaded.

[2] The ruling of the master, to which no exception was taken, concluded the question, and became the law of these cases whether he was right or wrong. But see *Gibson v. R. Co.*, 88 S. C. 360, 70 S. E. 1030.

[3] However, the error of the circuit court, in overruling the master on that point, was not prejudicial to defendant, because the court did consider the defense on its merits and sustained the master's finding that it was not established by the evidence.

The cotton was consigned to plaintiffs at Charleston. Defendant's freight depot is at Chapel street, about one mile from the wharf of the Charleston Compress, at which point, the master finds it was, and for several years had been, the invariable custom of defendant to deliver cotton, consigned to plaintiffs and others at Charleston. The wharf was reached over the rails of the Charleston Terminal Company, with which defendant had an agreement for the transportation of cotton to the wharf, defendant paying the Terminal Company eight cents per bale out of the freight charges paid by the shippers. In other words, defendant charged and collected a rate for the delivery of the cotton at

the Charleston Compress, and actually delivered it there. These findings dispose of the assignment of error in holding that the wharf was the place of delivery.

[4] But, even if part of the delay did occur while the cotton was in the possession of the Terminal Company, the defendant would be liable for such delay, under the act of 1903, without regard to the facts above stated. 24 St. at Large, p. 1; *Venning v. R. Co.*, 78 S. C. 42, 58 S. E. 983, 12 L. R. A. (N. S.) 1217, 125 Am. St. Rep. 768; *Reynolds v. Railway*, 81 S. C. 383, 62 S. E. 445. There is no force in the contention that the agreement to deliver at the wharf was a separate contract and should have been sued on in a separate action, because the court found that the agreement to deliver at Charleston was, in contemplation of the parties, an agreement to deliver at the wharf in Charleston.

[5] In view of the finding that the price of cotton continued to decline from the time delivery of the consignments in these cases was made, until the cotton was actually sold, and the finding that the loss sustained by plaintiffs was greater than that actually proved, there was no prejudicial error in holding that the measure of damages in these cases was the difference between the market price of cotton on the day the shipments should have been delivered and the day they were delivered. It is not necessary, therefore, to consider whether the rule stated for the measure of damages in these cases is one to be applied in all cases for delay in the delivery of freight.

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 420)

WARREN et al. v. WILSON.

(Supreme Court of South Carolina. June 6, 1911.)

APPEAL AND ERROR (§ 832*)—REHEARING—GROUNDS—DEFECTS RELATING TO RECORD.

Where a case was reversed and remanded on two different assignments of error, that one assignment of error was sustained, under a misapprehension of the state of the record, cannot change the result or warrant a rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.*]

On petition for rehearing. Dismissed.

For former opinion, see 71 S. E. 818.

PER CURIAM. This is a petition for rehearing, one of the grounds being as follows: "Because the Supreme Court overlooked and disregarded a material fact, when it decided that the circuit judge erred in not allowing the plaintiffs to introduce in evidence a written title deed, not signed, to the premises, the subject of the action, from G. H. Warren

to G. L. Warren, dated the 22d day of November, 1904, alleged to have been written by the defendant."

Prior to the hearing of the case in the Supreme Court on the merits, plaintiffs' attorneys made a motion to recommit the case, for the purpose of amending the record in certain particulars, one of which was by inserting the statement mentioned in the opinion touching this question. All the proposed amendments were allowed except that which sought a correction of the record, regarding the refusal to allow the introduction in evidence of the unsigned deed. The writer of the opinion was under the erroneous impression that it had been allowed. This error cannot, however, have the effect of changing the conclusion announced in the opinion, as there was another assignment of error, which was sustained, as to which no material question of law or of fact was either overlooked or disregarded. The opinion was not erroneous in any other respect than that hereinbefore mentioned.

It is therefore ordered that the appeal be dismissed, and that the order heretofore granted staying the remittitur be revoked.

HYDRICK, J., did not sit in this case.

(89 S. C. 371)

ROOKARD v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of South Carolina. July 24, 1911.)

1. JUDGMENT (§ 883*)—SET-OFF OF JUDGMENTS—COSTS.

Civ. Code 1902, § 2852, requires every action for death to be for the benefit of decedent's wife or husband and child, and provides that the amount recovered shall be divided among all parties in such shares that they would have been entitled to if decedent had died intestate, and the amount recovered had been personal assets of his estate, and section 2853 makes the administrator, plaintiff in the action, liable to costs upon verdict for defendant or nonsuit out of intestate's property, if any, "and if none, out of the proper goods and chattels of such executor and administrator"; the quoted words being omitted by amendment of 1903 (24 St. at Large, p. 96). Code Civ. Proc. 1902, § 330, provides that in an action prosecuted by an administrator, etc., costs shall be recovered as in an action by or against a person prosecuting or defending in his own right, which costs shall be chargeable only upon the estate or party represented, unless the court directs them to be paid by plaintiff or defendant personally for bad faith in the action. *Held*, in an administrator's action for death by wrongful act, decedent leaving no estate, that judgment for defendant for the costs of an appeal could be deducted from the amount recovered by plaintiff at a subsequent trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1671, 1675; Dec. Dig. § 883.*]

2. STATUTES (§ 225*)—CONSTRUCTION—RELATED STATUTES.

All sections of a statute relating to the same subject which were re-enacted in the Code

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

should be construed together so as to harmonize them, if possible.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 303; Dec. Dig. § 225.*]

3. STATUTES (§ 159*)—REPEAL—CONFLICTING STATUTES.

Where two statutes conflict, the last enacted controls.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 229, 231; Dec. Dig. § 159.*]

4. JUDGMENT (§ 883*)—SET-OFF OF JUDGMENTS—PROCEEDINGS.

Defendant, in a death action by an administrator, need not serve a rule requiring plaintiff to show cause why defendant's judgment for costs on a former appeal should not be set off against plaintiff's judgment on a second trial, upon the widow and children, the parties ultimately entitled to the fund; they being represented by the administrator.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1682; Dec. Dig. § 883.*]

5. EXEMPTIONS (§ 113*)—NATURE OF PROCEEDING—SET-OFF.

Under the Constitution and laws providing that \$500 worth of personalty shall be exempt from "attachment, levy and sale under any mesne or final process" issued to the head of a family, a judgment for defendant for the costs of an appeal, upon reversing a judgment for plaintiff in an administrator's action for negligent death, cannot be set off against the interests of intestate's widow and children in a subsequent judgment for plaintiff, an order of set-off being merely another mode of execution, and hence their interests are exempt, they being heads of families, the principle that one seeking equity must do equity not applying, because such persons are not actively invoking the aid of equity.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 134; Dec. Dig. § 113.*]

6. EXEMPTIONS (§ 4*)—CONSTRUCTION—STATUTES.

As a rule, exemption statutes are considered remedial and are liberally construed to advance the remedy and suppress the mischief.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 4; Dec. Dig. § 4.*]

7. JUDGMENT (§ 883*)—SET-OFF—NATURE OF RIGHT.

Jurisdiction to set off one judgment against another is equitable in its nature and should be exercised to do justice; motions for set-off being addressed to the court's sound discretion to be exercised according to settled rules.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1669-1688; Dec. Dig. § 883.*]

8. EXEMPTIONS (§ 16*)—PERSONS ENTITLED—HEADS OF FAMILIES.

A judgment for defendant, in an administrator's death action for the costs of an appeal, may be set off pro tanto against the interests of an infant nonresident child and of two infant children born since intestate's death; they not coming within the exemption statutes as heads of families, though the interest of the widow and other children are exempt as heads of families, and any apparent injustice not preventing such set-off.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 15-19; Dec. Dig. § 16.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; W. B. Gruber, Judge. "To be officially reported."

Action by Furman Rookard, as administrator, against the Atlanta & Charlotte Air Line

Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Sanders & De Pass, for appellant. S. G. Finley and H. K. Osborne, for respondent.

HYDRICK, J. [1] Plaintiff brought this action to recover damages of defendant for the wrongful death of his intestate, Daniel Brown. He recovered a judgment for \$2,000, which was reversed on appeal, and a new trial was granted. 84 S. C. 190, 65 S. E. 1047, 27 L. R. A. (N. S.) 435, 137 Am. St. Rep. 839. Thereafter defendant entered judgment against plaintiff for \$142.75, the costs and disbursements of the appeal. On the second trial, plaintiff recovered judgment for \$500. Thereupon defendant obtained a rule requiring plaintiff to show cause why defendant's judgment should not be set off against plaintiff's judgment, in satisfaction thereof, pro tanto. For cause, plaintiff alleged: That his intestate left no property or estate; that he left a widow and five children, for whose benefit the action was brought; that, under the terms of the statute under which the action was brought, the widow and children are entitled to the amount recovered in their own right; that the widow and two of the children are the heads of families residing in this state, and have no property other than their respective interests in this judgment, which are therefore exempt to them, as heads of families, under the Constitution and statutes.

The circuit court held that sections 2852 and 2853, 1 Code 1902, under which the action was brought, express the legislative intent that the amount recovered in such actions shall belong exclusively to the parties mentioned therein, for whose benefit they are brought, without being liable to diminution for costs or any other charges, and dismissed the rule. Section 2852, in so far as it is pertinent to the present inquiry, reads: "Every such action shall be for the benefit of the wife or husband and child, or children of the person whose death shall have been so caused. * * * And the amount so recovered shall be divided among the before-mentioned parties, in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate." Section 2853 provides that: "The executor or administrator, plaintiff in the action, shall be liable to costs, in case there shall be a verdict for the defendant, or nonsuit or discontinuance, out of the goods, chattels and lands of the testator, or intestate, if any, and if none, then out of the proper goods and chattels of such executor and administrator." The words of the section italicized were left out by the amendatory act of 1903 (24 Stat. p. 96), which seems to have been overlooked on circuit.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We agree with the circuit court that the statute plainly expresses the intent that the amount recovered in such actions shall belong to the persons for whose benefit they are brought; and that, although the statute provides that the action shall be brought in the name of the executor or administrator of the deceased, the amount recovered shall, nevertheless, not be assets of his estate, so as to be liable to the demands of the creditors thereof. We agree, also, that by the terms of section 2853 the decedent's estate is primarily liable for costs in the cases mentioned therein. It does not follow, however, that the amount recovered must, in all cases and under all circumstances, be distributed among the persons entitled thereto without any diminution for costs or other charges; and we do not think the statute expresses any such intent. Nor do we think that conclusion must necessarily be inferred from the provision making the estates of decedents primarily liable for costs in such actions. Such a construction of the statute would, in some cases, work results so inequitable and unjust that nothing short of an unequivocal expression of such an intent would induce the court to adopt it. In cases, such as this, where the decedent left no estate whatever, the necessary costs and expenses of administration, and such as the administrator must necessarily incur in the prosecution of the action, must be paid out of the amount recovered, or not at all. The court would certainly not require the amount recovered to be distributed among the persons entitled without first requiring the payment of the costs and expenses without which nothing could have been recovered. But, aside from this construction of the sections above quoted, ample authority is found in section 330 of the Code of Civil Procedure of 1902 for the payment of such costs out of the amount collected. That section reads: "In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected of the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defense."

[2] All the sections above cited were re-enacted in the codification of 1902, and should therefore be construed together so as to harmonize them, if possible. But there was irreconcilable conflict between the provisions of section 2853 and section 330 prior to the amendment of section 2853, hereinbefore referred to, whereby the words of that section, which made the executor or administrator personally liable for costs in the cases

therein mentioned, were omitted; because the one made an executor or administrator personally liable for costs, if there were no assets of his decedent's estate, while the other exempted him from liability, unless he was made so by direction of the court for mismanagement or bad faith.

[3] So long as that conflict existed, the provisions of section 380 prevailed, because they were enacted in 1870, subsequent to the enactment of section 2853, in 1859. *Insurance Co. v. Bradley*, 83 S. C. 427, 65 S. E. 433. But that conflict was removed by the amendment of 1903, so that now the executor or administrator is not personally liable for costs in such cases, except when made so by direction of court for mismanagement or bad faith under the authority of section 330. Therefore, in cases like this, if such costs and expenses as may be incurred by the executor or administrator in the prosecution of the action cannot be collected out of the estate, fund, or party represented, they must go unpaid. We do not think the Legislature intended any such result.

[4] The contention of respondent that the parties ultimately entitled to the fund should have been brought before the court by service of the rule upon them cannot be sustained. They are represented by the administrator, under the authority of the statute; and, in the absence of any showing of fraud or collusion on his part, it is not necessary that they be otherwise before the court than as represented by him.

[5] It remains to inquire whether the interests of the widow and two of the sons of decedent are exempt to them respectively, as heads of families, under the Constitution and laws of this state, which provide that \$500 worth of personal property shall be "exempt from attachment, levy and sale under any mesne or final process, issued from any court, to the head of any family residing in this state." Appellant contends that an order requiring one judgment to be set off against another would not violate the provision of the Constitution above quoted, because it is neither an attachment, levy, or sale of property, under any mesne or final process issued from any court. Upon a strict construction of the Constitution, such an order would not violate its letter; but it would, in many cases, violate its spirit and intent. The words attachment, levy, and sale were used in the Constitution and statutes, because the methods thereby indicated are the ones most usually adopted in the application of a debtor's property to the payment of his debts. An order of set-off is merely another mode of execution whereby the debtor's property is applied to the satisfaction of his debts. We feel quite sure the lawmakers never intended for this benign provision of the law to be set at naught by such a literal construction, and we are not inclined to adopt it.

[6] With few exceptions, the courts have held that exemption laws are remedial in their nature and should receive a liberal construction—such as will advance the remedy and suppress the mischief intended. In the case of *Harley v. Weathersbee*, 21 S. C. 243, cited and relied upon by appellant, the court does seem to give the exemption provisions of the Constitution and statute the strict construction contended for by appellant. But such a construction was not necessary to the decision in that case; and, in the case of *Norton v. Bradham*, subsequently decided and reported in the same volume at page 378, the court expressly held that these provisions of the Constitution and laws must be liberally construed, and, in that case, a very liberal construction of them was necessary to the conclusion reached.

[7] The jurisdiction of the court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties. It is not founded on any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction which the court exercises over suitors in it. Such motions are therefore addressed to the discretion of the court—a discretion which is not arbitrarily or capriciously exercised, but according to settled principles. *Ex parte Hiers*, 67 S. C. 114, 45 S. E. 146, 100 Am. St. Rep. 713, and cases cited. When it would result inequitably, set-off should be refused. On the other hand, it should be allowed, when justice requires it, unless the court is compelled to refuse it in obedience to some provision of the Constitution or statutes. The judgment in this case does not stand in the place of or represent exempt property, as did the judgments in those cases relied on by respondent, many of which are cited in the dissenting opinion of Mr. Justice Lamm in the case of *Caldwell v. Ryan*, 210 Mo. 17, 108 S. W. 533, 16 L. R. A. (N. S.) 494, 124 Am. St. Rep. 717. The motion cannot be refused on that ground. Until the judgment was obtained, there was nothing in which any of the heirs of decedent could claim any exemption. The moment it was obtained, the protecting shield of the Constitution was thrown around it in so far as the heads of families had any interest in it. Appellant contends that, in the effort to recover the judgment—that is, to create or bring into existence something which they could claim as property and in which the heads of families could claim an exemption—an obligation was incurred which justice demands should be satisfied out of the property so brought into existence, and that this may be done, notwithstanding the exemption, in analogy to the principle that he who seeks equity must do equity, a principle which has been held, under some circumstances, to be paramount to the right of exemption. *Hallman v. George*, 70 S. C. 408, 50 S. E. 24; *Small v. Usher*, 77 S. C. 112, 57 S. E. 623.

The principle is inapplicable in this case, because the parties against whom it is invoked are not seeking equity. They are not seeking anything. They are passive—simply trying to hold what they have, and some of them have interposed the exemption of the Constitution as a shield against defendant's claim. There is no principle upon which defendant's judgment can be set off against their interests without violating the Constitution, and, as to their interests, the motion was properly refused.

[8] But there is no sound principle on which the set-off can be refused in so far as the interests of those who are not entitled to the protection of the Constitution are affected. Of these, one is not a resident of the state, and two are infants, born since the death of the intestate. Respondent contends that it would be inequitable that their interests alone should be set off and thereby be made to satisfy the whole of defendant's judgment; that, so far as the infants are concerned, the result would be that those who are most entitled to the protection of the humane provisions of the statute under which the action was brought will be wholly deprived of it. That result may be unfortunate; but it cannot be said to be unjust or inequitable, any more than it can be said to be unjust or inequitable for the heads of families to be allowed an exemption when others are not. It is no more unjust than in any other case where a judgment creditor collects the whole of his judgment out of one or more joint debtors, while others equally liable under the judgment escape by reason of the exemption of their property. Suppose the infants were the sole beneficiaries of the judgment, upon what principle could the set-off be refused? Defendant's judgment should have been set off against the interests of those beneficiaries under the judgment who are not heads of families in satisfaction thereof *pro tanto*.

Reversed.

JONES, O. J., GARY, A. J., and WOODS, J., concur.

(136 Ga. 565)

HARTZ v. SOBEL et al.

(Supreme Court of Georgia. July 13, 1911.)

(Syllabus by the Court.)

1. WILLS (§ 174*)—PARTIAL REVOCATION—ACT CONSTITUTING REVOCATION.

A testatrix, after the execution of her will, cut therefrom two items giving bequests of money, and cut from another item, in which a bequest of money had been given to two of her nephews, the name of one of them, and also cut out the name of the same nephew as an executor, and removed other words, and pluralized letters which showed that there were more legatees than one in the last-mentioned bequest and more executors than one nominated. The will was propounded without such parts which had been cut therefrom. Evidence was

introduced to show that the testatrix did not intend to revoke the entire will, but only to revoke the parts eliminated therefrom, and that she retained the instrument, after such cutting, as being her will. *Held*, that under the statute of this state a revocation of a will pro tanto by canceling, obliterating, or destroying such part is not authorized.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 453; Dec. Dig. § 174.*]

2. WILLS (§ 174*)—REVOCATION—ACT CONSTITUTING REVOCATION.

Under the facts stated in the preceding headnote, if the testatrix did not intend to revoke the entire will, but only the particular legacies and the appointment of the executor, which were cut therefrom, a revocation of the entire will would not result as matter of law from such cutting.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 453; Dec. Dig. § 174.*]

3. WILLS (§ 234*)—PROBATE—WILL PARTLY DESTROYED.

If a will was duly executed, and when propounded for probate it appeared that certain words had been cut from it by the testatrix, with a view to making a pro tanto revocation only as to three bequests of money and the appointment of a certain executor, and it could be shown what such words were, they could be restored by evidence, and the will as originally executed admitted to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 563; Dec. Dig. § 234.*]

4. WILLS (§ 234*)—PROBATE—WILL PARTLY DESTROYED.

Under such circumstances, a legatee whose name was thus cut from the will may, when the will is propounded, enter a caveat to its being probated in its incomplete condition, and may plead and prove what were the words removed from the will, and pray that it be probated as originally executed. He is not compelled to merely file a caveat to the probating of the will as propounded, and then in a separate litigation propound the same will with the addition of the missing words and clauses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 563; Dec. Dig. § 234.*]

5. WILLS (§ 376*)—PROBATE—PROCEEDINGS ON APPEAL.

As the person claiming to be a legatee could intervene in the court of ordinary and set up the contentions stated in the preceding headnote, he could do so in the superior court, after the case had been carried thereto by appeal from the court of ordinary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 842; Dec. Dig. § 376.*]

(Additional Syllabus by Editorial Staff.)

6. WILLS (§ 174*)—REVOCATION—STATUTORY PROVISIONS—"MATERIAL."

In Civ. Code 1910, § 3919, providing that the intention to cancel a will will be presumed from the obliteration or canceling of a material portion of the will, "material" does not mean essential, but means important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 453; Dec. Dig. § 174.*]

For other definitions, see Words and Phrases, vol. 5, p. 4404.]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Proceedings by Morris A. Hartz for pro-

bate in solemn form of the will of Mrs. Minnie Cave. Sarah Sobel and others filed a caveat. From a judgment for the caveators, the propounder brings error. Reversed.

Morris A. Hartz propounded for probate in solemn form an instrument as the last will and testament of Mrs. Minnie Cave. Certain persons, as heirs at law of the decedent, filed a caveat on the grounds that the decedent did not execute the will propounded; that it was never signed by her and attested by subscribing witnesses; that she revoked the will made by her on March 31, 1908, by mutilating it, with intention to revoke it; and that the mutilation consisted in cutting out of the will and removing and destroying certain portions, namely, item 10, item 11, and certain words and letters in two other items, eliminating her nephew, Sidney L. Hartz, as a legatee and also as an executor. The case was carried to the superior court by appeal. In that court Sidney L. Hartz, claiming to be an heir at law of the decedent, and a beneficiary under the will, filed an intervention, in which he entered a caveat to the petition for the propounding of the will as offered. Attached to this intervention was a copy of the will as it was claimed to have existed before any change was made in it; and it was prayed that it, the will, be admitted to record as originally executed.

The original caveator demurred to this intervention, on the following grounds: (1) The superior court is without jurisdiction to entertain a petition for the probate of a will, and the intervention seeks to probate an alleged will which has never been offered in the court of ordinary, which alone has jurisdiction to entertain a petition for probate. (2) The intervention is not germane to the proceeding, which is a petition for probate in solemn form of another and distinct paper, alleged to be the last will and testament of the decedent. (3) The sole issue is whether or not the paper offered for probate by Morris A. Hartz is the last will and testament of the decedent; and the intervention can not set up for probate any other will than that offered by the propounder. (4) Sidney L. Hartz appears as the caveator in the proceeding of Morris A. Hartz to propound a certain will, and he cannot be both a caveator and a propounder in the same proceeding. The court sustained the demurrer, in so far as the intervention sought to set up another will and place Sidney L. Hartz on the side of the propounder. To this he excepted.

The case then proceeded to trial. The evidence showed the following facts: On March 31, 1908, Mrs. Cave executed a will. She died on August 12, 1909. A few days before her death she stated that she intended that Morris Hartz should manage her affairs; that the conduct of Sidney Hartz was unbearable to her; and that she considered that he had

disgraced the family and she would not recognize him in any way whatever. To another witness she stated (referring to a paper which she had in her hand): "This is my will, and I have made all the changes in it I want to do." In speaking of the changes which she had made, she said: "I have one particularly. I have cut Sidney Hartz out." She frequently expressed the desire to have her will opened before she was buried. After she died, search was made for it, and in a desk in her room, near her bed, was found an envelope, tied with a string, and having indorsed on it, "The last will and testament of Mrs. Minnie Cave, to be opened before her burial." The desk was one which was kept locked, and to which the decedent kept the key while she lived. In the same envelope with the will were two slips of paper containing memoranda in reference to the inscription to be placed on the tomb of the decedent and that of her deceased husband.

The will as offered for probate provided, in the first and second items, for the payment of the debts of the testatrix, and her burial. The third, fourth, and fifth items contained bequests to charitable institutions. The sixth item was as follows: "I give and bequeath to my nephew Morris A. Hartz, child of my brother, John Hartz, lately deceased, the sum of five thousand dollars absolutely." (The spaces marked represent holes in the paper, which had been cut out with some sharp instrument.) The seventh, eighth, and ninth items contained specific bequests to relatives. Then came another opening caused by cutting something from the paper. Then followed an item numbered 12, which contained a residuary clause, leaving the residuum of the estate to a brother and sister, and the children of another brother and another sister of the testatrix. The thirteenth item nominated an executor and conferred certain powers upon him. Here again the will had been cut. As offered for probate, it began as follows: "I hereby nominate and appoint as executor of this my last will and testament, my nephew Morris A. Hartz, giving full power and authority, whenever in judgment it may be necessary," etc. Later in the item reference was made more than once to the "executors."

It was proved that the will had been written on a typewriter, and a carbon copy of it as it was when signed had been preserved, which showed that when the will was signed it did not have the parts cut from it, and also showed what it contained at that time. Item 6, as it originally stood, read as follows: "I give and bequeath to my nephews, Morris A. Hartz, and Sidney L. Hartz, children of my brother, John Hartz, lately deceased, each the sum of five thousand dollars absolutely." Item 10 contained a bequest of \$1,000 to a friend of the testatrix, and item 11 contained a bequest of \$100 to an employé. The thir-

teenth item began as follows: "I nominate and appoint as executors of this my last will and testament, my nephews, Morris A. Hartz and Sidney L. Hartz, giving them full power and authority, whenever in their judgment it may be necessary," etc.

At the close of the testimony, the presiding judge directed a verdict in favor of the caveators. The propounder moved for a new trial, which was refused, and he excepted.

Miller & Jones and Hall & Fowler, for plaintiff in error. Hardeman, Jones, Callaway & Johnston, for defendants in error.

LUMPKIN, J. (after stating the facts as above). The testatrix, after executing a will, cut from it with some sharp instrument two items and also certain words. When the will was propounded for probate, there were vacant places where these words had been, but the will as presented was connected and expressed a complete testamentary scheme without the omitted words and items. By witnesses it was shown that a carbon copy of the will, except as to the signature and attestation, had been preserved. From this it appeared that the two items which had been cut out gave two legacies of \$1,000 and \$100, respectively, but did not affect the general testamentary purpose. The words which were cut from the will eliminated one of the nephews of the testatrix from an item where there was bequeathed to two of her nephews the sum of \$5,000 each, and also eliminated him from the clause appointing executors, leaving the bequest and appointment to stand as to the other nephew. The evidence strongly indicated that the testatrix did not intend to cancel or revoke her entire will, but only in the particulars mentioned, and that she preserved it and regarded it as her will in force after she had cut the words from it.

1-3. A will does not confer any present right at the time of its execution. Until the death of the testator, it has been called ambulatory. It has been compared to an undelivered deed or power of attorney, which contains an expression of a purpose which has not gone into effect. In the absence of all statutory regulation, it would be revocable by any act or declaration that the purpose of the testator had changed, and that the paper no longer expressed his testamentary wish. This would, of course, leave wills open to attack by parol to a dangerous extent. To guard against such latitude, statutes have been passed; and acts which will revoke a will must be such as the statute permits.

Revocation may be implied or express. In the former case it results from certain changes in the testator's circumstances, from which the law infers or presumes that he intended a change, either total or partial, in the disposition of his property. An express revocation arises from some act on the part of the testator, done for the purpose of

destroying the effect of the will in whole or in part; or from making some other will or codicil differing in whole or in part from the disposition previously made; or a partial revocation may be made by conveying the devised property, and thus withdrawing it from the operation of the will. The English statute of frauds (29 Charles II) contained the following provision: "No devise in writing of any lands, tenements, or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same by the testator himself, or in his presence and by his directions and consent." This recognized the power to revoke a will wholly or partially; it having been held that the words "any clause" were not restricted to an entire item or complete dispositive clause. The burning, cancellation, tearing, or obliteration was not obliged to be attested. Under this provision, by the erasure, cancellation, or obliteration of the name of an executor or of a devisee, the will was not entirely revoked, but only partly so, and the remainder of it stood unaffected. 1 Jarman on Wills (5th Am. Ed.) 282 (*129), 291 (*134); Id. (6th Eng. Ed., by Sweet and Sanger) 143 et seq.; Short v. Smith, 4 East, 418 (New Ed. 489); Larkins v. Larkins, 3 Bos. & Pul. 14; Swinton v. Bailey, L. R. 4 App. Cas. 70.

By statute 1 Vict. c. 26, it was enacted that: "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid [that is by marriage], or by another will or codicil executed in manner heretofore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is heretofore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same." The next section contained the statement that "no obliteration, interlineation, or other alteration, made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as heretofore is required for the execution of the will," etc. Under this statute, where a testatrix duly executed her will, and some time afterward cut out, with a pair of scissors, the name of the person appointed executor, and stated that she had "cut G. P. out of her will," it was held that the will was only partially revoked, and that it was entitled to probate in the state in which it was found at the death of the testatrix. In the Goods of Leach, 63 L. T. R. (N. S.) 111; Goods of Taylor, Id. 230.

In the United States, where the English common law and the statute of frauds have

been adopted, unless altered by statute, the rule as to the total or partial revocation of a will remains in force. In some of the state statutes have been adopted restricting the partial revocation of a will by means of interlineation, obliteration, tearing, or alteration. In some instances partial revocation in this manner is expressly prohibited; in others the statute makes provision for the revocation of a will in its entirety by such means, omitting any reference to revocation of a clause or part of it. Where such statutes have been enacted, it has been held by several courts that a partial revocation by canceling, erasing, obliterating, or tearing the name of a devisee or other words will not operate as a good partial revocation. It has also been held in several cases that, where the words thus sought to be revoked can be ascertained from the face of the will, the attempted revocation of them will be disregarded, and the will be probated as it was executed.

In Minnesota the statute (Gen. St. 1866, c. 47, § 9) provided that: "No will, nor any part thereof, shall be revoked, unless by burning, tearing, canceling, or obliterating same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some will, codicil, or other writing, signed, attested, and subscribed in the manner provided for the execution of a will." A testator made certain erasures and interlineations in a duly executed will. They were so made that there was no difficulty in reading the will as it was originally written. After he made the alterations, at his request, two persons signed the will as witnesses to "the erasures and interlineations made by the testator." What such erasures and interlineations were the witnesses did not know. It was held that the alterations did not supersede the provisions of the will; that the witnessing of such alterations did not amount to an attestation of the will as altered; and that the alterations did not operate as a revocation of the original will. Penniman's Will, 20 Minn. 245 (Gil. 220) 18 Am. St. Rep. 368.

In Illinois the statute (Rev. St. 1845, c. 109, § 15) provided that: "No will, testament, or codicil shall be revoked, otherwise than by burning, canceling, tearing, or obliterating same by the testator himself, or in his presence, by his direction and consent, or by some other will, testament, or codicil in writing, declaring the same signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence." A testator, after the publication of his will, sent for the executor and custodian of it, and informed him that he (the testator) wished to alter his will so that A. should have a tract of land devised therein to B. The executor, at the instance of the testator, canceled the name of B. by drawing a line through it with a pen, leaving the name still legible, and in-

terlined over it the name of A., so that the devise read to A. but the will, as altered, was never republished or attested by two witnesses in the presence of the testator. It was held that the alteration in favor of A. was inoperative, for want of attestation; and that, when the testator directed the erasure of the name of a devisee and the interlineation of the name of another person, with intent not to revoke the devise itself, but simply to substitute another devisee in place of the original one, which was done by drawing a pen through the original name, but leaving it still legible, and the alteration failed for want of a new attestation, the erasure of the name of the original devisee did not amount to a revocation of the devise to her. *Wolf v. Bollinger*, 62 Ill. 368. This decision was not based solely on the inability to revoke *pro tanto*, but the doctrine of dependent relative revocation was invoked.

In Ohio the statute (Rev. St. 1890, § 5953) reads as follows: "A will shall be revoked by the testator tearing, canceling, obliterating, or destroying the same, with the intention of revoking it, by the testator himself, or by some person in his presence, or by his direction," etc. It was held that, under this section, a clause of a will could not be revoked by the testator by drawing ink lines through the words thereof, with an intent to revoke such clause, but with no intent to revoke the whole will. It was said that "in such case, when the words of such clause remain legible, the whole will should be admitted to probate, including such erased clause as a valid part of such will." *Giffin v. Brooks*, 48 Ohio St. 211, 31 N. E. 743.

In New York the statute (2 Rev. St. [1st Ed.] pt. 2, c. 6, tit. 1, § 42) enacted that: "No will in writing, nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required, by law, to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed with the intent and for the purpose of revoking the same," etc. The testatrix, after executing her will, obliterated the second and fourth clauses thereof, with the intention to revoke them. The words were still apparent and legible. The surrogate directed the whole will, including these clauses, to be admitted to probate. The Court of Appeals sustained this ruling. Their decision was largely based on the fact that an earlier statute, similar to the English statute of frauds, had been repealed, and another enacted in its stead; that the later statute, in the first clause quoted, dealt with revocation by testamentary writing, and referred expressly to a revocation of the will, or "any part thereof"; that the second clause dealt with a revocation of "such will" by burning, tearing, canceling, obliterating,

or destroying, "with the intent and for the purpose of revoking the same"; and that this difference in language indicated a legislative intent to allow a partial revocation in writing, but not by means of burning, tearing, canceling, obliterating, or destroying, which applied only to the whole will. *Lovell v. Quitman*, 88 N. Y. 377, 42 Am. Rep. 254.

In Alabama the statute (Code 1886, § 1908) provided that, except in cases of marriage and birth of issue, "a will in writing can only be revoked by burning, tearing, canceling, or obliterating the same, with the intention of revoking it," etc. After the execution of a will, the testator erased the name of one of the legatees by drawing a pen through it. Evidence was offered to show that at the time of erasing the name and afterward the testator made declarations to the effect that he intended to revoke the will because he was not satisfied with it. The court of probate excluded these declarations, and charged that if the name of a legatee was erased with the intention to revoke the will only as to him, and not as to other legatees named, this was not a revocation of the will as to them. The Supreme Court held that the declarations of the testator were admissible; that whether he intended to revoke the whole will or only the part of it, making a certain person the legatee, was a question for the jury; that if the erasure was made with the intention to revoke the whole will, and, when explained by the declarations of the testator, was so material as to justify the inference of an intention to revoke the entire instrument, it would be effectual for that purpose; and that, if the intention was only to revoke the will *pro tanto*, so as to expunge the name of a legatee, the erasure was inoperative for such purpose. *Law v. Law*, 83 Ala. 432, 3 South. 752.

In Maryland the statute (Code 1878, art. 49, § 5) declared that "no devise in writing of lands, tenements, or hereditaments, or any clause thereof shall be revocable," except in the manner designated. A testator left 10 children. By his will he directed that his estate should be divided into 10 equal parts or shares, and he gave to all his children life estates in their respective shares, with remainders over to their children, except two named sons, to whom he gave their respective shares absolutely. They were also made executors of the will, and trustees of the other estates. After the execution of the will, the testator erased the names of these two sons, wherever they occurred, by drawing a line through them with his pen, but leaving the names legible. The erasures operated to confer estates in fee simple on all the sons. It was held that the attempted obliterations were inoperative, and that the will should be read as it was originally written and executed. *Eschbach v. Collins*, 61 Md. 478, 48 Am. Rep. 123.

In Connecticut the statute (Gen. St. 1897,

§ 542) provided that: "No will or codicil shall be revoked in any other manner except by burning, canceling, tearing, or obliterating it by the testator or by some person in his presence by his direction, or by a later will or codicil." Another statute provided how wills should be executed. A testator executed a will containing two items. By the first, after providing for the payment of his debts, he gave to two named nieces each 10 shares of railroad stock. By the second item he left all the residue of his property to his two brothers, share and share alike. When the will was presented for probate, lines appeared drawn through all of the first item, except the words referring to the payment of the testator's debts, thus striking out the gift of shares of railroad stock to his nieces, and leaving all of his estate to fall into the residuary clause. The words over which these lines were drawn were in no other manner canceled or obliterated, but remained legible. The probate court held that the will should be probated without the stricken words and clauses. The superior court, on appeal, reversed this judgment. The Supreme Court sustained the latter ruling. In doing so they said that "the sole inquiry was, Did this fact operate as a revocation, not, indeed, of the entire will, but of that portion of it?" They held that an erasure of a specific legacy from a will, with the effect of increasing the residuary bequest, was not a sufficient revocation of such legacy, under the statutes above cited; that it was in effect the making of a new testamentary disposition; and that the will should be probated with the stricken words included as part of it. Appeal of Miles, 68 Conn. 237, 36 Atl. 39, 36 L. R. A. 176.

In Schouler on Wills (3d Ed.) § 397, it is said: "This doctrine of partial revocation, even under the restrictions adopted by later English legislation, is not greatly favored in American codes of the present day. Many of our local enactments, it is true, once pursued the language of 29 Car. II, so as to admit of revocation pro tanto; but of late years that language has undergone a change of expression in leading states. Various codes now drop all reference to revocation in part; and the general policy intimates that such changes of disposition require an instrument executed with all the formalities of a will." In 30 Am. & Eng. Enc. Law (2d Ed.) 642, it is said: "The canceling or obliterating of a particular devise or bequest affects that provision of the will only, and not the whole will. In those jurisdictions where partial revocation is permissible, the result is the revocation of the clause canceled; in other jurisdictions the act is of no effect whatever."

In Massachusetts an early statute permitted a revocation in this manner of a devise of land: "Or any clause thereof." A later revised statute provided that "no will shall

be revoked," except in certain specified ways. It contained no reference to a partial revocation. The Supreme Court of that state nevertheless held that an erasure by a testator of a certain clause in his will, with the intention of revoking it only, was a valid revocation of such clause, but not of the whole will; and that the property thereby covered, in the absence of a contrary intention passed under the general residuary clause in the will. This is not in accord with cases already mentioned, and has been considerably criticised.

In the decisions from Maryland and Connecticut above cited, it was argued that where the cancellation or obliteration of a part of a will would not only revoke a legacy, but also operate, like an alteration, to convey to another legatee a new estate or increase that given him by the will, it amounted in effect to an alteration or new gift, and such a change would have to be executed like a new testamentary disposition. In the Maryland case this was applied to an obliteration which it was held would increase a life estate into a fee simple. In the Connecticut case the erasure of a specific legacy had the effect of increasing the residuary bequest. The court gave this illustration of what might be done in the way of transmutation by means of mere erasures: "Suppose the original words were: 'To my son William I give nothing, and give all my estate to my son John.' The will, with no addition, could be made to read: 'To my son William I give all my estate.'" This could be done by merely erasing the words "nothing, and give" and the words "to my son John." The argument advanced in these two cases against permitting erasures or obliterations in a will, which would result in taking an estate from one devisee and giving it to another, is very strong. But candor compels the writer to say that it may be doubted whether the learned judge who wrote the opinion in the Maryland case did not misconstrue the language of Lord Alvanley, in *Larkins v. Larkins*, 3 Bos. & Pul. 21, supra (which he quoted as an authority for the position taken), when Lord Alvanley's statement is considered as a whole; and this doubt is strengthened by what was said by the Lords, in *Swinton v. Bailey*, L. R. 4 App. Cas. 70, supra.

In Page on Wills, 284, it is said: "Recent statutes expressly provide that no alteration in the contents of a will shall have any effect, unless executed with the formalities required for the execution of a will, or omit all reference to revocation of a part of a will; but if the words canceled are illegible, and cannot be proved otherwise, the court will necessarily be unable to probate them; and, as it does not appear to be the intention of the testator to revoke the entire will, it must be probated with the canceled parts blank. The only point upon which there seems to be actual conflict of authority

in this connection is where the statute omits all reference to revocation of a part of a will, neither expressly permitting nor expressly prohibiting it. The weight of authority seems to be that under such statutes a partial revocation of a will is impossible in law, if the words sought to be revoked are still legible." See, also, notes to *Lawson v. Morrison*, 2 Hare & Wall. Am. Lead. Cas. (5th Ed.) 487 et seq., and note to *Graham v. Burch*, 28 Am. St. Rep. 344.

[1] Let us now consider more particularly the law of this state on the subject of revocation of wills. The English statute of frauds was included in the digests of the laws preceding the original Code, and this continued as late as the publication of Cobb's Digest, in 1851, where it will be found on page 1127 et seq. By the act of 1852, the law as to the revocation of wills devising realty was also made applicable to those bequeathing personalty. Acts 1851-52, p. 104. When the first Code (which took effect on January 1, 1863) was adopted, the article on the subject of revocation of wills contained nine sections. By section 2438 it was declared that a will, having no effect until the death of the testator, is necessarily revocable by him at any time before his death. Section 2439 declared that: "A revocation may be either express or resulting. An express revocation is where the maker by writing or acts annuls the instrument. An implied revocation results from the execution of a subsequent inconsistent will." It then dealt with the time when such revocation took effect. Section 2440 declared that an express revocation, by written instrument, must be executed with the same formality as that required for the execution of a will. It also dealt with the effect of destroying a revoking will and the revival of a will by republication. Section 2441 was as follows: "An express revocation may be effected by any destruction or obliteration of the original will, or a duplicate, done by the testator, or by his directions, with an intention to revoke; such intention will be presumed from the obliteration or canceling of a material portion of the will; but if the part canceled be immaterial, such as the seal, no such presumption arises." Section 2442 was as follows: "In all cases of revocation, the intention to revoke is necessary to make it effectual. An express clause of revocation will not operate upon a testamentary paper, where it is manifest that such was not the intention." Sections 2443 and 2444 dealt with inconsistent provisions in a subsequent will and inconsistent clauses in the same will. Section 2445 provided that the marriage of the testator, or the birth of a child to him, subsequently to the making of a will in which no provision was made in contemplation of such an event, should revoke the will. Section 2446 dealt with codicils and the subject of republication. These sections have been included in each subsequent Code,

including the last one, which was adopted in 1910, sections 3916, 3924.

It will be seen that no express reference was made to revocation pro tanto, except in the provision that an "implied revocation [by a subsequent will] extends only so far as the inconsistency exists," and that any portion of the first will which can stand consistently with the testamentary scheme and bequests in the last shall remain unrevoked. On the subject of revocation pro tanto by destruction or obliteration, the Code is silent. It has been more than once said that the Code "substantially" adopted the English statute of frauds. But it is evident that there are some changes which must have been intentionally made. In the first place, the reference to revocation of a clause or devise by destruction or obliteration, contained in the English statute, was left out. In the English statute, prior to the Victorian statute of wills, the acts of revocation, other than by writing, were mentioned as "by burning, canceling, tearing, or obliterating." The language of the Code is "by any destruction or obliteration of the original will." These words may be sufficiently broad, in connection with their context, to cover the other terms employed in the English statute, but they do not follow it literally. Again, under the English statute, the erasing or canceling of one or more clauses, although they might be substantial or material in their character, did not generally affect the rest of the will, unless it left the remainder unintelligible, and thus necessarily operated as a revocation of the whole.

[6] Under the Code it is provided that an intention to revoke the will will be presumed from the obliteration or cancellation of a material portion of it. It was argued that the word "material" meant essential. But the language of the Code indicates that it does not use the word in so restricted a meaning. It illustrates what is immaterial in Georgia by reference to the seal. In *Black's Law Dictionary* the word "material" is defined to mean "important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form."

The question of increasing or diminishing an estate by means of an erasure or obliteration seems not to have been discussed in the earlier English cases. In the *Larkins Case*, supra, which was decided in 1802, *Rooke, J.*, said: "It is rather extraordinary that this point should now come to be decided for the first time." When the codifiers dealt with the subject of revocation of wills, not only having before them the English statute of frauds, but doubtless investigating also the decisions which had been made on the subject, they formulated the sections cited, which were generally similar to the English statute of frauds, but did not follow its exact terms. While they were codifiers and not legislators, four times the Code, contain-

ing these same provisions, has been adopted. We think that the section touching the revocation of a will by obliteration, canceling, or the like, should be construed in harmony with the construction of similar statutes by other courts in reference to the subject now under consideration. And under a proper construction thereof, as embodied in section 3919 of the Civil Code of 1910, the statement that "an express revocation may be effected by any destruction or obliteration of the original will, or a duplicate, done by the testator, or by his direction, with an intention to revoke," dealt with an express revocation of the entire will, and not of a clause or part thereof, by destruction or obliteration. The obliteration or canceling by the testator of a material portion of the will raises a presumption of an intention to revoke the whole.

[2, 3] If, then, our statute does not provide for the revocation of a clause or part of a will by destruction or obliteration of it, the next question which arises is, What shall be the effect of such an obliteration, if actually made, with intent not to revoke the entire will, but only a particular clause or part thereof? The presiding judge expressed his view on this subject in the following part of a charge or opinion which he delivered before directing a verdict: "The intention to revoke, in the opinion of the court, does not mean, in its legal sense, that it is necessary, if there be an intentional obliteration or destruction of some part of the will, that the intention should relate to the destruction or obliteration of the whole will, in order to be effective to destroy and obliterate and revoke the entire will; but if a part of the will material in its character, and, in the opinion of the court, any legacies eliminated from the will by cutting them out physically, so as to obliterate and destroy the continuity of the will, is, to that extent, such a declaration on the part of the testator as shows an intent to revoke, and the intent goes in law, whatever in point of fact may have existed in the mind of the testator, but that, in law, it goes to the revocation of the instrument completely, and not pro tanto." In this view we cannot concur.

Aside from the construction of our Code or similar statutes, it has always been held that revocation involves both act and intent. In *Malone's Administrator v. Hobbs*, 1 Rob. (Va.) 346, 39 Am. Dec. 363, Baldwin, J., said that "a cancellation or destruction, to effect a revocation of the whole instrument, must be directed against the whole, or an essential part of it." In *Brown's Will*, 1 B. Mon. (Ky.) 56, 35 Am. Dec. 174, Robertson, C. J., said: "The obliteration or cancellation of a portion of a testamentary paper by the testator himself, is admitted to be an equivocal act, the legal effect of which generally depends on extrinsic proof of the accompanying circumstances indicating the intention, and therefore, although the prima facie import

of an act of cancellation may be that it was done *animo revocandi*, yet that presumption may be repelled by parol proof of facts showing that the *animus cancellandi* applied only to so much of it as had been actually cancelled." Section 3920 of the Code of 1910 declares that "in all cases of revocation, the intention to revoke is necessary to make it effectual." If the revocation referred to is of the entire will, it must be an intention to revoke the entire will. The statement in section 3919 that "such intention will be presumed from the obliteration or canceling of a material portion of the will" cannot mean a conclusive presumption. If so, it would have been much simpler to state that the obliteration or cancellation of a material portion of the will operated as a cancellation of the will as a whole. If the obliteration or canceling of a material part raises a prima facie presumption of an intention to revoke the whole, and the intention to revoke must exist in all cases to make the revocation effectual, it cannot be held that the testatrix revoked her entire will, whether she intended to do so or not. Parol evidence was admissible to rebut such presumption. In *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71, it was held that "joint operation of act and intention is necessary to revoke a will." Dealing with the subject of whether certain erasures and obliterations were made with intent to revoke a will absolutely, or were dependent upon the making of a new will, Chief Justice Simmons said: "The matter finally turns upon the intention of the testator, and no mere presumption can be allowed to defeat this intention when it has been made to appear."

In *Burge v. Hamilton*, 72 Ga. 568, a will, as offered for probate, was written on 10 pages. Pages 1, 2, 3, 4, 5, 7, and 9, were clearly numbered, and without alteration in the numbering. On page 6, the numbering appeared to have been changed from 5 to 6. On page 8 the numbering appeared to have been altered from 7 to 8. On the last page the numbering at the top of the page had been altered from 11 to 10. At the bottom of this page was the number 11. The entire will was in the handwriting of the testator, and his signature was on each of the pages. Each page contained a separate paragraph of the will. A codicil was executed, in which it was stated that the will was approved, except as altered by the codicil. The latter was written on pages numbered 12, 13, and 14, and was attached to the paper offered for probate. Parol evidence was offered to show that the will was in the same condition when the codicil was executed and attached to it as when it was offered for probate, and that the will was executed as it was offered. The caveators attacked it, among other reasons, because it showed on its face that a part of it was missing. The main question discussed was the admissibility of the evidence. But in the course of his opinion, after citing nu-

merous authorities, Chief Justice Jackson said: "These references to able text-books and cases decided show that by the English law parol evidence is admissible, first, to explain certain ambiguities; * * * and, sixthly, that a will, identified in part, will not be refused probate as to that part because of the uncertainty of other probable parts, the contents of which lost or missing parts are unknown. And these adjudications are not affected by or based upon any statute of Victoria or other modern law, but are constructions of the old law. How do the Georgia statutes and adjudications of this court affect this law? So far from detracting from its force, we think that the laws of this state not only confirm it, but enlarge its scope in many respects." Under this decision, if the parts eliminated could not be shown, and their contents were unknown, but there was an intelligible testamentary paper remaining, the mere possibility that the missing parts might have affected the testamentary scheme as a whole would not prevent the probate of what was left.

We thus reach the question, where it can be shown with certainty what were the words thus eliminated, and the statute does not recognize such elimination as a revocation pro tanto, shall the will be probated without such words, or with them reproduced, so that the will shall stand as it was before the mutilation? Under the statute of Victoria, if the words or clause were entirely absent, the will would be probated without them. The cases already decided show that in the United States, where statutes do not recognize or authorize revocation pro tanto, an effort to cancel, erase, or obliterate certain words or clauses would simply be disregarded, and the will would be probated as if no such effort had been made, if the obliterated words can be ascertained. In each of the cases which has come to our attention, this could be ascertained from the face of the paper. Magnifying glasses and the aid of expert examiners have sometimes been used to aid in deciphering obliterated words. Unless the statute so provides, there seems to be no sound distinction in principle between restoring words thus partly obliterated and words completely obliterated or cut out, if it can be proved what they were. The present English statute makes a distinction. The Georgia statute does not. Of course, this may result in admitting parol evidence of certain words obliterated or removed from the will. But that is not extraordinary. It has been held that, if a testator, by accident or mistake, destroys his will without intention to revoke it, it does not work a revocation. If not, how would the will be proved, save by secondary evidence? If a deed or any other written instrument should, by reason of age or accidental tearing or obliteration, be in such condition that certain words were illegible or entirely missing from it, this would not

destroy the whole instrument, but the missing words would be shown by the best evidence obtainable. If the paper were not recorded, they could be proved by parol. See *Hayden v. Mitchell*, 103 Ga. 431, 434, 30 S. E. 287 (where the contents, of illegible lines of a record were shown by parol). Suppose that the testator should accidentally upset some corrosive substance upon his will, so that certain words should be eaten away, if it could be proved by parol what such words were, it would neither render the whole will void nor require its probate without such words. If, then, an attempted revocation of a word or clause by obliteration is not permissible, under the statute, no sound reason appears why such eliminated words should not be shown by extrinsic evidence, if they can be ascertained, and the will probated as it was before such attempted change was made. In *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 31, supra, some words were stricken with a pencil and slips of paper were pasted over other words; but it was held that the will as executed originally could be probated, if there was no intention to revoke. To hold that the will must be probated without the words removed from it, when they can be ascertained or proved, would destroy the effect of the previous rulings.

[4] 4, 5. How, then, shall these rulings be made practically effectual? The will is offered for probate with certain words cut from it. The evidence indicates that this was done by the testatrix, with no intention to revoke the entire will, but only certain legacies and the appointment of one of the executors, which were affected by the mutilation. One of the legatees whose name was thus cut out filed a caveat to the probating of the will with some of it omitted, and insisted that it should be probated as it stood before the attempted change. We have held that this should be done, if the words removed can be restored by evidence. Why should this legatee be required to litigate to a conclusion these two propositions separately? Must he obtain a judgment declaring the will propounded not to be the will of the testatrix, when in fact he contends that every word of it is a part of her will? Must he have it rejected because a part of it is omitted when propounded, and then begin a new and distinct proceeding to have the identical paper, plus the omitted words, adjudged to be the will? To employ an extreme illustration, suppose that a will as executed should contain 20 pages of carefully prepared devises and bequests; that in one of the items the testator should say that he did not desire that legacy to be paid until six months after his death; that by some means the word "not" should become obliterated, and the will should be propounded without it. Must the other legatees fight to a conclusion the probate of the will containing legacies in their favor, and including

all the other items which they contend were properly parts of the will, and then repropound the same thing with the word "not" restored? Such does not appear to have been the practice adopted in the cases above cited. It is true that when a will is offered for probate and a caveat filed thereto, the general question is *devisavit vel non*, and an entirely different will cannot be propounded by the caveator in the same proceeding. Where this is not sought to be done, but, in response to the propounding of a will which shows on its face that certain words have been obliterated or cut from it, the effort is to show what such words were, so that the will may be probated in its entirety, if it has not been revoked, the rule has no application. Rules of practice are made for the purpose of having an orderly and systematic trial, so that the truth may be reached. To hold as contended on this point would be to make a technical rule of pleading effective, not to reach a trial on the merits, but to obstruct it and prolong litigation uselessly. The case may be somewhat unique. But where a lady undertakes to cut out a legatee in her will by means of a penknife or pair of scissors the situation produced is unusual.

[5] When the case was appealed from the court of ordinary to the superior court, it was tried *de novo*. The superior court had like power in the matter as the court of ordinary originally had. Pleadings which could be had in the court of ordinary could be had in the superior court. The point does not appear to have been decided in Georgia. But in *Roulette v. Mulherin*, 100 Ga. 591, 28 S. E. 291, two distinct papers were offered as the will of the same testator, and the cases thus arising were appealed to the superior court, and there consolidated. It was held that it was not error for the judge to consolidate them, "and in this manner have all the issues disposed of by a judgment binding and conclusive upon all the parties before the court." There is nothing in the Code of 1910, § 3863, or in *Godwin v. Godwin*, 129 Ga. 67, 58 S. E. 652, in conflict with what is here said; nor is it necessary to discuss the meaning of the words, "without the consent of the testator," used in that section, when considered in connection with reference to the presumption of revocation in the latter part thereof. In the case just cited, there was no contention that the testatrix had altered or revoked her will, or that it had been destroyed, either in her lifetime or after her death. But a petition to probate a copy of the will in one county merely showed that the original had been propounded for probate in another county.

Judgment reversed in each case. All the Justices concur.

(9 Ga. App. 606)

STEPHENS v. LOUDERMILK et al.
(No. 3,128.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 206*)—REVIEW OF DECISIONS—CERTIORARI.

It is not error for the court to refuse to continue a certiorari case, in order that the justice of the peace may have further time in which to make answer to certain exceptions which have been filed, where it appears that the exceptions were filed at a previous term of the court, and an order ordering the magistrate to reanswer was taken at that time, and that no copy of the exceptions and of the judge's order had ever been served upon the magistrate.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 206.*]

2. JUSTICES OF THE PEACE (§ 208*)—REVIEW OF DECISIONS—CERTIORARI.

The judge of the superior court did not err in refusing to sustain the certiorari on account of the alleged improper refusal of the magistrate to continue the case, as, under the testimony submitted on the motion for continuance, only a question of discretion was presented.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 817; Dec. Dig. § 208.*]

3. EVIDENCE (§ 317*)—HEARSAY—ADMISSIBILITY.

A witness testified as to the conduct of a dog, and referred to this dog as the defendant's dog. The witness further said that he knew that it was the defendant's dog, because he had seen it at another person's house, and that person had told him that it was the defendant's dog. *Held*, that while, standing alone, this testimony would have been hearsay and inadmissible, still it became competent, when it was supplemented by the testimony of the person at whose house the dog was seen to the effect that the dog which was seen there, and which he had told the other witness was the defendant's dog, was in fact the defendant's dog. *Cabaniss v. State*, 8 Ga. App. 129 (16), 68 S. E. 849.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

4. SUFFICIENCY OF EVIDENCE.

The evidence, though conflicting, authorized the verdict.

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by T. A. Loudermilk and others against R. D. Stephens. From a judgment for plaintiffs, defendant brings error. Affirmed.

McMillan & Erwin, for plaintiff in error.
J. C. Edwards, for defendants in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 632)

EATON v. STATE. (No. 2,972.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. FISH (§ 13*)—OFFENSES—OBSTRUCTION OF STREAM BY NETS.

Section 603 of the Penal Code of 1910 forbids the putting of an obstruction in any river, creek, or fresh water drain, for the purpose of catching fish, unless at least 10 feet in the case of rivers, and one-third of the main chan-

nel in the case of creeks, is left open for the free passage of the fish. The section excepts dams for milling or manufacturing purposes, but this exception does not render lawful the use of a fall trap in the tailrace below the mill wheel, where a milldam runs entirely across the main channel of a creek, except at the small space where the wheel is located.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 22-24; Dec. Dig. § 13.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to authorize the jury to find that, while the creek in question had many prongs or channels, the defendant had unlawfully obstructed the main channel with a dam and fish trap.

Error from Superior Court, Terrell County; W. C. Worrell, Judge.

Dan Eaton was convicted for illegally obstructing a river for purpose of catching fish, and brings error. Affirmed.

W. H. Gurr, for plaintiff in error. J. A. Laing, Sol. Gen., and R. R. Arnold, for the State.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 591)

SOUTHERN RY. CO. v. DAVIS. (No. 3,014.)
(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 159*)—APPEAL—SUFFICIENCY OF BOND.

A liberal construction should be given to appeal bonds; and, where the language of the appeal bond is sufficient to afford ample protection to the appellee in the event he prevails in the suit, the appeal should not be dismissed on the ground that the statute was not complied with in the technical execution of the bond.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 550-578; Dec. Dig. § 159.*]

Error from Superior Court, Floyd County; John W. Maddox, Judge.

Action by J. M. Davis against the Southern Railway Company. From a judgment for plaintiff before a justice, defendant appeals. Appeal to the superior court, and, from an order dismissing the appeal, it brings error. Reversed.

Maddox, McCamy & Shumate and Geo. A. H. Harris & Son, for plaintiff in error. Eubanks & Mebane, for defendant in error.

HILL, C. J. Davis brought suit in a justice court against the Southern Railway Company to recover damages for the killing of his steer. From an adverse judgment, the railway company entered an appeal to a jury in the superior court.

The appeal bond was as follows: "J. M. Davis v. Southern Railway Company. Justice court of 1569th Dist. G. M., Floyd county, Ga. Suit for killing steer. Judgment for Plff. for \$75.00. Now comes the defendant in the above-stated case, and, being dissatisfied with the judgment rendered there-

on, and within the time allowed by law, after paying all costs, enters this its appeal to a jury in the superior court of said county, and brings J. G. Early and tenders him as security on the appeal bond. Oct. 16, 1909. Southern Railway Co., by its attorney, Geo. A. Harris, Jr., Principal. [Seal.] J. G. Early, Security. [Seal.]"

The judge of the superior court dismissed the appeal, holding that the above bond was not sufficient, because it did not contain the words "for the eventual condemnation money." The judgment dismissing the appeal is assigned as error.

We think the exception is well taken, and that the appeal should not have been dismissed for this reason. The liability of the security on an appeal bond is fixed by law. The purpose of the bond is to protect the appellee in the event the appellant does not succeed in the appeal and is not able, or for any reason refuses, to pay the judgment against him rendered by the superior court. Under the terms of the bond in this case, if a final judgment had been rendered against the appellant, can it be doubted that the bond would have been sufficient to hold the surety thereon and to compel him to pay the final judgment? The bond stated the amount of the judgment rendered against the appellant in the court below, and the security, when he signed the bond, must have known that he obligated himself to pay as security on the appeal bond, which could have no other meaning, except that as security he obligated himself to pay the final judgment against his principal. In other words, we think that the language of the bond filed in this case and approved by the justice of the peace, "as security on the appeal bond," is equivalent to the words, "as security for the eventual condemnation money."

In the case of Shirley v. Price, 30 Ga. 328, the Supreme Court held that the words "I stand security on the appeal of the above stated case," signed by the security and following a statement of the case and of the judgment entered therein and the appeal entered therefrom, was equivalent to the words, "I stand security for the eventual costs and condemnation money."

In Hays v. Eubanks, 125 Ga. 352, 54 S. E. 174, in discussing the statutory requirements as to appeal bonds, the following significant language is used: "A reasonable intentment and liberal construction has heretofore been uniformly given to appeal bonds, which are not governed by the strict rules applicable to technical pleading, but which are to be held legally sufficient whenever there has been a substantial compliance with statutory requirements on the part of the appellant, and the contemplated protection to which the opposite party is entitled is thereby afforded him."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The appeal bond in the present case was sufficient, to have afforded ample protection to the appellee in the event the appellant did not succeed in its appeal. See *Smith v. Jackson*, 122 Ga. 857, 50 S. E. 930; *Hendrix v. McBurney*, 70 Ga. 525; and *Seymour v. Howard*, 15 Ga. 110. Besides, if the appeal bond in this case had been deficient for the reasons stated, an opportunity should have been afforded for an amendment thereof. Civil Code, 1910, § 5707.

Judgment reversed.

(9 Ga. App. 621)

PACE v. GEO. A. H. HARRIS & SON.
(No. 3,414.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 14*)—SECOND WRIT OF ERROR.

Only one writ of error will lie in favor of the same party to the same judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 48-58; Dec. Dig. § 14.*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action between J. R. Pace and others and George A. H. Harris & Son. From the judgment, Pace brings error. Dismissed.

C. I. Carey, for plaintiff in error. M. B. Eubanks, for defendants in error.

POWELL, J. The defendant in error has moved to dismiss the writ of error, because it is the second writ of error to the same final judgment. The plaintiff in error resists the motion. He candidly admits that before he secured the signature of the judge to the present writ of error he had previously presented to the judge another bill of exceptions, which had been duly certified by the judge (and under the practice in this state the certificate of the judge to the bill of exceptions constitutes the writ of error) and served on opposing counsel, and that owing to the contention of counsel for the defendant in error that certain matters had been incorrectly stated, to the prejudice of the defendant in error, he did not file that bill of exceptions, but presented the one now before us, eliminating the objectionable features, and procured it to be certified, served, and filed. He asserts, however, that this court is without power to discover that this is a second bill of exceptions to the same judgment. He asserts that it is not disclosed on the face of the record that this is not the original bill of exceptions, and that we have no power to ascertain facts dehors the record. However, on examining the record we do find evidence of the presentation, signing, and service of the former bill of exceptions. There is in the record a supplemental certificate of the nature provided for by Civil Code 1910, § 6149. It is duly entitled in the

cause, is dated April 8, 1911, and its recitals clearly disclose the existence and service of the prior bill of exceptions sued out by the present plaintiff in error. As the certificate to the present bill of exceptions bears date of April 12, 1911, this cannot be the first writ of error in the case. Besides, this court, following a well-established custom of the Supreme Court, has a way of legally finding out some things which are dehors the record. In matters affecting the jurisdiction of the court, and in a number of similar instances, when the attention of the court is called to the probable existence of some matter resting within the knowledge of the parties or counsel to the case, but not appearing in the record, the court issues a rule requiring parties or counsel to answer under oath whether the alleged or supposed fact is or is not true. If the answers filed present an issue of fact, the court cannot settle that issue; but, if the fact be conceded, the court acts upon the admissions of the parties. So in this case, in view of the frank admissions of counsel for the plaintiff in error the court would have no difficulty in obtaining the facts, even if they did not appear on the face of the record.

Because of the motive which induced the attorney for the plaintiff in error to let his first bill of exceptions go by and to present the second bill to the same judgment, and because we dislike to penalize, as it were, an effort to be extra fair, we are reluctant to dismiss the bill of exceptions on the ground stated; but a dismissal seems to be imperative. When the judge once certifies a bill of exceptions in a case, he cannot thereafter certify another for the same party as to the same judgment. *Perry v. Central Railroad*, 74 Ga. 411; *Marshall v. Livingston*, 77 Ga. 21 (5); *Scott v. Central Railroad*, 77 Ga. 450. We may say, however, that we have also examined the case on its merits, and that, even if we did not dismiss the bill of exceptions, the same substantial end would be reached, for we would have to affirm the judgment anyway.

Writ of error dismissed.

(9 Ga. App. 623)

BURTON v. STATE. (No. 3,483.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1111*)—APPEAL—RECORD—PROCEEDINGS ON MOTION FOR NEW TRIAL.

The final order in the case, to which the exception relates, is as follows: "It appearing that no brief of the evidence has been prepared and filed in the within case, and that no service of this motion was made on the solicitor, it is hereby ordered that the motion for new trial be and the same is hereby dismissed." Nothing in the record contradicts the recitals of facts contained in this order, though the order originally continuing the motion provided that the brief of the evidence should be prepared and presented for approval at the time set for the

hearing, and filed in the office of the clerk within 10 days thereafter. *Held* that, if the brief of evidence had been prepared and presented in time, the fact that it was not lodged in the office of the clerk for filing would not have been ground for dismissal of the motion, but that, as the record nowhere discloses that it was ever prepared or presented, the judgment dismissing the motion on the day set for the hearing will not be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2894-2896; Dec. Dig. § 1111.*]

Error from City Court of Millen; W. H. Davis, Judge.

W. A. Burton was convicted of crime, and brings error. Affirmed.

Anderson & Rabb, for plaintiff in error.
Jas. A. Dixon, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 610)

MIXON v. WALKER & WALKER.
(No. 3,257.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(*Syllabus by the Court.*)

1. GAMING (§ 19*)—CONSIDERATION FOR NOTE—LEGALITY.

An agent cannot recover from his principal money which he has advanced for the purchase of cotton futures for the principal; hence, such a transaction cannot be successfully asserted as supplying any part of the consideration of a promissory note given to secure future advances.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 39-44; Dec. Dig. 19.*]

2. GAMING (§ 19*)—CONSIDERATION FOR NOTE—LEGALITY.

Where a planter gives to a factor his promissory note for supplies and money to be furnished him for the making of his crops, and the factor furnishes him some money for that purpose, and thereafter, at the direction of the planter, pays out other sums for the purchase of cotton futures for the planter's benefit, the promissory note will be upheld only as to the money advanced for the purpose, other than the purchase of cotton futures.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 39-44; Dec. Dig. 19.*]

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by Walker & Walker against R. M. Mixon. From a judgment for plaintiffs defendant brings error. Affirmed on condition.

E. H. Callaway, for plaintiff in error.
Wm. H. Barrett, for defendants in error.

POWELL, J. [1, 2] To state thus much of the facts will be sufficient to illustrate the point which is decided and which, as we see it, controls the case. On March 3, 1908, Mixon gave to Walker & Walker his promissory note for \$1,053.33, the \$53.33 representing interest. Mixon was a planter and Walker & Walker were factors. This note did not represent any then existing indebtedness, but

was given for the purpose of securing advances of money to be made from time to time by Walker & Walker, in order to enable Mixon to make his crops. On the day the note was given, he got \$500, and on April 4 he got \$250 additional. With the exception of the sums which were paid out by Walker & Walker in the purchase of cotton futures, as will be hereafter explained, nothing further was advanced. At the time this note was given, Mixon had 77 bales of cotton in the warehouse of Walker & Walker, on which they had made advances. They were instructed by Mixon to sell this cotton and buy 100 bales of cotton futures. The sale of the spot cotton somewhat more than paid the amount of Mixon's account, and left a fund to his credit on the account, if we leave the note transaction out of consideration. In keeping up the margins on the futures contract which they bought for Mixon, the Messrs. Walker paid out \$900, and the futures contract was closed out with that much loss. The testimony may make some issue as to whether the \$500 and the \$250 which Mixon drew were advanced to him upon the note of \$1,000, or were paid to him out of the proceeds of his spot cotton, but we take the verdict of the jury as settling that in favor of the Messrs. Walker. In their petition the plaintiffs conceded that the full amount of the \$1,000 had not been advanced; at least they only claimed \$824.01, with interest from the maturity of the note, and this amount the jury allowed them.

As we view this case, it all turns upon the question as to how much the Messrs. Walker can be considered as having lawfully advanced to Mixon upon the \$1,000 note. If they had in their hands moneys arising from the proceeds of Mixon's cotton, and he authorized or directed them to expend it in the purchase of cotton futures, and they so spent it, he could not recover it back from them in a direct action, nor could he set off the sum so expended by them by causing it to be credited upon this note. *Benton v. Singleton*, 114 Ga. 548 (3), 40 S. E. 811; *Clarke v. Brown*, 77 Ga. 608, 4 Am. St. Rep. 98. On the other hand, the rule is well settled that, "when a broker is privy to such a wagering contract, and brings the parties together for the very purpose of entering the illegal agreement, he is particeps criminis, and cannot recover for services rendered, or losses incurred by himself in forwarding the transaction." *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, quoted and applied in *National Bank v. Cunningham*, 75 Ga. 366, in which it was concretely held that, "where a note was given to brokers for money which was to be expended by them in purchasing cotton futures for and on account of the maker, and no money went into his hands, such note was void." See, also, *Walters v. Comer*, 79 Ga. 796, 5 S. E. 292.

Following this, it was held, in *Benson v. Dublin Warehouse Co.*, 99 Ga. 303, 25 S. E. 645, that "a promissory note given for money which had been advanced by the payee to the maker, to be used 'as margins in speculating in cotton futures,' and which the lender had, in the maker's behalf, in fact 'placed' for this purpose, is void; and its payment cannot, either as against a principal or a surety thereon, be enforced by suit." See, also, *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947.

Now let us apply these principles of law to the facts of the present case. The note for the \$1,000 was given upon no present consideration; the consideration was to consist in advances to be made in the future. At the time the note was given, it was not intended to be a part of any wagering transaction, and therefore was not wholly void, as the note in the *Benton Case*, supra, was held to be under the particular facts there stated. However, notes made for future advances are not collectible according to the amount stated on their faces, unless those amounts have been actually and lawfully advanced. In other words, if one gives a note for \$1,000 to cover advances to be made in the future, and gets under it only \$500, the payee of the note can only recover the \$500 and the interest. It follows that this note was valid and collectible to the amount of the \$750 which was advanced on it for legitimate purposes, and for the interest on the \$750. (In passing, it may be said that interest on the entire \$1,000 might have been collected if the plaintiffs on the defendant's demand had furnished the entire \$1,000 during the course of the year. For, as we understand it, where a note is given to secure advances of money to be made and the money is at the borrower's command as he may need it, interest may be charged on the full amount thus set apart for him from the time the note is given and the money put at

his disposal; but in this case the plaintiffs refused to let the defendant have beyond what they had already advanced.)

In order to make the plaintiffs' demand as much as the jury allowed them, it is necessary to add in some of the money (a small amount, it is true, and yet enough to be material) which they paid out for the cotton futures; and this cannot be done. If they had paid this money over to *Mixon* and he had bought the futures, or perhaps if they had merely placed the money to his credit and had honored his drafts in favor of others of whom the futures were bought, they might recover as to these items, under the doctrine announced in the case of *Singleton v. Bank of Monticello*; but the fact is they were particeps criminis; they actively officiated in the buying of the futures, and they cannot supply any part of the consideration of this note by showing that they advanced money in any such way. The result is that we affirm the judgment, on condition that the plaintiffs will write off from their judgment all in excess of \$750, and the interest thereon, from the date of the note.

It was argued on the part of the defendants in error that the plaintiff in error did not successfully show the illegality of these future contracts; that he did not show that they were not such contracts as contemplated a bona fide purchase and consequent delivery of the cotton. Without reciting all of the facts that appear in the record, we deem it sufficient to say that it is too clear to admit of any doubt that mere speculation and not legitimate dealing was involved in these cotton future transactions. The proof of this element is as clear as it is in any of the cases which we have cited above, and in all of them the illegality of the transaction is either assumed or directly stated.

Judgment affirmed on condition.

(90 S. C. 439)

MEANS v. McPHAIL.

(Supreme Court of South Carolina. Aug. 10, 1911.)

APPEAL AND ERROR (§ 1094*)—REVIEW—FINDINGS OF FACT.

A judgment of the circuit court affirming on questions of fact a judgment of a magistrate is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

Appeal from Common Pleas Circuit Court of Anderson County; Geo. W. Gage, Judge. "To be officially reported."

Action by A. G. Means against D. B. McPhail. A judgment of the magistrate for plaintiff was affirmed by the Circuit Court, and defendant appeals. Dismissed.

Martin & Earle, for appellant. A. H. Dagnall, for respondent.

HYDRICK, J. This appeal is from a judgment of the circuit court affirming a magistrate's judgment upon questions of fact which this court has no jurisdiction to review.

Appeal dismissed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(90 S. C. 229)

HODGE v. ATLANTIC COAST LUMBER CORPORATION.

(Supreme Court of South Carolina. July 31, 1911.)

1. JUDGMENT (§ 572*)—RES JUDICATA.

While a judgment sustaining a demurrer to the complaint would not bar another action, in so far as the demurrer went to the insufficiency of the allegations, it would bar a second action between the same parties for the same cause, if the demurrer was based upon the ground that the complaint showed affirmatively that plaintiff was not entitled to recover.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1047-1049; Dec. Dig. § 572.*]

2. JUDGMENT (§ 656*)—RES JUDICATA.

An order, in a former action between the same parties for the same cause, sustaining a demurrer to the complaint on the ground that it showed affirmatively that plaintiff was not entitled to recover, precludes the Supreme Court from inquiring on a second trial the nature of the allegations of the complaint demurred to.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1167; Dec. Dig. § 656.*]

3. APPEAL AND ERROR (§ 868*)—NECESSITY OF APPEAL.

There being no appeal from the conclusion of the trial court in this trial that the order in a former trial sustained the grounds of demurrer to the complaint, the Supreme Court is bound by such conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3487; Dec. Dig. § 868.*]

4. NEGLIGENCE (§ 63*)—PROXIMATE CAUSE—ACCIDENTAL INJURIES.

If intestate, while a licensee or a trespasser, was injured by the accidental breaking of defendant's machinery while used in ordinary

course of its business, defendant will not be liable therefor.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 80, 81; Dec. Dig. § 63.*]

5. PLEADING (§ 246*)—INJURIES—AMENDMENTS.

An allegation of the complaint, in an action for personal injuries by the accidental breaking of machinery while on defendant's premises, may be amended so as to show that the injuries were not accidental; amendment being the proper remedy.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 676-683; Dec. Dig. § 246.*]

Appeal from Common Pleas Circuit Court of Georgetown County; Geo. W. Gage, Judge. "To be officially reported."

Action by A. O. Hodge, administrator of the estate of J. J. Hodge, against the Atlantic Coast Lumber Corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Willcox & Willcox, Henry E. Davis, and Le Grand G. Walker, for appellant. Legare & Holman and W. E. Parker, for respondent.

HYDRICK, J. [1] This appeal presents the following question, Does a judgment dismissing a complaint on a demurrer, based on the ground, among others, that the complaint alleges facts which affirmatively show that plaintiff is not entitled to recover, bar a second action between the same parties for the same cause?

In *Duke v. Tel. Co.*, 71 S. C. 101, 50 S. E. 675, the court ruled that a judgment dismissing a complaint on demurrer, because of the omission of an allegation essential to the cause of action, does not bar a second action in which the necessary allegation is supplied. The reason is that the merits of the case, as disclosed in the second action, were not heard and decided in the first.

But the authorities cited by the court in that case recognize this distinction: That where the complaint is dismissed, not because of the omission of a material allegation, but because of the affirmation therein of facts which show that plaintiff is not entitled to recover, a second action is barred, because the first was necessarily a decision upon the merits. In *Gould v. Evansville, etc., R. Co.*, 91 U. S. 526, 23 L. Ed. 416, the court deduces these conclusions from the authorities: "(1) That a judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is that facts thus established can never after be contested between the same parties or those in privity with them. (2) That if judgment is rendered for the defendant on demurrer to the declar-

*For other cases see same topic and action NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 71 S.E.—64

ation, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration, for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless (citing cases). Support to these propositions is found everywhere; but it is equally well settled that, if plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right, for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action." In *Black on Judgments*, § 707, it is said: "But if the decision was on account of some inherent vice or defect in the case *shown by the complaint*, rather than for the lack of proper allegations, it is difficult to resist the conclusion that the judgment would be a complete bar to any further suit upon the same transaction or state of facts."

Under these authorities, and especially *Duke v. Tel. Co.*, in so far as the demurrer in the first action was based on grounds of insufficiency of allegation in the complaint, the judgment would not be a bar to this action, in which the deficiency is fully supplied. But if it was based also upon the ground that the complaint showed affirmatively that plaintiff was not entitled to recover, then the judgment is a bar to this action.

[2] It is not necessary for us to consider the allegations of the complaint in the former case to ascertain what is and what is not therein alleged. The order of the court, in that case, sustaining the demurrer on the grounds upon which it was based, precludes any such inquiry. All parties including this court, are bound by the construction put upon the complaint by the court in that case.

[3] We are also bound by the conclusion of the circuit court in this case that the order in the former case sustained all the grounds of demurrer, because there is no appeal from that conclusion. Therefore it is only necessary to look to the grounds of demurrer in the former case to see if any one of them is based upon the ground that the complaint alleges facts which show that the plaintiff was not entitled to recover; for if there is one such ground it is enough to show that the merits of the former case were considered and decided.

[4] The third ground of demurrer was as follows: "The entire complaint shows that

the plaintiff's intestate, while a licensee or a trespasser, was injured by a mere accident as a result of the breaking of the machinery of the defendant, while used in the ordinary course of its business, and which could not have been guarded against." Now, clearly, if the complaint shows what is stated in this ground of demurrer, and that it does cannot now be questioned, it shows affirmatively that plaintiff was not entitled to recover; for the law does not impose liability for a mere accident, which could not have been guarded against. That plaintiff's intestate lost his life as the result of such an accident has been conclusively adjudicated. Therefore the court erred in not holding such adjudication to be a bar to this action. Every litigant is entitled to have the merits of his case tried once, but he is entitled to only one such trial.

[5] It must not be inferred that such an allegation is not subject to amendment. *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684. But the remedy in such a case is by amendment; for, so long as the allegation remains in the pleading, the plaintiff is bound by it.

The same question is involved and the same judgment will be entered in the case of *A. O. Hodge*, as administrator of the estate of *Howard M. Hodge*, against the same defendant.

Reversed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(30 S. C. 409)

JENKINS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. July 31, 1911.)

1. RAILROADS (§ 134*)—LEASE OF ROAD—ACTIONS—VENUE—RESIDENCE—PLACE OF BUSINESS.

A contract between two railroad companies allowed the second company to operate its trains, in charge of its own servants and conductors, over the tracks of the first, with the added provision that the first company should be liable to the second for any sums which might be recovered against the second because of injuries received by passengers or others while the second was operating its trains over the line of the first. *Held*, that as a railroad company is bound to operate its railroad, and is liable for injuries caused by those who are allowed to operate it, this contract could not change the liabilities of either company to the public; and hence the lessee company was carrying on its business within the counties in which the line of the lessor company ran, and might be sued therein.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 433; Dec. Dig. § 134.*]

2. RAILROADS (§ 260*)—OPERATION—DUTY TO OPERATE.

The owner of a railroad must operate it, and is liable for injuries caused by those who are allowed to use it.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 817-823; Dec. Dig. § 260.*]

3. JUDGMENT (§ 684*)—CONCLUSIVENESS.

One railroad company leased its line to another, and a passenger injured in a wreck sued the lessor company. A judgment was had for defendant. The passenger then sued the lessee company. *Held*, that the judgment in the action against the lessor company was a bar.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1207; Dec. Dig. § 684.*]

4. JUDGMENT (§ 713*)—CONCLUSIVENESS—MATTERS CONCLUDED.

A judgment upon the merits is conclusive, not only as to all matters litigated, but as to all matters which might have been litigated and determined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. § 713.*]

5. ABATEMENT AND REVIVAL (§ 9*)—PENDENCY OF OTHER ACTION.

Where a passenger was injured while on a train run over leased tracks, the passenger could sue either the lessor or the operating company, and the pendency of an action against one would not prevent him from suing the other, though he could not have a double satisfaction.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 73-85; Dec. Dig. § 9.*]

Appeal from Common Pleas Circuit Court of Greenville County; R. C. Watts, Judge.

Action by P. A. H. Jenkins against the Atlantic Coast Line Railroad Company. From a judgment overruling a motion to strike out a certain defense and overruling a plea to the jurisdiction, both parties appeal. Reversed.

J. J. McSwain, for plaintiff. P. A. Willcox and L. W. McLemore, for defendant.

HYDRICK, J. The defendant operates a passenger train between Charleston and Greenville. Between Charleston and Columbia, it is run over defendant's own road. Between Columbia and Laurens, it is run over the road of the Columbia, Newberry & Laurens Railroad Company, and between Laurens and Greenville it is run over the road of the Charleston & Western Carolina Railway Company. On September 7, 1908, plaintiff's wife became a passenger on said train at Newberry, for Greenville. The train was wrecked between Newberry and Laurens, and she was injured. The plaintiff brought an action in the circuit court for Laurens county against the Columbia, Newberry & Laurens Railroad Company to recover damages resulting to him for her injury. The case was tried on the merits, and the judgment was in favor of the railroad company. Thereafter the plaintiff brought this action, in the circuit court for Greenville county, against this defendant for the same cause. The defendant pleaded to the jurisdiction of the court, alleging that Greenville was not the county of its residence, and praying that the action be dismissed, or, failing in that, that it be transferred to the proper county for trial. The plea to the jurisdiction having been overruled and the mo-

tion to transfer refused, defendant answered and pleaded as its second defense the judgment rendered in the action between this plaintiff and the Columbia, Newberry & Laurens in bar of this action. In connection with that plea, defendant alleged that at the time of the injury the train upon which plaintiff's wife was riding was leased to and operated by the Columbia, Newberry & Laurens, and exhibited a copy of the agreement under which the train was operated; and also that, under the terms of their agreement, the Columbia, Newberry & Laurens was and is primarily and solely responsible for any and all damages or injuries arising out of the operation of said train, while on its railroad, and is liable over to this defendant for any sum or sums that may be recovered of it on account of any such injury.

The plaintiff moved upon the record to strike out the second defense. The motion may be regarded as a demurrer to that defense. Numerous grounds are stated in the motion, but in substance they all amount to the same thing—that the judgment in that case is no bar to this action. The court ruled that the former action was not a bar to this action, but refused to strike out the second defense, on the ground that it would be competent for defendant to show that plaintiff had sought to hold another party liable for the same injury. The plaintiff appealed, assigning error in the refusal to strike out the second defense. The defendant also appealed, assigning error in refusing its motion to transfer the cause to the proper county for trial, on the ground that the court in Greenville has no jurisdiction, because defendant is not a resident of that county, and in holding that the judgment pleaded was not a bar to this action.

The ruling that the Laurens judgment was not a bar to this action and the refusal to strike out the plea of that judgment, as a bar, is inconsistent. If it is not a bar, it is irrelevant matter, and should have been stricken out.

[1] There was no error in refusing the motion to transfer the case. The court in Greenville has jurisdiction to try it. *Rafeld v. Railway Co.*, 86 S. C. 324, 68 S. E. 634; *Dennis v. Railway Co.*, 86 S. C. 258, 68 S. E. 465. Under the terms of the contract between defendant and the Columbia, Newberry & Laurens, the train, which was owned and equipped by defendant, manned by its own crew, and run under the direction and control of its own conductor, was operated by defendant.

[2] The proper construction of the contract makes the Columbia, Newberry & Laurens the lessor and defendant the lessee of the right to run defendant's trains over the tracks of the Columbia, Newberry & Laurens. The fact that, by the terms of the contract,

the Columbia, Newberry & Laurens is as between it and defendant, primarily liable for all injuries occurring in the operation of said trains, while on its tracks, and liable over to defendant for any and all sums that may be recovered from it on account of such injuries, cannot affect the liability imposed by law upon either or both to the public. The law imposes upon the owner or a railroad the duty of operating it, and in consequence liability for injuries done by those who are allowed to operate it. *Harmon v. Railway*, 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686. The defendant was therefore carrying on its business in Greenville county, so as to make it a resident of that county. *Tobin v. Railway Co.*, 47 S. C. 387, 25 S. E. 283, 58 Am. St. Rep. 890.

[3] The question whether the Laurens judgment is a bar to this action is one of interest and importance. In the opinion of the circuit court, refusing a motion for a new trial, in *Logan v. Railway*, 82 S. C. 522, 64 S. E. 515, the writer of this opinion investigated that question, and undertook to show that the true ground upon which a former judgment, in a case like this, should be allowed to operate as a bar to a second action is not *res judicata*, or technical estoppel, because the parties are not the same, and there is no such privity between them as is necessary for the application of that doctrine; but that in such cases, on grounds of public policy, the principle of estoppel should be expanded, so as to embrace within the estoppel of a judgment persons who are not, strictly speaking, either parties or privies. It is rested upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity. In *Logan's Case*, and also in *Rookard's Case*, 84 S. C. 190, 65 S. E. 1047, 27 L. R. A. (N. S.) 435, 137 Am. St. Rep. 839, it is stated that a judgment on the merits in favor of a lessee railroad company would bar an action against the lessor for the same cause, because the liability of the lessor is predicated upon that of the lessee. In other words, if the operating company—the one that actually does the injury—is held not to be liable, it follows that the lessor, upon whom the law imposes liability only for the acts of the lessee, cannot be liable. Now, with respect to the injuries complained of here, the lessor and lessee, the Columbia, Newberry & Laurens and the defendant, were jointly and severally liable to the plaintiff, and the liability of each is based upon exactly the same acts or omissions. In other words, there is nothing which the defendant did or failed to do in the operation of that train for which the Columbia, Newberry & Laurens would not be liable, because in its operation defendant was the agent of the Columbia, Newberry & Laurens; and there is nothing, with respect

to the same matter, which the Columbia, Newberry & Laurens did or failed to do for which the defendant would not be liable, because, in the discharge of its duties to the public as common carrier, defendant is responsible for all the instrumentalities employed by it.

[4] From this it follows that there is no force in the plaintiff's contention that the specifications of negligence against the defendant in this case are different from those charged against the Columbia, Newberry & Laurens in the former action. "The rule is well settled that a judgment of a court of competent jurisdiction, delivered upon the merits of a cause, is final and conclusive between the parties in a subsequent action upon the same cause, not only as to all matters actually litigated and determined in the former action, but also as to every other ground of recovery or defense which might have been presented and determined therein." 24 A. & E. Enc. L. (2d Ed.) 781. "An entire claim arising from a single tort cannot be divided and made the subject of several suits; a judgment upon the merits in respect to any part will be available as a bar in other actions arising from the same cause; the rule being that plaintiff must include in the one action all the various items or elements of his damage, and recover all the compensation he is entitled to for each and all of such items." 23 Cyc. 1178. As the liability of the Columbia, Newberry & Laurens is predicated upon that of the defendant, and as it would be liable for anything for which the defendant is liable, in respect to the matter complained of, the logical conclusion necessarily is that, if the Columbia, Newberry & Laurens is not liable, the defendant is not. Now, as between the plaintiff and the Columbia, Newberry & Laurens, it has been conclusively adjudicated that the Columbia, Newberry & Laurens is not liable. Therefore the defendant is not, and the former judgment is a bar to this action.

[5] This conclusion illustrates the difference between the effect of a pending action and a judgment in that action. The cases above cited show that plaintiff could have sued both companies at the same time for the same cause, and he could have sued them in the same or in different actions; and, if he had sued them separately, neither action could have been pleaded in abatement of the other. And he could have recovered judgment in both, though he could have had but one satisfaction. On the other hand, a judgment *against* him in either would have been a bar to any further prosecution of the other.

Reversed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(39 S. C. 407)

In re COLUMBIA, N. & L. R. CO.
JENKINS v. ATLANTIC COAST LINE
R. CO.

(Supreme Court of South Carolina. July 31, 1911.)

Appeal from Common Pleas Circuit Court of Greenville County; R. O. Watts, Judge.

"To be officially reported."

Action by P. A. H. Jenkins against the Atlantic Coast Line Railroad Company, in which the Columbia, Newberry & Laurens Railroad Company petitioned to be made a party defendant. From a judgment refusing the petition, petitioner appeals. Affirmed.

Lyles & Lyles, for appellant. J. J. McSwain, for respondent.

HYDRICK, J. The Columbia, Newberry & Laurens Railroad Company filed a petition in this case setting out the judgment in its favor in an action in the court of common pleas for Laurens county, between plaintiff herein and itself, for the same cause of action as is herein sued on, alleging that, if any one is liable to plaintiff for the injury herein complained of, it is; and that, by the terms of the contract between itself and defendant, it is liable over to defendant for any sum that may be recovered of defendant in this action, and therefore it prays to be made a party defendant.

The decision in the principal case (71 S. E. 1010) shows there was no error in refusing petitioner's motion.

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(9 Ga. App. 614)

POWELL v. STATE. (No. 3,289.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1137*)—APPEAL—ESTOPPEL TO ALLEGE ERROR.

Under the special facts appearing in the record, especially as recited in the note of the trial judge qualifying the grounds of the motion for a new trial, the conviction will not be set aside because he informed the jury in the beginning of his charge that the defendant was indicted for killing Owen Folsom, when in fact the indictment charged the killing of J. O. Folsom.

[Ed. Note.—For other cases, see Criminal Law. Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict rendered, and the exceptions to the charge are not well taken.

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

Tom Powell was convicted of murder, and brings error. Affirmed.

Jas. M. Johnson, for plaintiff in error. J. A. Wilkes, Sol. Gen., and Whitaker & Dukes, for the State.

RUSSELL, J. The indictment charged that the defendant, Tom Powell, did "kill and murder one J. O. Folsom, in the peace of the state, by then and there striking and beating the said J. O. Folsom with a certain

stick of wood known as a shingle back, then and there held by him, the said Tom Powell, and then and there giving to him, the said J. O. Folsom, a mortal wound of which the said J. O. Folsom died." Throughout the testimony the witnesses, both for the state and the accused, spoke of the deceased as Owen Folsom, and the initials "J. O." do not appear in the brief of the testimony. The defendant in his statement to the jury spoke of the deceased as "this Owen Folsom." The court opened his charge to the jury in the following language: "The state of Georgia, by this indictment which you will have before you, charged the defendant, Tom Powell, with the offense of murder, alleging that he did, in the county of Lowndes, at some time previous to the return of this indictment into court, unlawfully kill, in the peace of the state, one Owen Folsom, with malice aforethought."

One of the grounds of the motion for a new trial complains that the judge thus instructed the jury that the accused was being held for killing Owen Folsom, when the indictment in fact charged the killing of J. O. Folsom; the movant alleging that there was no proof that J. O. Folsom and Owen Folsom were one and the same person. The judge adds an explanatory note as follows:

"After the witnesses were introduced and the case was argued and the time arrived to charge the jury, counsel for the state and the defendant confronted the court, while the jury occupied the seats to the left. The indictment was in the hands of the attorneys for the prosecution. For the purpose of ascertaining precisely the name of the deceased alleged in the indictment, in order to state the issues in the case to the jury, the court turned to the attorneys in the case, and, in the hearing and presence of the jury inquired as to what was the name of the deceased alleged in the indictment; to which question the attorneys for the prosecution both arose and stated that the name was Owen Folsom. Counsel for the defense made no remonstrance, in fact, he sat without any expression of any kind; and the court, accepting as true the statement of the attorneys, which was undenied, and turning to the jury, stated the issues as appeared in the charge, using the name of Owen Folsom, instead of J. O. Folsom. No question was ever raised, either in the arguments of counsel upon either side or before the court, as to any question as to the identity of J. O. Folsom, as alleged in the indictment, and Owen Folsom referred to by the witnesses. The case was argued to the jury by the attorneys both for the prosecution and the defense. When the defendant took the witness stand to make his statement, with reference to the charges alleged in the indictment against him, which charged him with the killing of J. O. Folsom, he began by refer-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ring to this Owen Folsom,' as will appear from his statement incorporated in the record."

[1] Under the facts recited, we do not think that the court committed reversible error in referring to the person alleged to be killed as "Owen Folsom." Of course, the allegata and the proof should correspond in respect to the identity of the person killed, just as it should in respect to all other material matters involved; but where the evidence suggests no actual conflict of identity, and the trial proceeds to verdict without any question being made as to it, slight evidence will be sufficient on this point.

In *Mitchum v. State*, 11 Ga. 615, the indictment charged the homicide of William R. Morris, and the proof referred merely to the killing of W. R. Morris. The court held that the variance was not fatal; and Judge Nisbet, in discussing the point, said: "It is very clear that there must be a killing before there can be murder; and it is equally clear that the prisoner cannot be convicted of murder, unless he is proven to have slain the person which the indictment charges him to have murdered. On this indictment for the murder of William R. Morris, the plaintiff in error could not be convicted upon proof that he had murdered John Stiles. So vital is this, as a practical rule, that its observance substantially must be insisted upon with strenuousness. It may be conceded that in former times such a variance would have been held decisive, and even now we are not altogether satisfied that we are right in not so holding it. We think, however, whether W. R. Morris, the person slain according to the testimony, was or was not the William R. Morris charged to have been slain in the indictment was a question safely trusted with the jury. W. R., it is true, may represent Wilson R. or Willis R.; but these letters may also represent William R. The jury had the right to consider the question of identity, not alone in the light of the testimony specially referred to, but also in the light of all the attendant circumstances. They were satisfied with the identity, as is evidenced by their verdict, and we will not disturb it on this account."

In *Robinson v. State*, 68 Ga. 833, it was held: "Where an indictment charged the larceny of a horse belonging to Joel W. Perry, and the evidence was that the horse belonged to 'Colonel Perry,' whom one of the witnesses called his father-in-law, the identity of the owner as charged and as proved was for the jury; and, in the absence of any conflicting testimony as to the ownership or of proof that there was any other Perry in the county, a verdict of guilty will not be set aside as contrary to law, on the ground that

the probata and allegata did not agree as to ownership."

In *McLain v. State*, 71 Ga. 280, which is very close on its facts to the case at bar, the court ruled: "Where an indictment for murder alleged the killing of W. F. Sexton, and the witnesses spoke of the deceased as Freeman Sexton, the question of identity having been submitted to the jury, who found that the deceased, as charged and proved, was the same person, and there being evidence to support such finding this court will not interfere." See, also, *Joyce v. State*, 82 Tenn. (2 Swan) 667; *Stuart v. State*, 60 Tenn. (1 Baxt.) 178; *Rutherford v. State*, 79 Tenn. 31.

It is true that in the present case the court did not submit the question to the jury, but told them directly that the defendant was indicted for killing Owen Folsom; but this statement must be taken in connection with the judge's qualifying note. He was beginning his charge; he did not have the indictment before him; counsel both for the state and the accused were sitting just in front of him, and the Solicitor General had the indictment in his hand. The judge asked the name of the person for whose killing the defendant was indicted; the question being addressed to counsel generally. State's counsel said, "Owen Folsom." The judge looked to the defendant's counsel, and he made no dissent, and we think that the only reasonable and fair construction to put upon his silence under all the circumstances is to construe it as an acquiescence. It was silence at a time when proper respect for the court and the duty of counsel to make objection, if he had any, to the information given by the other attorney demanded that counsel for the accused should speak out, or thereafter forever hold his peace.

Counsel for the plaintiff in error strenuously argues that a new trial should be granted on the point we have just been discussing, because, as he says, the present conviction under the indictment charging the homicide of J. O. Folsom will not bar a subsequent prosecution for the killing of Owen Folsom; that if the state were now to bring a new indictment charging the killing of Owen Folsom, and he should attach a copy of the present indictment to his special plea of autre fois convict, the plea would be demurrable for the variance. All the defendant would have to do in order to avoid liability to demurrer on this ground would be to allege that Owen Folsom and J. O. Folsom were the same person; for in this state the "same transaction test" is the one recognized by the courts.

[2] The errors assigned upon the charge are not well taken, and the requests to charge submitted by the accused were fairly and fully covered in the general charge.

Judgment affirmed.

(9 Ga. App. 584)

OLDKNOW v. CITY OF ATLANTA.

(No. 3,026.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. THEATERS AND SHOWS (§ 2*)—ORDINANCES—POLICE POWER.

A municipal ordinance, which makes it the duty of proprietors, lessees, or other persons in charge of opera houses or theaters, moving picture shows, or vaudeville performances or similar exhibitions, to require ladies who attend the performances in such places to remove their hats before the performance begins and to keep them off during the performance, reasonably construed, is within the police power of the municipality, and is authorized under a "general welfare clause" in its charter which confers upon it the power to pass ordinances "for the prevention and punishment of disorderly conduct, and conduct liable to disturb the peace and tranquility of any citizen or citizens thereof," and such as "may seem to [it] proper for the security of the peace, health, order, and good government of said city."

[Ed. Note.—For other cases, see *Theaters and Shows*, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. MUNICIPAL CORPORATIONS (§ 640*)—ORDINANCES—REGULATION OF THEATERS—EVIDENCE.

The finding of the recorder is supported by evidence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1410; Dec. Dig. § 640.*]

(Additional Syllabus by Editorial Staff.)

3. CONSTITUTIONAL LAW (§ 81*)—"POLICE POWER."

The "police power" of a state is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 148; Dec. Dig. § 81.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5424-5438; vol. 8, p. 7756.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

William Oldknow was convicted of violating a city ordinance, and brings error. Affirmed.

Hudson Moore, for plaintiff in error. J. L. Mayson, and W. D. Ellis, Jr., for defendant in error.

RUSSELL, J. William Oldknow was convicted in the recorder's court of the city of Atlanta for a violation of a city ordinance which makes it "the duty of the proprietor, lessee, or other person in charge of every opera house, or theater, or moving picture show, or vaudeville performance, or similar exhibition in the city of Atlanta to require ladies who attend performances in such theater or opera house to remove their hats before the performance begins and to keep them off during the performance." On certiorari the superior court affirmed the judgment of the recorder, and Oldknow excepted.

[1] He challenges the legality of the ordinance in question on various grounds, such as that no authority in law existed for the enactment of such ordinance, that it was discriminatory and class legislation, in that it did not apply to all subjects alike, and that the ordinance, if otherwise valid, was wholly unreasonable, because it imposed a penalty for an offense over which the defendant had no control and was powerless to prevent; in other words, that the ordinance was not within the police power of the city under its charter. He further insists that, conceding the legality of the ordinance, the evidence in this case fails to show a violation of its terms, reasonably construed.

It will hardly be questioned that the city has the power to regulate all classes of exhibitions such as are conducted for the recreation and amusement of the public, and that the police power of the city is properly exercised over places of public resort, although owned and operated by private citizens. 28 Am. & Eng. Enc. Law, p. 116, and cases cited. "Places to which people come in numbers and indiscriminately by invitation or license of the owner and generally for his benefit, such as public conveyances, railroad depots, wharves, inns, restaurants, and theaters, may be said to be affected with public interest. The police power is duly exercised not only for safety and health, but sometimes also for public comfort. So in directing the heating of cars or depots, restricting the number of passengers to be carried in a car, regulating the landing of vessels at wharves, and *requiring women attending theatrical performances to remove their hats.*" Freund on Police Power, § 175.

[3] Generally speaking, it is well settled that the Legislature has the same authority over the theatrical business as over any other lawful private business. Besides the requirement of a license, it is authorized to regulate the conduct of places of public amusement, where the public health, safety, morality, comfort, and tranquility are concerned and the general welfare requires. This is the exercise of police power, which has always been declared by the courts as that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society. The "general welfare clause" contained in the charter of the city of Atlanta confers upon the municipality authority to pass ordinances "for the prevention of disorderly conduct and conduct liable to disturb the peace and tranquility of any citizen," and such as "may seem to [it] proper for the security of the peace, health, order, and good government of said city." City Code, § 33. Under this welfare clause we think the state conferred upon the city the authority to adopt the ordinance in question, provided it is an appropriate measure cal-

culated to promote the comfort, safety, and welfare of the citizens generally, and of their peace, tranquillity, and comfort in places of public amusement.

The plaintiff in error in this case was proprietor of what is known as a "moving picture show" in the city of Atlanta. This character of amusement has become one of the most popular methods of recreation and pleasure, and is resorted to almost universally by all classes of citizens. The business is clearly lawful, as well as entertaining, and sometimes instructive, and the public has the right to resort to these places, and, while there, to be protected in the full enjoyment furnished by this class of entertainment. It is a matter of common knowledge that the style of modern hats worn by ladies, if permitted to be worn by them while the performance is in progress, will prevent those who may be so unfortunate as to sit in the rear of ladies from seeing the stage or from enjoying the spectacular entertainment there presented, which is a most important part of the performance. Nothing more greatly mars the pleasure of an entertainment, or disturbs the comfort of those who may be so unfortunate as to be located behind these obstructions, or more irritably disturbs or interferes with the comfort of the audience attending the theaters or moving picture shows, than these large hats worn by ladies, which in many cases completely obstruct the view of the performance. The spectacular is the principal part of moving picture shows. The evil aimed at by this ordinance, the mischief it was intended to prevent, and the nuisance it was passed to abate, all clearly show that the ordinance in question is within the police power of the city and is authorized by the "general welfare clause" of its charter.

Nor do we think that the ordinance is an unwarranted interference with the right of the citizen to conduct his private business in such manner as he may see proper. All places conducted by private citizens where the public are congregated are protected by public authority, and those located in the city are under police surveillance. This is not an interference with the right of the proprietor to operate his private business, but is simply a requirement that he shall operate it in such manner as not to disturb the public tranquillity, peace, and comfort of those who may be assembled there. The proprietors, or those who operate such establishments, have themselves the right to make any reasonable rules and regulations for the orderly conduct of such places, and, where they cannot effectually do so, it becomes the duty of the municipality to interfere and make such regulations as will secure the orderly conduct of such places and the peaceful and full enjoyment of those who have a right to assemble at such places. Neither

is the ordinance unreasonable because it imposes upon the proprietor a burdensome duty which he cannot enforce. If the ordinance is lawful, he can enforce it by simply calling to his aid the police of the city to arrest any lady who refuses to obey the regulation and remove her hat. Besides, it is a matter of common knowledge that the ladies of our country are always amenable to reasonable requests conducing to the comfort of others.

The ordinance is not discriminatory because it does not include men within its operation. Men do not need any regulation on this subject. Public opinion, which demands that the man shall take off his hat in the presence of ladies, is sufficient, and does not need the aid of any police regulation. If it were the fashion for men to wear hats of such description as those worn by ladies in this day and to keep them on in public places, could it be doubted that there would be a loud and vociferous demand on the part of the ladies for the abatement of such a nuisance? But we will not extend the discussion. We hold that the ordinance in question, reasonably construed, is clearly within the police power of the city of Atlanta, that it does not discriminate, that it does not impose on the proprietor of such places any unnecessary or unusual hardship, and that it is in the interest of public order and comfort.

[2] It is contended that the evidence fails to show a violation of the ordinance; that the ladies present did remove their hats during the performance, except two, who sat on the rear seat; and that these two put their hats on preparatory to leaving the house, and just before they left. If this was all the evidence, we do not think it would show a violation of the ordinance, reasonably construed. The purpose of the ordinance is to give to all in the house a full opportunity to see all the performance, and to prevent the shutting off of the view of the stage by the enormous hats worn by the women. The terms of the ordinance are that the hats should be kept removed during the performance. It is not intended to prevent the ladies from replacing their hats inside the house, or while in their seats, if they do so preparatory to leaving, and do in fact leave the house. This is not all the evidence. It is true that only two ladies kept their hats on, but they remained in their seats with their hats on for nearly an hour during the performance. Besides, there is some evidence from which it might have been inferred that there was no attempt to enforce the ordinance until the proprietor discovered the presence of the author of the ordinance, who presumptively reported the violation of the ordinance. While the direct and positive evidence did not show a very flagrant disobedience of the law, there was enough to warrant conviction.

Judgment affirmed.

(9 Ga. App. 617)

HOWARD v. CENTRAL OF GEORGIA RY. CO. (No. 3,386.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

*(Syllabus by the Court.)***1. TORTS (§ 6*)—BREACH OF CONTRACT.**

Where the result of a contract is to create a relationship as to which the law imposes certain specific duties, a violation of one of these duties may give a cause of action in tort in favor of the party to whom the duty is owing. But ordinarily a breach of contract, as such, gives rise only to an action *ex contractu*. For a railroad company, at one of its agencies, to accept money from a person under a contract to deliver to another person at another time and place a railroad ticket creates only a contractual relationship between the person first named and the company, and a breach of the contract and a failure to furnish the ticket at the time mentioned does not give rise to an action in tort.

[Ed. Note.—For other cases, see *Torts*, Dec. Dig. § 6.*]

2. CONTRACTS (§ 177*)—CARRIERS (§ 236*)—PERFORMANCE OF CONTRACT—ACTION FOR BREACH.

A father in one city, being desirous that his son in another city should be furnished railroad transportation, went to the office of the railroad company in his own city and made an agreement with the agent, whereby the father deposited with the agent the usual fare, under an agreement that transportation would be furnished at once to the son in the other city through telegraphic means, and the company failed to furnish the transportation to the son. *Held*, that the father has a right to sue for the breach of the contract; but that he can recover only such damages as were in contemplation of the parties at the time the contract was made.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 177.* *Carriers*, Cent. Dig. §§ 968-972; Dec. Dig. § 236.*]

Error from City Court of Columbus; G. Y. Tigner, Judge.

Action by W. H. Howard against the Central of Georgia Railway Company. From a judgment for defendant, plaintiff brings error. Affirmed.

D. L. Parmer and Davis & Davis, for plaintiff in error. C. E. Battle and Howell Hollis, for defendant in error.

POWELL, J. The petition alleged that the defendant company is a corporation existing under the laws of this state, owning and operating certain railway lines for the carriage of passengers, and also certain telegraph lines between the cities of Columbus and Atlanta. The plaintiff was in Columbus and had a 13 year old son in Atlanta, and he desired that the son should come to Columbus without delay. The plaintiff went to the company's office in Columbus and paid to the company's agent \$2.77, for which the agent promised to telegraph a "railway ticket" to the son in Atlanta. Petitioner alleges that the defendant company was guilty of certain unreasonable and negligent delay in the delivery of the telegram and the ticket. The son, not having received the ticket, did not come at once, and this

caused the father anxiety; he inquired of the railway company's agent at Columbus, and the latter told him that the telegram and ticket had been sent. His anxiety became so great that he went to Atlanta and incurred certain expenses and lost three days from his work. He sued for these expenses; also for mental pain and suffering caused by his anxiety at his son's not coming in response to his sending the ticket by telegraph. Certain demurrers, both general and special, were filed. The court held that damages for the mental pain and suffering could not be recovered. As to the other damages alleged in the petition, the court sustained certain special demurrers on account of the indefiniteness of allegation, and gave the plaintiff opportunity to amend. The plaintiff refused to amend, and the court dismissed the entire petition. The plaintiff excepts.

[1] The petition leaves it somewhat doubtful as to whether the action is brought *ex delicto* or *ex contractu*. However, we think that the court properly dismissed it in either event. The plaintiff, in order to sustain his right to sue in tort, cites the Civil Code 1910, § 4403(3), where it is said that a tort may be the violation of some private obligation by which damage accrues to the individual, and upon section 4406, which provides: "Private duties may arise either from statute, or flow from relations created by contract express or implied. The violation of any such specific duty, accompanied with damage, gives a right of action." These sections merely declare the doctrine (well recognized in our decisions) that if the result of a contract is to create a relationship between the parties, and there are certain duties which the law attaches to that relationship, the breach of one of these duties may give rise to an action in tort. For instance, a person makes a contract with a railroad company for transportation over one of its lines; the contract creates the relationship of carrier and passenger; the law attaches to that relationship certain duties, and a neglect of one of these duties gives a cause of action. Likewise, if one person hires himself into the service of another for the performance of labor, the relationship of master and servant is created by the contract. The law imposes upon the master certain duties under that relationship and a breach of one of those duties may give a cause of action. But it is not to be contended that every contract creates such a relationship, or that the breach of every contract gives a cause of action in tort. The duty, for a breach of which an action *ex delicto* lies, must be a duty imposed by law as to some relationship, general or special, as applied to that class of cases where the alleged duty arises out of a contract. For instance, if one promises to pay another a given sum

of money by a named day, the contract creates a duty to pay; but a breach of that duty is not a tort.

The terms of the contract between the plaintiff and the railroad company in this case are not very explicitly alleged, but we think that we understand what the pleader means to say; and, as we understand it, what he charges is that he paid to the defendant's agent in Columbus the price of a ticket from Atlanta to Columbus, with the understanding that the agent at Columbus would cause the ticket to be furnished to the plaintiff's son in Atlanta, by sending a certain telegram from Columbus to Atlanta, so that the son in Atlanta could secure the necessary evidence that his transportation had been paid for. This certainly did not create the relationship of carrier and passenger between the plaintiff and the company, nor do we conceive of any relationship that it created, other than the mere ordinary relationship of promisor and promisee; and we do not think that the transaction was such as to give rise to an action in tort.

[2] 2. We think that the petition did allege a breach of contract, and if legal damages had been alleged a cause of action might have been asserted. The defendant in error contends that if a contract was made the cause of action for the breach of it existed in favor of the son, and not in favor of the father, and relies upon the cases of *Aiken v. Sou. Ry. Co.*, 118 Ga. 118, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. Rep. 107, and *Ga., Carolina & Northern Ry. Co. v. Brown*, 120 Ga. 380, 47 S. E. 942. The first headnote in the *Aiken* Case, which states the substance of what is held in both of these cases, is as follows: "While a husband may make with a railway company a contract for the safe carriage of his wife, the law will not imply such a contract from the mere purchase of an ordinary ticket by the husband for the wife. In such a case the law raises an implied contract for safe carriage in favor of the wife only."

However, the present case is clearly distinguishable from those cases, and it falls squarely within the purview of the decision in the case of *Ogles v. Nashville, Chattanooga & St. Louis Ry. Co.*, 130 Ga. 430, 60 S. E. 1048, 124 Am. St. Rep. 175. The headnote, which states the substance of the ruling in that case, is as follows: "A. paid his own money to a railroad agent, for which the agent agreed to issue a railroad ticket and cause it to be delivered at a distant place to B., the married daughter of A., to be used by B. in traveling over the road of the agent's principal, in coming to the home of A. The agent failed to issue the ticket, or to cause a ticket to be issued and delivered to B. Because of failure to receive the ticket, B. was delayed in mak-

ing the trip, and suffered injury. Suit was instituted against the railroad company by B., for damages alleged to have resulted from a breach of the contract. Held, that there was no privity of contract between B. and the railroad company, and that the petition was open to general demurrer." In the course of the opinion it is said: "There were but two parties to this agreement, the plaintiff's father and the defendant." It is further said in the opinion: "It is alleged that there was a breach of this contract by failure to issue the ticket, and by failure to furnish the plaintiff with transportation. The effect of such allegations was to allege a breach of the contract between the plaintiff's father and the defendant. Clearly any right of action thereunder for injury arising from breach of this contract was in the plaintiff's father, who made it. Had the contract been so far executed by the defendant as to issue a ticket and deliver it to the plaintiff, the plaintiff, by virtue of holding the ticket, might have been introduced as a party, and for a breach of duty thereafter occurring might recover, under the ruling in *Georgia, C. & N. Ry. Co. v. Brown*, 120 Ga. 380, 47 S. E. 492, and *Aiken v. Southern Ry. Co.*, 118 Ga. 118, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. Rep. 107."

Construing the case as an action *ex contractu*, the damages sued for were too remote. They were not such damages as were naturally in the contemplation of the parties at the time of the making of the contract.

Judgment affirmed.

(9 Ga. App. 578)

GAULDING v. BAKER. (No. 2,818.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. REFORMATION OF INSTRUMENTS (§ 3*)—RIGHT TO REMEDY—IMMATERIAL MISTAKE.

Any mistake consisting of some unintentional act or omission and manifestly a mere clerical error, in no sense changing the contract or the relations of the parties thereto, is relievable at law, and there is no necessity to resort to a court of equity for the purpose of reforming the contract.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 3½; Dec. Dig. § 3.*]

(Additional Syllabus by Editorial Staff.)

2. DAMAGES (§ 78*)—LIQUIDATED DAMAGES—CONSTRUCTION OF CONTRACT—MISTAKE IN LANGUAGE.

Under Civ. Code 1910, § 4268, providing that the cardinal rule of construction is to ascertain the intention of the parties, and section 4268, par. 3, providing that the construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part, a contract providing that the defendant, on making a tender of cotton sold, and the refusal of the plaintiff to accept, should be entitled to liquidated damages

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in a certain sum, and, should the defendant refuse to deliver the cotton, the defendant should be entitled to liquidated damages, will be construed, even in the absence of parol evidence, as providing in the latter case for liquidated damages in favor of plaintiff.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 78.*]

Russell, J., dissenting.

Error from City Court of Nashville; W. D. Bule, Judge.

Action by J. W. Gaulding against H. O. Baker. From a judgment dismissing the petition, plaintiff brings error. Reversed.

The petition alleges that, as a buyer and seller of cotton, the plaintiff made a contract with one Harmon C. Baker, by which the latter contracted and sold to him 65 bales of cotton at the average weight of 500 pounds per bale. The contract is made the basis of the action, and a copy thereof is attached to the petition, which seeks to recover \$1,452 as the difference between the contract price of the cotton and its market value at the time fixed by the contract for its delivery. It is plainly to be seen that the action depends for its existence wholly upon the contract. The contract provides: "Should either party to this contract fail or refuse to carry out his or their part of same, on the day specified, time being of the essence of this contract, it is understood and agreed that the party of the second part, upon making tender of said cotton and the refusal of said J. W. Gaulding to accept same and settle at the price above contracted for, shall be entitled to liquidated damages in an amount equal to the difference between the price herein contracted for and the actual value of the same grade of cotton in Tifton on the day of such tender of cotton, and should the said party of the second part fail and refuse to deliver said cotton on the day mentioned above for its delivery, it is understood and agreed that the said Harmon C. Baker [the defendant] shall be entitled to liquidated damages in an amount equal to the difference between the actual value of the same grade of cotton in Tifton, Ga., on the date of delivery agreed upon in this contract, and the price herein contracted for."

In that portion of the contract above quoted which it would naturally be supposed would express the plaintiff's right to recover against Baker it is to be seen that the damages are payable instead to Baker himself. It is insisted that it is manifest that this is a palpable mistake, and that it was the intention of the parties in filling in the name of the party in the printed contract to insert Gaulding's name where Harmon's appears. It is contended, on the other hand, that this error, if an error, must be corrected by an equitable proceeding to reform the contract, and that the city court

is without jurisdiction to afford such affirmative relief. The lower court took this view of the question and dismissed the petition on demurrer, and this is assigned as error.

Fulwood & Murray, for plaintiff in error.
Denmark & Griffin and Alexander & Gary, for defendant in error.

HILL, C. J. The mistake in the contract was manifestly a lapsus penæ, and no reformation of the contract was necessary. In *Thompson v. Hall & Long*, 67 Ga. 630, it is held that: "Any mistake consisting of some unintentional act, or omission, or error, is relievable in equity, and also now at law. We scarcely regard this an open question in this court." A suit was brought by Hall & Long on a bond which was on its face payable to Hull & Long instead of to Hall & Long, and it is said in the opinion that "the mistake in making the bond sued on payable to Hull & Long instead of to Hall & Long cannot be doubted, from the whole of the surrounding circumstances," and that "such a mistake is relievable in equity beyond a doubt, and why not at law under our liberal statute, with proper averments?" This case seems to be much in point, and if proof of the mistake made, to wit, the writing of the obligees in the bond as Hull & Long instead of Hall & Long, was permissible in a court of law, it seems clear that it would have been entirely proper to have proved by parol evidence that the insertion of the name of Harmon C. Baker in the place where that of J. W. Gaulding should have been inserted in the contract which is the basis of the suit in this case was simply a clerical error. See, also, the case of *Shaver v. McLendon*, 26 Ga. 228, where a forthcoming bond was made payable to James B. Shaver instead of to William B. Shaver, and it was held that William B. Shaver might sue at law and show the mistake. So in *McCrary v. Caskey*, 27 Ga. 54, where a promissory note dated in December was expressed to be payable on the "25th day of December next," and parol evidence was offered to show that the 25th day of December intended was the 25th day of the same December in which the note was made, it was held that this parol evidence ought to have been received. *Jackson v. Johnson*, 67 Ga. 168, was a suit on an administrator's bond which purported to be for \$150, and parol evidence was admitted to show that the bond was intended to be for \$150,000; and in this case it was held that "what was the true intention of the parties to the contract is always admissible in case of alleged clerical mistakes," etc.

[2] But we think the error in this case was so manifestly a clerical one that even parol evidence to prove the fact was not necessary. See, also, *Atlanta & W. P. R. Co. v. Speer*, 32 Ga. 550, 79 Am. Dec. 305. The cardinal

rule of construction is to ascertain the intention of the parties. Civil Code 1910, § 4268. And another rule of construction is that "the construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part." Civil Code 1910, § 4268, par. 3. Bearing in mind these two rules of construction, and considering the contract in its entirety, it is manifest that the insertion of the name of Harmon C. Baker in the contract where that of J. W. Gaulding should have been was a clerical error, and that the name of J. W. Gaulding was intended to be inserted in that place. The contract is made by the two parties Gaulding and Baker, and Gaulding is designated in the contract as "party of the first part," and Baker as "party of the second part," and these parties are so referred to throughout the entire contract, and, in fixing the liability of either party in the event of a breach of the contract, it is recited: "Should the party of the second part [who unquestionably was Harmon C. Baker] fail and refuse to deliver said cotton on the day mentioned above for its delivery, it is understood and agreed that the said Harmon C. Baker shall be entitled to liquidated damages." Of course, it meant that a breach of the contract on the part of Harmon C. Baker, party of the second part, to deliver the cotton as agreed on would entitle the other party to the contract, J. W. Gaulding, to liquidated damages. So manifestly is this a mere clerical error, when we consider the contract as a whole, that it seems to us that it is a mere quibbling technicality to compel a resort to a court of equity to reform the contract and to correct a clerical mistake where the mistake does not change any of the terms of the contract, or the subject-matter of the contract, but is simply an unintentional substitution of the name of one party where, by the contract, the name of the other party should have been inserted, and was intended to be inserted.

It is wholly unreasonable to compel a resort to a court of equity to correct a mistake so palpable, and which does not in any manner affect the validity of the contract or leave in any doubt whatever who were the respective parties thereto and their respective relations to the contract. An examination of the contract will show that there were other clerical mistakes equally serious, if the word "serious" can be applied to mistakes of this trivial character. In one part of the contract Gaulding, who should have been designated as "the party of the first part," is incorrectly designated as "the party of the second part," and so Harmon C. Baker is designated as "party of the first part" when he should have been designated

as "party of the second part." These are simply clerical mistakes not affecting the legality of the contract or rendering in the slightest degree doubtful the relations of the parties to each other in the contract, the one as buyer and the other as seller, for it is manifest from the contract, itself, about which there could not be the slightest doubt, that Gaulding was the buyer of the cotton mentioned in the contract, and Baker was the seller. And it follows that if Baker tendered the cotton at the time and place fixed by the contract, and Gaulding refused to accept it, Baker was entitled to the liquidated damages fixed by the contract; and, if Baker neglected or refused to tender it at the time and place fixed by the contract, then Gaulding was entitled to the liquidated damages as fixed by the contract. And, besides, the damages as liquidated by the contract are the measure of damages as fixed by law, flowing from a breach thereof, and an agreement was entirely unnecessary. The contract recites that "the party of the second part," upon making tender of such cotton and the refusal of said J. W. Gaulding to accept the same and settle at the price above contracted for, shall be entitled to liquidated damages in an amount equal to the difference between the price herein contracted for and the actual value of the same grade of cotton in Tifton on the day of such tender of the cotton, and, should the said party of the second part fail and refuse to deliver said cotton on the day mentioned above for its delivery, then "the said Harmon C. Baker [of course it should have been J. W. Gaulding] shall be entitled to liquidated damages in an amount equal to the difference between the actual value of the same grade of cotton in Tifton, Ga., on the date of the delivery agreed upon in this contract, and the price herein contracted for." This is the measure of the damages fixed by the law for the breach of a contract of this character. *Wrenn, Whitehurst & Co. v. Deveney, Hood & Co.*, 74 Ga. 421; *Erwin v. Harris*, 87 Ga. 336, 13 S. E. 513 (5). Judgment reversed.

RUSSELL, J. (dissenting). The action was brought to recover damages resulting upon the breach of a contract which is pleaded. In my opinion the plaintiff cannot recover upon the contract in its present form, for the reason that the damages consequent upon its breach, if any, are expressly payable to another person expressly named, instead of to the plaintiff, and, even if this condition of the writing is due to mistake, a city court is without jurisdiction to reform or correct the writing. In my opinion, therefore, the lower court did not err in dismissing the petition.

(3 Ga. App. 599)

MILLER v. STATE. (No. 3,092.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§§ 122, 301*)—JUSTIFICATION—DEFENSE OF ANOTHER—INSTRUCTIONS.

While a father cannot lawfully kill one merely because he has had unlawful sexual intercourse with his daughter, still he may justify the homicide by showing that it was necessary in order to prevent further acts of fornication. In a prosecution for homicide, where there is evidence such as to authorize the jury to find that the deceased had been maintaining illicit sexual relations with the defendant's minor unmarried daughter, and had threatened to kill the father if he interfered, and that even after the father had become apprised of what had taken place, and was taking guard to prevent the further debauching of his child, the defendant, in company with his daughter, came upon the deceased under such circumstances as to indicate that he was endeavoring to continue the illicit relationship, and would likely seek to do so, notwithstanding the father's protest, an instruction of the court to the jury in the following language was erroneous: "The killing, if necessary, or apparently so to a reasonable mind, in order to protect the daughter at the time of the killing, would be justifiable. The killing must be necessary, or apparently so, to prevent the deceased from accomplishing his purpose then and there." The qualification contained in the words "then and there" rendered the instruction erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 177-181, 633; Dec. Dig. §§ 122, 301.*]

2. HOMICIDE (§ 169*)—EVIDENCE—ADMISSIBILITY—STATEMENT BY DECEASED.

There being evidence that when, just prior to the killing, the accused met the deceased and inquired of him as to his whereabouts on the night before (it appearing that the deceased had attempted to enter the bedroom of the daughter of the accused on the night before), the accused made a movement as if to draw his revolver, with which he was armed, it was error to exclude from the jury testimony to the effect that in a conversation prior to the day of the killing, when a friend had warned the deceased that he had better keep away from the house of the accused, the deceased had replied that he could shoot about as quick as the accused could. This evidence and other similar evidence, which was improperly excluded, tended to show the animus of the deceased at the time of the fatal encounter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341-350; Dec. Dig. § 169.*]

3. WITNESSES (§ 370*)—CREDIBILITY—COMPETENCY OF EVIDENCE.

While it is generally relevant to prove the state of a witness' feelings toward the parties to a case, still, where a witness had testified on behalf of the defendant, it was improper for the court to allow the state to prove by other persons that this witness had made certain disparaging remarks concerning the defendant as to matters not connected with the case on trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1189; Dec. Dig. § 370.*]

Error from Superior Court, Telfair County; J. H. Martin, Judge.

W. A. Miller was convicted of voluntary manslaughter, and brings error. Reversed.

W. L. & Warren Grice, C. A. Glawson, and Eschol Graham, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

RUSSELL, J. This record discloses one of the saddest and most mournful tragedies which has ever fallen under our observation. An aged father, who was educating at a religious school an only daughter, who was the idol of his old age, was shocked by the discovery that this daughter had been ruined. She was less than 17 years of age. To add to the horror of the situation disclosed to the parent's consciousness was the fact that the debauching of his daughter had been frequently carried on under his own roof, and that the bedroom of his young daughter, which he had believed to be a retreat of innocence, was a den of pollution whose very presence disgraced his home. The aged father was forced to realize that the fair daughter, whose purity and grace might have served to counterbalance his own shortcomings, lived only to bring his gray hairs to the grave in disgrace, and that her very life was but a living death. He slew the man, and for this homicide was convicted and sentenced for voluntary manslaughter. The writ of error protests the judgment refusing a new trial.

[1] Whatever the bent of our natural human sympathies, or however much as individuals we might be surprised at the verdict of a jury which would condemn a father to penal servitude for slaying the seducer of his daughter in a case where there was unimpeached evidence supporting the presumption that nothing but death would discontinue the adulterous relations, still we should not be at all disposed to interfere with the judgment if it was plain that the verdict of guilty was rendered by the jury—as it might have been—because the testimony upon this point in justification of the homicide was disbelieved; this for the reason that there might be no theory deducible from the evidence credited by the jury under which the defendant could be held to be wholly blameless in slaying the deceased. In other words, where a jury, with full cognizance and exact knowledge of the law, reaches a verdict with evidence to support it, this court cannot interfere. But whenever it appears that the verdict of the jury (who must receive the law from the court) may not have been due to disbelief of testimony or to the choice of one view of the evidence in preference to another view, and was likely the result of a misapprehension of the law, directly traceable to the absence of instruction or to erroneous instructions, then a new trial is required. Every defendant who is convicted of crime, where material instructions pertinent to his defense are withheld or erroneously presented, must be presumed to have been injured and deprived of his rights, if evidence which would have authorized his acquittal was submitted upon the trial.

After a very painstaking review of the

record in this case, we are of the opinion that the judgment refusing a new trial was error. There is no "unwritten law" in this state in criminal cases. The application of any so-called "unwritten law" in the trial of a criminal case is itself a rape upon justice. However, the right of a parent to protect his child's virtue is plainly written in our law, and, so far from being confined to a present injury, the law lengthens the father's arm to protect his helpless offspring from impending danger; the right of protection is valueless if it exists only for the present, when all the world can see that the danger, though not immediately present, is just ahead and must be prevented, or disaster will ensue. The duty of protection is not performed, unless all is done to render protection effective. A father is not only charged with the duty of protecting his minor child, but is responsible to society for the child's conduct during minority, and entitled, as a matter of law, to control it for the protection of society and of the child alike.

The charge of the trial judge in the present case was in many respects well-nigh perfect, but it failed to submit to the jury the right of a father to protect his minor daughter from continued adulterous relations with the man who had seduced her, if the jury believed that this protection, in the particular circumstances of the case, would be an instance standing upon a like footing of reason and justice with the defense of her life or of his own; and the judge restricted the right of such protection by instructing the jury that the father would only have had the right to kill the deceased if he had reason to believe that the act of fornication was to be committed at the time and place of the killing—"then and there." According to the testimony, two distinct defenses were available to the defendant and were raised by him—the defense of his own person against an apparent attempt on the part of the deceased to shoot him with a pistol, and the defense of his immature child against further defilement at the hands of one whose boastfulness of the ruin he had wrought, though unknown to the father, left little reason for doubt that he would continue the pursuit of the object of his lust, and finally work the irretrievable ruin of the defendant's daughter.

[2] We shall not attempt to recapitulate the several assignments of error contained in the 39 grounds of the amended motion for new trial, because, in so far as the exceptions taken are meritorious, all of them appear to turn upon the doctrine of actual self-defense, or the right of a parent to protect his child; and this is true whether the assignment of error relates to the exclusion or admission of testimony, or the refusal of requisite instructions, or the giving of instructions alleged to be erroneous. The charge of the court upon every feature of

the case, so far as the right of the defendant to defend himself is concerned, is not only without error, but is a model presentation of the law as applicable to the case. It is so clear, so full, and so manifestly fair to the defendant as to leave no ground for complaint. We think, however, that the court erred as to this branch of the case in rejecting testimony sought to be adduced by the defendant which tended to show the probable intention of the deceased with reference to the pistol which, according to the testimony in behalf of the defendant, he attempted to draw. These sayings of the deceased, though not communicated to the defendant, were competent for the purpose of illustrating the *quo animo* of the deceased's act in reaching for his pistol. Previous statements of one who participates in a rencounter may be used for the purpose of comparing what he actually did with what he himself stated he intended to do, in order to enable the jury to determine what his intentions were in the act which he actually did or attempted to do. It was most material to the defendant in this case to corroborate his statement and the testimony to the effect that the deceased attempted to draw a pistol before he fired the fatal shot, and to that end he could show that the deceased had threatened to kill him if he ever interfered with his illicit relations with his daughter. The testimony that he had made such threats was relevant to this very matter, and therefore admissible. For the same reasons the declarations of the deceased as to his improper relations with a woman, easily identifiable by the circumstances as being the defendant's daughter, were admissible.

[3] We think also that the court erred in permitting the state to examine one of the witnesses, over the defendant's objection, as to statements alleged to have been previously made by that witness, tending to discredit the witness by raising the inference that he had been unduly influenced, and laying the foundation for impeaching him by proof of contradictory statements in regard to matters immaterial to the issue on trial. In every judicial investigation, great latitude should be allowed in the inquiry and search for truth, and especially should the right of cross-examination, thorough and sifting, not be abridged; but the scope of inquiry should not be permitted to extend to the introduction of irrelevant testimony, the only reasonable effect of which must be to create prejudice against one of the parties.

In the present case, the witness Parker was introduced by the defense for the purpose of testifying to threats made by the deceased against the life of the defendant, and testified that he had a conversation upon one occasion with the deceased, in which the latter said that he did not like old man Miller, and that if he ever said anything out of the way to him he was going

to kill him, or if he ever said anything about his daughter he was going to kill him. This witness was permitted to testify, without objection, that he did not tell the defendant about the conversation until about two months after the killing, and that he at one time lived with the defendant, but moved away, and after the killing moved back to Miller's place. Upon cross-examination, and over the defendant's objection, the witness was interrogated as to certain language which indicated great bias on the part of Parker against the defendant, as the means of discrediting his testimony and impeaching him before the jury. The witness was asked if he had not had a previous conversation with Jim Doughty, in which he stated that he had moved away from old man Miller's place to keep from killing Miller, or to keep Miller from killing him, and that he wanted Miller hung and buried standing on his head, and that he would give the prosecutor \$10 to help hang the defendant. The witness Parker denied ever having had such conversation, or that he ever made such statement, and thereupon the state introduced witnesses who swore, for the purpose of impeaching Parker, that he had in their presence a conversation in which he used the language which he denied he had uttered.

It is clear that this testimony was not relevant, and that the prior conversation was not admissible. It would have been competent for the state to show any motive which would tend to discredit the witness in the eyes of the jury. The witness could have been asked as to the state of his feelings toward the defendant, but this could not be shown by hearsay; nor could the witness be impeached by the proof of contradictory statements as to matters immaterial. The court went even further than this, and allowed the state to prove that the witness Parker had made broader statements than those with reference to which he had been interrogated. We think that the witness Parker should at least have been asked, first, the state of his feelings toward the defendant, and, if it was stated that they were good, it then might have been shown that his testimony was procured or influenced by corrupt motives; but it was not competent to go into the details of the conversation.

As to the second branch of the defendant's case, the instructions of the court were defective, in that the jury were not told, as the defendant requested they should be, that if the defendant, having just learned of the seduction of the daughter before he encountered the deceased in the road, and having knowledge that the place where he (the defendant) then sat in his buggy was an accustomed meeting place of the guilty couple, really believed that the purpose of the deceased was to continue his illicit relations with the daughter, and had good reason to believe that nothing but the death of the deceased would prevent the continuance of

such relations, he had the right to kill the deceased. And, further, the jury should have been told that it was for them to consider and determine whether, under the evidence in the case, the danger of a repetition of the acts of fornication was sufficiently grave to create an instance standing upon the same footing of reason and justice as the right of actual self-defense.

The judge instructed the jury that "the killing, if necessary, or apparently so, to a reasonable mind, in order to protect the daughter at the time of the killing, would be justifiable. The killing must be necessary, or apparently so, to prevent the decedent from accomplishing his purpose then and there." We think the plaintiff in error justly complains of this charge as too greatly restricting his right to protect his daughter. The error consists in telling the jury that the defendant would only be justifiable in killing the deceased to prevent the sexual intercourse at that time and place. The act of sexual intercourse is very rarely, if ever, voluntarily committed in the presence of a third person, and the cases where participants in the sexual act are detected while in the very act of copulation are so infrequent that to say that one who would have the right to prevent the intercourse can only do so when it is about to be indulged under his eyes would preserve only the shadow of the right and destroy its substance. According to testimony in this case, the deceased had passed the defendant's house in his buggy earlier in the morning. It is easily inferable that he knew that the young girl would go to the commencement at Helena, and he knew the road she would have to travel, and that she would have to pass the point where he stopped his buggy. He perhaps did not know that the father would be accompanying his daughter, for this was unusual. He had been accustomed to meet her there alone. His presence at that particular time and place at least indicated an intention on his part to repeat the illicit act. The numerous notes which passed between the parties, and which are to be found in the record, give evidence that the defendant's daughter was completely under the influence of the young man, and that he was determined to continue his relations with her at any cost, even to the length of taking her father's life if the father detected the criminal intercourse.

Surely section 75 of the Penal Code, which authorizes the jury to justify a homicide if in their opinion, upon their oaths, it stands upon the same footing of reason and justice as the instances of self-defense which are previously enumerated, was not originally inserted into the body of our laws without any purpose or object. The fact that it has been inserted into every succeeding Code, and stands to-day, embracing, by the universality of the word "all," every instance where a homicide has been committed, and where

the circumstances of the killing may appeal to the conscience of the jury as placing it in the same category as defense of person, habitation, or property, clearly shows that it is not the legislative intention to treat this law as a dead letter. In the opinion of the writer, this Code section was intended to supply the equity of the criminal law, and cover those cases where the law, by reason of its universality, is deficient. This would seem to have been the opinion of Chief Justice Lumpkin, in the Biggs Case, 29 Ga. 723, 76 Am. Dec. 49, when he asked the question, "What American jury has ever convicted a man for slaying the seducer of his wife or daughter?" But, though a killing cannot be justified, if a wrong, no matter how heinous, has been completed, it is still justifiable to prevent certain wrongs which may be prevented, even if it cost human life to prevent their infliction. One may shoot and kill a burglar, to prevent the burglar from entering his house; it is for the jury to say whether a father endowed with the right to protect his daughter has not an equal right to prevent her continued defilement and disgrace. The principle underlying both instances is the same. The only question which could arise is, Which is the more valuable, the preservation of the chattels within the house, or the protection of its inmates?

Judgment reversed.

(9 Ga. App. 592)

THOMPSON v. SLOSS-SHEFFIELD STEEL & IRON CO. (No. 3,017.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

(Syllabus by the Court.)

SALES (§ 359*)—REMEDY OF SELLER—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE.

No error of law is complained of, and the evidence demanded the judgment rendered.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 359.*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by the Sloss-Sheffield Steel & Iron Company against C. L. Thompson, doing business as the Thomasville Iron Works. From a judgment for plaintiff, defendant brings error. Affirmed.

Roscoe Luke, for plaintiff in error. W. J. Hammond and Theo Titus, for defendant in error.

HILL, C. J. The Sloss-Sheffield Steel & Iron Company brought suit in the city court of Thomasville against C. L. Thompson, doing business as the Thomasville Iron Works, on an account for a car load of pig iron for \$464 and interest. A bill of particulars was attached to the petition. The defendant admitted by his plea that he was doing busi-

ness as the Thomasville Iron Works, but denied that he was indebted to the plaintiff on the account sued on, or for any other amount for the pig iron. On the trial the plaintiff introduced as a witness the defendant, who testified that he was doing business as the Thomasville Iron Works; that he had received the car load of pig iron which had been shipped to him by the plaintiff, under a written contract; and that he had agreed to pay the plaintiff for all the pig iron \$16 per ton, with interest thereon. This amounted to \$464, according to the bill of particulars, which the defendant admitted. He also admitted that the iron was received by the Thomasville Iron Works, or by him operating as the Thomasville Iron Works, and that it was melted by the iron works; but he stated that the iron was of no value to him, and that neither he nor the Thomasville Iron Works owed the plaintiff anything for the pig iron. This was all the evidence, and the judge, trying the case without the intervention of a jury, found in favor of the plaintiff the principal sum sued for, with the interest due thereon. The defendant filed a motion for a new trial, based upon the general grounds alone, and the refusal of the motion is assigned as error.

In our opinion the evidence demanded the finding. The defendant admitted receiving the iron. He admitted the agreement to pay for the iron the price for which the suit was brought. He admitted that the pig iron was used by him. He did not file any plea of payment or of partial payment, nor did he set up total or partial failure of consideration. His only defense was that the pig iron was of no value to him; that neither he nor the Thomasville Iron Works owed the plaintiff anything therefor. It would be a remarkable situation if, after having admitted the receipt of the goods and the use of them, and the agreement to pay for them as set out in the suit, he should be permitted to escape payment by the simple statement that the iron was of no value to him, and that he owed nothing therefor. This general statement, denying indebtedness, is in the teeth of the facts clearly proving indebtedness, and in fact has no probative value whatever. He certainly owed for the iron, under his admission, unless it was worthless, and he made no plea of total failure of consideration. Having admitted that he received and used the iron, if it was not entirely worthless, he would owe its real value, and his duty was to plead and prove any partial failure of consideration. While the brief of evidence is probably not as explicit and as full as it should have been, yet it is ample, in connection with the pleadings, to show that the defendant owed this account, and that he set up absolutely no defense.

Judgment affirmed.

(29 S. C. 440)

McALHANY v. MURRAY et al. (DUKES et al., Interveners).

(Supreme Court of South Carolina. Aug. 11, 1911.)

CORPORATIONS (§ 438*)—ELEMOSYNARY CORPORATIONS—DISSOLUTION—RIGHTS OF MEMBERS TO PROPERTY.

Persons associated as Sons of Temperance, for the purpose of promoting temperance by corporate organization, obtained a charter, in 1854, for a term of 14 years, and thereafter defendants' ancestor conveyed a lot in fee simple to the trustees of the corporation for a consideration; which was paid, and the members acquired property by their own contributions, erected a hall upon the lot for the purpose of holding its meetings, and managed the affairs of the corporation themselves. The corporation continued in possession until 1861, and the survivor of the original trustees continued in possession of the property until the expiration of the charter, and thereafter. *Held*, in an action of partition between the representatives of persons who were members of the corporation at the time its charter expired and the heirs of the grantor, that, under the general doctrine that on the dissolution of any corporation the corporate assets, both real and personal, should be regarded as belonging to a trust estate in the hands of those who happen to have their custody, to be disposed of by a court of equity according to the equitable rights of creditors and interested persons, and after satisfaction of all the equities the remainder to go to the state, the representatives were entitled to the property to the exclusion of the heirs of the grantor.

[*Ed. Note.*—For other cases, see *Corporations*, Cent. Dig. §§ 1769-1771; Dec. Dig. § 438.*]

Appeal from Common Pleas Circuit Court of Dorchester County; B. H. Moss, Special Judge.

Action for partition by D. L. McAlhany against Louisa Murray, continued after her death against Emory Murray and others as her heirs, in which O. B. Dukes and others intervened. Judgment for plaintiff, and for defendants Murray and others against interveners, and the interveners appeal. Reversed.

Walker S. Utsey, for appellants. R. Lon. Weeks, for respondent McAlhany. Hunter A. Gibbs and J. Otey Reed, for other respondents.

WOODS, J. The question to be decided in this case is whether, upon the dissolution of a corporation created for a benevolent or social purpose, its land reverts to the grantor, or is a corporate asset, to be divided among those who are members of the corporation at the date of dissolution.

The facts are not in dispute, but it is necessary to make a statement of the manner in which the legal issue arose. A charter for 14 years was granted to St. George's Division, Sons of Temperance, by an act of incorporation of December 21, 1854. 12 Stat. 364. The purpose of the corporation is not stated in the charter but it is admitted that it was the promotion of temperance by corporate organization; and that the corpora-

tion was therefore a benevolent and social, as distinguished from a trading or business, corporation. On March 25, 1855, James George, by fee-simple deed, conveyed a lot to Andrew Myers, and other persons named in the deed, as "committee or trustees" of the corporation, for the consideration of \$10, which was actually paid to him. The society erected on the lot a hall for the purpose of holding its meetings, and it flourished until 1861, when it disbanded, for the reason that most of its members had enlisted in the Confederate Army. Immediately after the war, an effort was made to resuscitate the organization, but it was unsuccessful, and the society has been practically defunct since 1861. The charter expired by its own limitation in 1868, and has never been renewed. The Sons of Temperance were in possession of the property until 1861; and D. L. McAlhany, one of the original trustees to whom the land was conveyed, continued the possession in that capacity until November 2, 1903, when he conveyed by deed to his son, D. L. McAlhany, Jr., the plaintiff in this action, all his right, title, and interest in the property. This deed was intended to convey what D. L. McAlhany supposed to be his interest as one of the three surviving members of the St. George Division of the Sons of Temperance.

James George died some time between 1868 and 1903, leaving a will, by which he devised and bequeathed all of his property to his daughter, Louisa Murray. Mrs. Murray, claiming that the title had reverted to her as the heir and devisee of James George, under a specific clause in the deed, which is not involved in the consideration of this appeal, through her husband, Emory Murray, took possession of the property in 1905. An action was commenced against her for the recovery of the property, in the name of the corporation, which was dismissed by order of the circuit court, on the ground that the corporation was defunct and could not maintain the action, and from the judgment there was no appeal. Thereafter P. L. Horn and J. A. Dukes, two of the three surviving members of the society, commenced an action to recover the property from Louisa Murray. That action was ended by the conveyance by Horn and Dukes of their interest to Mrs. Murray.

The present action for partition was commenced in 1907 by D. L. McAlhany, Jr., as grantee of his father under the deed above recited, against Mrs. Murray, as the owner of the interests of Horn and Dukes. Among other defenses, Mrs. Murray set up the claim that under the specific clause in the deed above referred to the property had reverted to her as heir and devisee of James George. Mrs. Murray died during the pendency of the action, and it was continued in the name of her heirs. The referee to whom the case was referred overruled all the defenses, and re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ported that the plaintiff was entitled to one-third interest and the defendants to two-thirds interest in the lot. On April 9, 1909, a decree was made, by consent of counsel, confirming the report of the referee and directing a sale of the property and a division of the proceeds, one-third to the plaintiff, McAlhany, and two-thirds to the heirs of Mrs. Murray. On June 7, 1909, an order was made in the case, allowing O. B. Dukes, M. W. Dukes, J. W. Fahey, and Margaret Shieder to intervene in the cause and set up their claim to an interest in the property as heirs of deceased persons who were members of St. George's Division of Sons of Temperance at the date of the dissolution of the corporation. Against this claim the heirs of Mrs. Murray alleged that the property, on dissolution of the corporation in 1868, had reverted by reason of such dissolution to Mrs. Murray, the heir and devisee of James George, the original grantor. The cause was referred to Wm. C. Wolfe, Esq., who held that the Murray heirs were bound by the former decree, and therefore could not avail themselves of the claim of reversion against McAlhany, but sustained the defense against the interveners. The report was confirmed by a decree of Special Judge Moss, with a slight modification not involved here. The interveners appeal, assigning error in the holding of the circuit court that the real property of St. George Division, Sons of Temperance, did not belong, on the dissolution of the corporation, to the persons who were members of it at that time but reverted to the grantor, by whom it was conveyed to the corporation. The statute of 1898, now section 1866, of Civil Code of 1902 will not be discussed or construed, for the reason that the rights of the parties in this case arose before it was enacted.

In many decided cases, dicta will be found expressing recognition of the doctrine that at common law on the dissolution of a corporation its lands revert to the grantor, but we think few cases will be found in which the point was raised and decided, and the doctrine actually applied in the disposition of property by the judgments of courts of last resort. The ancient authority relied on as supporting the doctrine is the following passage from Coke on Littleton, 13 b: "And so if land be given in fee simple to a deane and chapter, or to a major and commonalty, and to their successors, and after such body politique or corporate be dissolved, the donor shall have again the land, and not the lord by escheat. And the reason and cause of this diversity is, for that in the case of a body politique or corporate the fee simple is vested in their politique or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift and grant, that if such body politique or incorporate be dissolved, that the donor or grantee shall re-enter for

that the cause of the gift or grant falleth."

The language of Lord Coke makes it clear that the corporations which he had in mind were the religious orders and the municipal organizations of the times. The land of the religious orders was usually acquired by gift, without valuable consideration; and it was not wholly unreasonable that upon dissolution of the order the land should revert to the grantor.

Upon the dissolution of a municipal corporation, distribution of the land among the entire community would have been inconvenient, even if there had been recognition of the right of the individuals constituting a community to an interest in the land.

The older authorities follow Coke in the statement of the rule, as will be seen by reference to 2 Cruise, 493, 2 Bac. 32, 1 Bl. Com. 482, 2 Kyd on Corporations, 516. But with the conception and development of the corporation as a means of bringing together individual resources for the promotion of the innumerable enterprises of modern life came conviction of the injustice and absurdity of the doctrine. Chancellor Kent thus sets out what he calls "most injurious and distressing consequences" of the dissolution of money or trading corporations under the rules laid down by the old authorities: "An absolute and unqualified repeal, at once, of a charter of incorporation of a money or trading institution would be attended with most injurious and distressing consequences. According to the old settled law of the land, where there is no special statute provision to the contrary, upon the civil death of a corporation, all its real estate, remaining unsold, reverts back to the original grantor and his heirs. The debts due to and from the corporation are all extinguished. Neither the stockholders, nor the directors or trustees of the corporation, can recover those debts or be charged with them, in their natural capacity. All the personal estate of the corporation vests in the people, as succeeding to this right and prerogative of the crown at common law." In a note he says: "The rule of the common law has in fact become obsolete and odious. It never has been applied to insolvent or dissolved moneyed corporations in England. The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund and see that it be duly collected and applied. The death of a corporation no more impairs the obligation of contracts than the death of a private person." 2 Kent Com. 807.

In the leading case of *Bacon v. Robertson*, 59 U. S. 480, 15 L. Ed. 499, Mr. Justice Campbell for the court says, on the same subject: "For according to the doctrine of the text-writers on this subject, the consequences are visited without any discrimination; the loss-

es are imposed upon those who are not blameworthy; and the benefits are accumulated upon those who are without desert. The effects of a dissolution of a corporation are usually described to be the reversion of the lands to those who had granted them; the extinguishment of the debts, either to or from the corporate body, so that they are not a charge nor a benefit to the members. The instances which support the dictum in reference to the lands consist of the statutes and judgments which followed the suppression of the military and religious orders of knights, and whose lands returned to those who had granted them, and did not fall to the king as an escheat; or of cases of dissolution of monasteries and other ecclesiastical foundations, upon the death of all their members; or of donations to public bodies, such as a mayor and commonalty. But such cases afford no analogy to that before us. The acquisitions of real property by a trading corporation are commonly made by a bargain and sale, for a full consideration, and without conditions in the deed; and no conditions are implied in law in reference to such conveyances. The vendor has no interest in the appropriation of the property to any specific object, nor any reversion, where the succession falls."

Of the American cases criticizing and rejecting the doctrine, we cite only a few of the more recent, in some of which the authorities are reviewed. *Shayne v. Evening Post Co.*, 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777, 85 Am. St. Rep. 654; *Hopkins v. Crossley*, 138 Mich. 561, 101 N. W. 822; *Richards v. Northwestern C. & M. Co.*, 221 Mo. 149, 119 S. W. 953; *Huber v. Martin*, 127 Wis. 412, 105 N. W. 1031, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023; *Wilson v. Leary*, 120 N. C. 90, 26 S. E. 630, 38 L. R. A. 240, 58 Am. St. Rep. 778; *Diamond S. I. Co. v. Husbands*, 8 Del. Ch. 205, 68 Atl. 240. The point has never arisen for direct decision in this state, but there are dicta to the effect that the doctrine of Lord Coke is not sound as applied to business or trading corporations.

Judicial discussion and decision, it is true, has been concerned mainly with business or trading corporations, and there are many dicta and some authorities to the effect that business corporations—that is, associations incorporated for private gain—are to be distinguished from eleemosynary associations incorporated for charitable purposes; that the grantor cannot claim a reversion of the land or the state a forfeiture of the personal property of the former, but upon dissolution of the latter reversion of the land and forfeiture of the personal property do take place. Distinctions are also drawn between private corporations conducted mainly for the benefit of their own members, such as Masons, Odd Fellows, temperance societies, and social clubs, and corporations chartered as charities for the benefit of the general public. We are not concerned in this case

with public charities, but with the property of a temperance society or lodge conducted by its own members, and acquiring property by their contributions for corporate uses. Nor are we directly concerned with the question whether, upon the dissolution of a division of the Sons of Temperance, its personal property was forfeited to the state.

There are some broad and obvious lines of difference between trading or business corporations and eleemosynary corporations; but there is no such difference as makes reversion to the grantor of corporate real estate, on dissolution of the corporation, unjust and absurd in one case and fair and reasonable in the other. The difference that one kind of corporation issues shares of stock for the capital paid in, and is conducted for the purpose of making money for its shareholders, while the other receives and invests money in buildings and lands or other property for the special benefit of a class, or of the general public, and issues no stock, is no logical basis for holding that the rule of the common law has become obsolete and odious in one case and not in the other. In rapidity of development, in variety of organization and of enterprise, the modern eleemosynary corporation has well-nigh kept pace with the modern business corporation. In its development, it has reached a point entirely out of the view and conception of jurists of Lord Coke's day. Incorporated hospitals, universities, colleges, churches, fraternal societies, and social clubs buy land, construct expensive buildings, and accumulate large endowments. The idea that upon the dissolution of such a corporation the land and buildings go to one who happened to be the person who conveyed the land to the corporation seems clearly as absurd and odious as it is antiquated.

There is hardly any logical ground for rejecting the common-law rule of reversion, when considered with respect to business corporations, that does not apply with equal force, when considered with respect to eleemosynary corporations. Not only is the distinction artificial, but the attempt to apply it must lead to doubt and confusion on the bench, as well as at the bar, because of the practical difficulty of classification. There are many corporations, such as fraternal societies and other like organizations, which have both business and eleemosynary features. Such associations can be placed on one or the other side of the line between business and eleemosynary corporations only on refined distinctions about which, no doubt, courts would differ.

The next important inquiry is whether the doctrine that the personal property of a defunct eleemosynary corporation is forfeited and its land reverts to the grantor has been established by judicial decision in this state. In *Elliott v. Morris*, Harp. Eq. 281, heard in 1824, the litigation was between the heirs of William Elliott and the devisees under his

will. No question was made as to whether there had been a reversion on the dissolution of the Baptist Church to which the land had been conveyed; on the contrary, the reversion was assumed by both parties, and the sole point decided was that the assumed reversion was to the heirs and not to the devisees of the grantor. The question now under consideration was not decided nor discussed.

The only point involved in *Attorney General v. Society for the Relief of Elderly Ministers, etc.*, 10 Rich. Eq. 604, decided in 1859, was whether the General Assembly was prohibited by the Constitution from amending the charter of an existing corporation, so as to allow it to apply its funds to a purpose not within the terms of the original charter. The remark found in the opinion of the court, that on the dissolution of a corporation the real estate would revert to the grantor, and the personal assets would vest in the state, is nothing more than a dictum.

The circuit decree of Judge Kershaw, in *St. Philip's Church v. Zion Church*, 23 S. C. 297, discusses the common-law rule as laid down by Lord Coke, and holds it to be still in force in this state with respect to eleemosynary corporations. But on appeal the case was decided on other points, and the Supreme Court, speaking through Chief Justice Simpson, expressed its doubt by reserving its final opinion on the question.

It is safe to say, then, that the question is not settled by authority in this state; and we have been able to find no strong, persuasive adjudication elsewhere supporting the contention that the grantor takes the real property of an eleemosynary corporation on dissolution. In the case of the *Late Corporation of the Church of Jesus Christ of the Latter Day Saints v. United States*, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478, the doctrine is broadly stated by the court, as one of the grounds of the decision, that, upon the repeal of the charter of the Mormon Church, the Congress of the United States could by legislation require that the church assets be taken as reverted and forfeited property and applied to school purposes. But the archaic common-law doctrine of reverter seems a much weaker support to the judgment of the court than the violation by the church of an act of Congress, which expressly provided that violation of its terms by a corporation should result in forfeiture and escheat to the United States.

In *Wilson v. Leary*, 120 N. C. 90, 26 S. E. 630, 38 L. R. A. 240, 58 Am. St. Rep. 778, cited above, the question arose upon the dissolution of *Oriental Lodge No. 24, I. O. O. F.* The Independent Order of Odd Fellows, like other benevolent societies, has its business features, no doubt; but its main purposes as commonly understood are charitable and social. The Supreme Court of North Carolina, ignoring the supposed distinction between business and eleemosynary corporations, re-

pudiates in emphatic language the doctrine of reverter and forfeiture, and holds that there was no reverter. In *Hopkins v. Crossley*, 138 Mich. 561, 101 N. W. 822, the court held that there was no forfeiture of the funds of the "Old Volunteer Fire Department of Detroit," but that on the dissolution of the corporation the funds should be distributed among the members of the association.

The true modern rule, arising out of the development in importance and variety of corporate organization and enterprise, and the principle which will be found running through nearly all modern judicial thought and expression, is that, on the dissolution of any corporation, the corporate assets, both real and personal, including debts due to the corporation, should be regarded as belonging to a trust estate in the hands of those who happen to have their custody, to be disposed of by the court of equity according to the equitable rights of interested parties. In such distribution the court considers the claims of creditors, and of any other person who may set up claims. In the adjustment of the equities, one who has donated land in whole or in part stands on the same footing as any other contributor to the permanent property of the corporation, and has no higher equity. If such grantor conveyed away his land for a money consideration alone, it is manifest that there is no foundation in equity and justice for any claim that he could make to the lands or any other property of the corporation. When all the equities are satisfied, the remainder of the property, if any, goes to the state, just as the property of the estate of an individual goes to the state, when no one appears who has any just, legal or equitable claim to it.

The following language of Mr. Justice Campbell, in *Bacon v. Robertson*, *supra*, asserting such jurisdiction of the courts of equity, was used, after giving the reasons why the old rule of forfeiture to the state and reverter to the grantor was entirely inapplicable to the modern business corporation: "These just views which have afforded to wise chancellors a sufficient motive to enlarge the scope and relax the vigor of the rules of chancery proceeding, so as to bring the civil rights of individuals, in whatever form they may exist, or however complicated or ramified, under the protection of legitimate judicial administration, have been adopted in the United States, not simply for the improvement of methods of proceeding, but also for the adjustment of rights and the assertion of responsibilities among the members of such associations." The reasons for the application of equitable principles to the distribution of the assets by a court of equity are as strong in this case as in that.

Applying the principle of equity jurisdiction to an incorporated volunteer fire company, the Supreme Court of Michigan says, in *Hopkins v. Crossley*, *supra*: "The doctrine

that upon the dissolution of a corporation its real estate reverts, and its personal property goes to the crown, is a hard doctrine that courts of equity have power to relieve against, and we think that such a rule is not generally applied in this country to corporations in which the members had a pecuniary interest.

The case of *Diamond, etc., Co. v. Husbands*, 8 Del. Ch. 205, 68 Atl. 240, grew out of the dissolution of a business corporation, but the court discussed the subject in general terms, holding that, even if the person who conveyed to a corporation for a valuable consideration could claim the reversion on dissolution of the corporation, the naked legal title would be held by him as a mere trustee for the equitable owners of the property.

In this case, the record shows a conveyance for a valuable consideration actually paid to the grantor, and it is manifest that he and his heirs have no equitable claim to the land. The property was paid for and the building on it erected by the contributions of the St. George Division, Sons of Temperance, and there is no person before the court having any equitable claim, except those who were members of the order at the date of dissolution. It follows that such persons and their representatives are entitled to the property to the exclusion of the heirs of the grantor.

It is the judgment of this court that the judgment of the circuit court be reversed.

(39 S. C. 433)

GIBBES v. HAMILTON et al.

(Supreme Court of South Carolina. Aug. 10, 1911.)

JURY (§ 14*)—RIGHT TO JURY TRIAL—MORTGAGE FORECLOSURE—DEFENSES.

Defendant, in an action to foreclose a mortgage given to secure the purchase price of a ma-

chine, though not only denying the allegations of the complaint, but setting up as affirmative defenses misrepresentation and breach of warranty of the condition of the machine, failure of consideration, and a counterclaim for fraud and collusion between plaintiff and the original mortgagee in obtaining the mortgage, is not entitled to a jury trial.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 35-88; Dec. Dig. § 14.*]

Appeal from Common Pleas Circuit Court of Hampton County; J. Wm. Thurmond, Special Judge.

"To be officially reported."

Action by A. M. Gibbes, trading under the name of the Gibbes Machinery Company, against W. T. Hamilton and another. Judgment for plaintiff, and defendant Hamilton appeals. Affirmed.

T. A. Hamilton and B. R. Hiers, for appellant. W. S. Smith and C. B. Searson, for respondent.

HYDRICK, J. In an action for foreclosure by the assignee of a mortgage given to secure the purchase price of machinery, defendant, the mortgagor, denied the allegations of the complaint, and set up as affirmative defenses, misrepresentation and breach of warranty of the condition of the machinery, failure of consideration, and a counterclaim for damages for fraud and collusion between plaintiff and his assignor, the original mortgagee, in obtaining the mortgage from defendant. Held, that defendant was not entitled to a trial by jury. *Boulard v. Carpin*, 27 S. C. 235, 8 S. E. 219; *McLaurin v. Hodges*, 43 S. C. 187, 20 S. E. 991; *Pratt v. Timmerman*, 69 S. C. 186, 48 S. E. 255.

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(9 Ga. App. 624)

FULCHER v. MOORE. (No. 3,897.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

*(Syllabus by the Court.)***SALES (§ 479*)—REMEDIES OF SELLER—ATTACHMENT FOR PURCHASE MONEY—FRIVOLOUS DEFENSE.**

M. sold F. a mule, and took a note for \$190 for the purchase money, reserving title. The mule proving unsatisfactory, F. brought it back and got a horse from M., for which he agreed to give \$20 more. A new note for the purchase money of the horse was drawn and turned over to F. for execution; he agreeing to have it executed by himself and another as security. F. never executed the note, but kept the horse. M. sued out an attachment for the purchase money of the horse. F. defended on the ground that he did not owe for the horse, as he had exchanged the mule for it, and that the plaintiff's only remedy was to attach the mule, which had been returned to him when the trade was rescinded, but offered no evidence. *Held*, that the defense was palpably frivolous, and that the verdict in the plaintiff's favor is demanded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1438; Dec. Dig. § 479.*]

Error from City Court of Jefferson; W. W. Stark, Judge.

Action by J. W. Moore against J. L. Fulcher. From a judgment for plaintiff, defendant brings error. Affirmed.

Ray & Ray, for plaintiff in error. G. A. Johns, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 624)

HARRELL v. STATE. (No. 3,097.)

(Court of Appeals of Georgia. Aug. 4, 1911.)

*(Syllabus by the Court.)***1. NO ERROR—EVIDENCE SUFFICIENT.**

No error of law appears, and the verdict is fully supported by the evidence.

*(Additional Syllabus by Editorial Staff.)***2. WITNESSES (§ 286*)—EXAMINATION—RECT EXAMINATION—SCOPE.**

Where a witness testified on direct examination in a prosecution for being intoxicated in a place of divine worship that defendant's appearance showed that he was drunk and that he staggered as he went along, there was no error in overruling objections to his testimony on re-direct examination that he could not say whether defendant was drunk or sober only from his appearance, that he did not see him drink any liquor, but that from his appearance he was drunk.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 286.*]

3. WITNESSES (§ 352*)—IMPEACHMENT—COMPETENCY OF EVIDENCE.

In a prosecution for being intoxicated at a place of divine worship, testimony of a witness for defendant that he was 17 years old, introduced to show that the state's principal witness had given to defendant's witness whisky, and was endeavoring to convict defendant to forestall a prosecution against the state's witness for

furnishing liquor to a minor, was properly excluded.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 852.*]

4. DISTURBANCE OF PUBLIC ASSEMBLAGE (§ 15*)—CRIMINAL PROSECUTION—INSTRUCTIONS.

Where the special presentment charged that defendant "was then and there intoxicated and in a manner under the influence of intoxicating liquor while the people were assembled for the purpose of engaging in divine worship," an instruction that the defendant was "charged with the offense of being intoxicated at a place of divine worship or being in any manner under the influence of intoxicating liquors at a place of divine worship while the people were assembled there for divine worship on the date alleged in a bill of indictment, or special presentment, whatever it is," was not broader than the presentment.

[Ed. Note.—For other cases, see Disturbance of Public Assemblage, Dec. Dig. § 15.*]

5. DISTURBANCE OF PUBLIC ASSEMBLAGE (§ 15*)—CRIMINAL PROSECUTION—INSTRUCTIONS.

In a prosecution for being intoxicated at a place of divine worship, an instruction that if any person shall appear at any church or other place of divine worship intoxicated or in any manner under the influence of intoxicating liquors, while the people are assembled to engage in religious worship, he is guilty of a misdemeanor, was proper.

[Ed. Note.—For other cases, see Disturbance of Public Assemblage, Dec. Dig. § 15.*]

6. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

In a prosecution for being intoxicated at a place of divine worship, the refusal of a request to charge handed to the judge while the charge was being made, and not before it began, which, while not given literally, was given in substance, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

7. DISTURBANCE OF PUBLIC ASSEMBLAGE (§ 15*)—CRIMINAL PROSECUTION—INSTRUCTIONS.

In a prosecution for being intoxicated at a place of public worship, it was not error to refuse to charge that, to convict, the jury must find that the defendant was drunk on intoxicating liquor, and that if it was beer, morphine, or other narcotics that produced the condition of defendant, they would not be authorized to find him guilty.

[Ed. Note.—For other cases, see Disturbance of Public Assemblage, Dec. Dig. § 15.*]

8. CRIMINAL LAW (§ 785*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

Though the defendant contended that the witness for the state had sworn willfully and knowingly falsely to material facts, the failure to instruct that if a witness swore willfully and knowingly falsely, his testimony ought to be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence, was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776-1781, 1889-1894; Dec. Dig. § 785.*]

Error from City Court of Nashville; W. D. Buie, Judge.

John Harrell was convicted of being intoxicated at a place of divine worship, and he brings error. Affirmed.

The grounds of the motion for a new trial, in addition to the grounds that the verdict was contrary to law and to the evidence, were as follows:

[2] (1) Because the witness George Gray testified, on direct examination: "Q. What was his condition? A. His appearance showed that he was drunk. Q. How did he act? A. He staggered as he went along." And on the redirect examination, over defendant's objection, the court allowed the witness to testify: "Q. What do you say as to his being drunk or sober? A. I could not say, only from his appearance. I did not see him drink any liquor. Q. What do you say as to his appearance? A. From his appearance he was drunk." The questions and answers were objected to before going to jury, by defendant, as follows: The witness was examined fully on the direct examination, and the state has no right to re-examine the witness as if on direct examination, but only in rebuttal of the testimony brought out on cross-examination, because the questions are leading. [Note by the court: This was before the witness was excused from the stand, on his original examination or redirect examination.] The court overruled defendant's objections, and the defendant assigns the ruling as error, because the examination was prejudicial to the interest of the defendant, in that it unduly stressed the testimony of the state, and the ruling was an intimation as to the guilt of the accused. It violated the rules of evidence and the ethics of good practice, and needlessly incumbered the record with superfluous testimony.

[3] (2) It was error for the court to exclude from the consideration of the jury the material testimony of Dan Harrell, a witness for defendant, as follows: "Q. How old are you? A. 17 years." The purpose of the evidence was to show that the state's star witness, John Metts, had given to this minor boy whisky, and the witness was endeavoring to convict the defendant to forestall a prosecution against the witness for the offense of furnishing liquor to a minor.

[4] (3) It was error harmful to defendant for the court to charge as follows: "This is a case of the state against John Harrell charged with the offense of being intoxicated at a place of divine worship, or being in any manner under the influence of intoxicating liquors, at a place of divine worship while the people were assembled there for divine worship, on the date alleged in the bill of indictment, or special presentment, whatever it is." The offense charged in the special presentment being: "John Harrell [did] be and appear at the Dan Griffin schoolhouse, in said county, a place of divine worship. He, the said John Harrell, was then and there intoxicated and in a manner under the influence of intoxicating liquors while the people were assembled for the purpose

of engaging in divine worship." The error being: (a) The charge was much broader than the special presentment, in that it instructed the jury that the defendant was charged either with being "intoxicated" or being "in any manner under the influence of intoxicating liquors." (b) The special presentment charged one offense only, to wit: "John Harrell was then and there intoxicated, and in a manner under the influence of intoxicating liquors;" whereas the charge instructed the jury that he was charged with either one of the offenses. (c) Because a person may be under the influence of intoxicating liquor not to such extent as to be discernible, and with perfect propriety attend church or the church grounds while the congregation is assembled for divine worship and violate no criminal statute. (d) Because no person, under the charge, could use liquor for medicinal purposes and attend church if he were "in any manner under the influence of intoxicating liquor." (e) Because it did not state the contention of the state correctly, but much stronger than charged in the special presentment, and authorized the jury to convict the defendant if the influence was "any." (f) Because the court should have correctly stated that the defendant was being tried upon an indictment or special presentment.

[5] (4) It was error for the court to charge: "The particular law in this case is: If any person shall be and appear at any church or other place of divine worship intoxicated, or in *any manner* under the influence of intoxicating liquors, while the people are assembled for the purpose of engaging in any religious worship, he shall be guilty of misdemeanor;" the error being: (a) The expression "such religious worship" was an opinion of the court that the "Dan Griffin schoolhouse" was *per se* a place of "religious worship." (b) The charge is also open to the error assigned to the charge, in the third ground of the amended motion, from (a) to (f), inclusive, and especially where the court emphasized this paragraph in his charge by using the expression, "Now, this is the law." (c) Because the court used the expression three times in his charge, and every time in different parts and connections of the charge, to wit, "Or in any manner under the influence of intoxicating liquors," as charged by the court, is error. (e) Because the charge of the court is incorrect as an abstract principle of the law applicable to the case on trial.

[6] (5) It was error for the court to neglect to give in charge the principle that, in order for the defendant to be guilty under the special presentment of the offense as therein charged, the jury must believe from the evidence, beyond a reasonable doubt, that the defendant was intoxicated and under the influence of intoxicating liquors, upon the church grounds, as alleged in the special

presentment. It was error for the court to refuse to give in charge the written request of the defendant as follows: "Gentlemen of the jury, I charge you that, before you can find the defendant guilty, you must find by the evidence that the defendant was under the influence of intoxicating liquors at the time and place alleged in the special presentment, and while the congregation was assembled for the purpose of divine worship, and it is just as necessary that the state prove the allegations in the presentment that it was intoxicating liquors as it is to prove the defendant was under the influence of such liquors, and the state must prove both allegations beyond a reasonable doubt before you would be authorized to find the defendant guilty." [Note of the judge: The request of charge was handed to me while the charge was being made, and not before the charge began, and the request, while not given literally, was given in substance.]

[7] Second request: "It is alleged in the indictment that the defendant, John Harrell, was intoxicated on spirituous liquors. Now, you must find from the evidence that the defendant was drunk on intoxicating liquors, and nothing else. If it was beer, morphine, or other narcotics that produced the condition of defendant, then you would not be authorized to find the defendant guilty." [Note of the judge: This request was not given, but it was not correct as a whole.] The error being: (a) The charge was so

general that it allowed the jury to convict, if they believed the defendant was intoxicated on anything besides liquor. (b) Because there was no proof that he was intoxicated on liquor, and if his condition was as was contended for by the state, it could have been produced by some drug or opiate, and not by liquor. (c) Because nowhere in the charge was the attention of the jury called to the sufficiency of the proof required to authorize the verdict of guilty. (d) Because there was no evidence on which the jury was authorized to find that the defendant was intoxicated on liquor.

[8] (6) It was one of the contentions of the defendant before the jury that the witness John Metts swore willfully and knowingly falsely to material facts in the case, and that the court, having undertaken to charge the law of impeachment, failed to instruct the jury that if a witness swore willfully and knowingly falsely, his testimony ought to be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence. The court charged rules of impeachment not applicable to the evidence and contentions of defendant and neglected to charge the correct and applicable rule as above stated.

J. P. Knight and Hendricks & Christian, for plaintiff in error. J. H. Gary, Sol., and J. A. Alexander, for the State.

RUSSELL, J. Judgment affirmed.

(39 S. C. 433)

HECKHEIMER v. ALLEN.(Supreme Court of South Carolina.
Aug. 26, 1911.)**PARTNERSHIP (§ 286*)—DISSOLUTION—POWER OF PARTNER TO BIND FORMER PARTNERS—NOTE.**

After dissolution of a partnership, one of the partners executed promissory notes to plaintiff for the balance of a firm debt, signing them in the firm name, with notice to plaintiff that the partnership had been dissolved, and that he had no authority to sign the firm name. *Held*, that a former partner of the signer was not liable thereon.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 646-649; Dec. Dig. § 286.*]

Appeal from Common Pleas Circuit Court of Florence County; Ernest Gary, Judge.

Action by E. Heckheimer against James M. Allen. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. Ragadale and R. E. Whiting, for appellant. Willcox & Willcox, for respondent.

HYDRICK, J. The complaint alleges that the firm of James Allen & Son, composed of James Allen and his son, James M. Allen, the defendant herein, became indebted to the plaintiff, and on December 7, 1896, gave him their two promissory notes, one for \$350, due July 1, 1897, and the other for \$546.51, due January 1, 1898, both bearing interest from November 10, 1896, and containing a promise to pay all expenses of collection, including attorney's fees, if not paid at maturity, and prays judgment for the amount due thereon. The defendant denies liability, alleging that the notes were given after the dissolution of the firm of James Allen & Son, of which plaintiff had notice. There was testimony tending to show that the firm was dissolved in May, 1896, and that plaintiff had notice of the dissolution; that, prior to the dissolution, plaintiff held the firm's note for \$1,500 which had been reduced by payments to the aggregate amount of the two notes sued on, which were given in renewal of that note, and that the new notes were first signed by James Allen alone; but plaintiff insisted that they should be signed in the firm's name, as the old note was, and that, in compliance with his request, James Allen signed them in the firm name, but told him, when he did so, that the firm had been dissolved, and that he had no authority to sign the firm name. The defendant also testified that the original debt was a private debt of his father, and that the old note was given before he was of age. Upon the evidence, the court directed a verdict for the plaintiff, holding that giving the new notes was not creating a liability of the firm, but merely giving evidence or an acknowledgment of its existence, which one of the former partners could do.

It has frequently been decided in this court

that, after dissolution of a partnership, one of the partners cannot, without special authority, bind his former partners by giving a new note, even for a partnership debt, if the party taking it had notice of the dissolution. *Martin v. Walton*, 1 McCord, 16; *Bank v. Humphreys*, 1 McCord, 388; *Veale v. Hassan*, 3 McCord, 278; *Loomis v. Pearson*, Harp. 470; *White v. Union Ins. Co.*, 1 Nott & McC. 556, 9 Am. Dec. 726; *Chardon v. Oliphant*, 3 Brev. 183, 6 Am. Dec. 572; *Foltz v. Pourie*, 2 Desaus. 43; *Bank v. Galliot*, 1 McMul. 209, 86 Am. Dec. 256. The decision in *Burris v. Whitner*, 3 S. C. 510, relied on by respondent, was rested upon the ground that plaintiff did not have notice of the dissolution of the partnership when he took the new note. The remark of the writer of the opinion in that case that the consideration of that note was a partnership debt, and that was in itself sufficient to support the plaintiff's demand, was obiter dictum, and is inconsistent with the rule laid down in the cases above cited, and with the authorities elsewhere. 30 Cyc. 658, 668.

Reversed.

(39 S. C. 436)

SPRUNT et al. v. GORDON.(Supreme Court of South Carolina. April
10, 1911.)**1. PLEADING (§ 369*)—SIMULTANEOUS DEMUR-
RER AND ANSWER—PROPRIETY.**

Under Code Civ. Proc. 1902, § 164, authorizing defendant to "either" demur "or" answer, it is improper to do both at the same time, except to challenge the complaint for want of facts or the court's jurisdiction, and defendant may be required to elect upon which he will stand.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.*]

**2. PLEADING (§ 222*)—DEMURRER—RIGHTS ON
OVERRULING.**

When defendant's demurrer, filed in good faith, is overruled, ordinarily he should be allowed to answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 570-574; Dec. Dig. § 222.*]

**3. PLEADING (§ 369*)—CONCURRENT ANSWER
AND DEMURRER—ELECTION.**

Under Code Civ. Proc. 1902, § 169, providing that grounds for demurrer to a complaint are waived by failing to take them by demurrer or answer, except objections for want of facts or to the court's jurisdiction, where defendant demurs and answers at the same time, both pleadings setting up want of facts, it is error to require him to elect on which he will stand.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.*]

**4. SALES (§ 411*)—ACTION BY BUYER—PLEAD-
ING.**

On suit for breach of contract to sell cotton the complaint was sufficient without alleging tender of the price, where it stated that plaintiffs were ready and willing to perform, and where defendant was entitled to deliver different grades at different prices.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1161-1164; Dec. Dig. § 411.*]

5. SALES (§ 185*)—TENDER BY BUYER— WAIVER.

By refusing to perform a contract to sell, the seller waives tender of the price by the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 498; Dec. Dig. § 185.*]

Appeal from Common Pleas Circuit Court of Williamsburg County; Geo. E. Prince, Judge.

Action by James Sprunt and another, partners as Alexander Sprunt & Son, against Alexander M. Gordon. Judgment for plaintiffs, and defendant appeals. Reversed.

Kelley & Hinds, for appellant. Gilliland & Gilliland, for respondents.

HYDRICK, J. This is an action for damages for breach of contract. Plaintiffs allege that defendant made a written contract with them, whereby he sold and agreed to deliver to them, at Gourdins, S. C., between September 15 and October 31, 1909, 25 bales of cotton, to average 500 pounds per bale, 5 per cent. more or less, and they agreed to pay him for it, on delivery, 10 cents a pound for middling cotton, and 10½ for strict middling; that they were ready and willing to perform, and demanded performance of him, which he failed and refused to do, to their damage \$500.

[1] Defendant answered, and afterwards served notice of a demurrer to the complaint for insufficiency, because it is not alleged that plaintiffs tendered defendant the money for the cotton. On plaintiffs' motion, the court ordered defendant to elect whether he would stand on his answer or demurrer. He chose the demurrer, which was overruled, and plaintiffs had judgment on the pleadings. The court erred in requiring defendant to elect. At common law, it was not allowable to plead and demur to the same matter at the same time. Nor does the Code of Procedure of 1902 contemplate the filing of both an answer and a demurrer to the same matter at the same time, except as to two of the grounds of demurrer specified therein, to wit, that the pleading fails to state facts sufficient to constitute a cause of action or defense, and that the court is without jurisdiction. Section 164 says that the only pleading on the part of the defendant is *either* a demurrer or an answer, which clearly indicates that *both* were not intended to be allowed for the same matter at the same time. It then proceeds to specify the grounds for which a demurrer will lie, and provided, in section 168, that, if the matter enumerated as grounds of demurrer do not appear upon the face of the complaint, the objection may be taken by answer. But section 169 provides that all of the objections specified as grounds of demurrer shall be deemed waived, if not taken either by demurrer or answer, "excepting only the objection to the juris-

diction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." There are sound reasons why a party should not be allowed to demur and answer at the same time. The office of a demurrer is to test the sufficiency of a pleading, and, until the pleadings are in proper form, the case is not ready for trial on the merits. To allow a party to answer and demur at the same time tends to confusion and unnecessary expense in the administration of the law; for neither party can tell whether the case will be disposed of on the issue of law, raised by the demurrer, or on the issues of fact raised by the answer. Therefore they are compelled to come to trial prepared to meet both issues; and they may be put to the unnecessary trouble and expense of having their witnesses at the trial when the case will be disposed of on the issue of law raised by the demurrer. It is therefore the better practice, and the intention of the Legislature, as indicated in the section of the Code above referred to, that the issues of law should be disposed of before the case is set down for trial on the merits. Therefore, when a demurrer is interposed on any of the grounds specified in the code, other than the two above mentioned, and an answer to the merits is also put in at the same time, the court may, in its discretion, require the party to elect upon which he will stand, especially if it appears that such action will promote the orderly disposition of the cause. *Stahn v. Catawba Mills*, 53 S. C. 519, 31 S. E. 498. Nevertheless, the spirit of the reformed procedure requires that causes be decided on their merits rather than on the technicalities of pleading.

[2] Therefore, when a demurrer is interposed on any ground in good faith, and it is overruled, the party should ordinarily be allowed to answer. Of course, there may be circumstances which would justify the court in refusing to exercise its discretion to allow an answer to be put in after overruling a demurrer, but none such appear in this case.

[3] However, where the statute, expressly or by necessary implication, allows a demurrer and an answer to the same matter at the same time, the court is bound to administer the law as it is written, and it cannot order a party to elect upon which he will stand, and, upon his electing one, strike out the other. There can be no doubt that section 169 of the Code contemplates and authorizes the filing of both a demurrer for an insufficient statement of facts and an answer to the merits at the same time. Prior to the amendment of that section by Act March 2, 1903 (24 St. at Large, p. 180), which requires five days' notice of the grounds of such a demurrer, the practice prevailed of entertaining such a demurrer, when made

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

orally at the trial. *Hull v. Young*, 29 S. C. 64, 6 S. E. 938; *Harvey v. Hackney*, 35 S. C. 361, 14 S. E. 822. And it was afterwards regulated by rule 18 of the circuit court, requiring the grounds to be reduced to writing, or taken down by the stenographer, under the direction of the court. In *Latimer v. Sullivan*, 30 S. C. 111, 8 S. E. 639, it was held that a plaintiff could at the same time reply and demur to a counterclaim set up in the answer on the ground of insufficiency. It necessarily follows that a defendant can, at the same time, answer a complaint and demur to it for insufficiency, or for want of jurisdiction of the court. The latter ground may be taken at any time—even on the argument of an appeal in this court. *Ware v. Henderson*, 25 S. C. 385.

[4] The demurrer was properly overruled. The allegation that plaintiffs were ready and willing to perform was sufficient, without an allegation that the price of the cotton was tendered. By the terms of the contract, defendant had the right to deliver different grades of cotton, at different prices, and the bales might vary in weight from 475 to 525 pounds. It was, therefore, impossible for plaintiffs to determine, before the cotton was delivered, weighed and graded, what amount to tender. The law does not require impossible things. Appellant relies, upon this point, on the case of *Pickett v. Cloud*, 1 Bailey, 362, where the court used some language which seems to support his contention that a tender of the price of the cotton was necessary. In that case, however, the contract was to deliver 30 bales of cotton at defendant's ginhouse, on a day certain, for which plaintiff was to pay 12½ cents a pound for 29 bales and 8 cents a pound for one bale. It does not appear in the report of the case whether the cotton had been weighed, so that the plaintiff could tell the amount to tender, but it is probable, and it may be inferred, that it had been. It had been graded, as evidenced by the fact that the price for 29 bales was fixed at 12½ cents and the price for one at 8 cents a pound, and it is not suggested that plaintiff would have had any difficulty in ascertaining the amount to tender, which it would have been impossible for him to do, if the cotton had not been weighed. In that case, the contract stipulated that plaintiff should be at the place on the day specified to receive the cotton and pay for it. Defendant was there and ready to deliver the cotton, but plaintiff did not appear. Twenty days afterwards, and after the price of cotton had gone up, he demanded the delivery of the cotton at a place some miles distant from that specified in the contract. Defendant then refused to deliver at all. It was held that plaintiff could not recover, because he had himself broken the contract by failing to appear at the time and place specified to

receive and pay for the cotton, as he had agreed to do. In concluding the opinion, the court said: "The plaintiff having failed to tender the money, and make demand of the cotton at the time and place stipulated in the agreement, the defendant had the right to elect either to enforce the contract against him, or to consider it at an end, and dispose of it on his own account." If the cotton had been weighed and the weights were known to plaintiff, as above suggested, there would have been no difficulty in making the tender; but if it had not, then it is probable that the court used the words "tender the money," not in the restricted sense of tendering the exact amount, but in the broader sense of a tender of performance by appearing at the time and place specified and offering to receive the cotton and pay for it, according to the contract. At any rate, where a tender of the exact amount is impossible, because the party whose duty it is to make the tender does not know and has no means of ascertaining the amount, the law will not require such a tender. In such cases, a general offer to perform and the allegation of readiness and willingness to perform is sufficient.

[5] But, aside from this, it is alleged that defendant refused, after demand, to perform. This was a waiver of his right to insist upon a tender by plaintiffs. *Pickett v. Cloud*, supra; 28 A. & E. Enc. L. 4 et seq.; 9 Cyc. 723 et seq.; 35 Cyc. 167.

The order requiring defendant to elect is reversed, and the order overruling the demurrer is affirmed.

(89 S. C. 432)

CORLEY v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Aug. 10, 1911.)

CARRIERS (§ 356*)—WRONGFUL EJECTION OF PASSENGER—VALIDATION OF TICKET—MISREPRESENTATIONS OF SELLING AGENT.

Plaintiff, though asking defendant carrier's ticket agent at C. for a round-trip to A., accepted a special round-trip ticket to S., a few miles beyond A., because it was cheaper, and because, when he stated that he did not want it if he had to go to S., the agent told him he would not have to do so, but that the agent at A., as was his custom and duty, would on its presentation to him send it to the agent at S., and have it stamped and returned by him. Held that, notwithstanding stipulations in the ticket signed by plaintiff as to how and where the ticket would have to be validated for return trip, he had a right to rely on the representations of the selling agent; and that it was the duty of the agent at A. to have it validated, as it had been represented that he would; and that, he having refused to forward it for validation on the ground that it had ceased to be the practice for him to do so, it was the conductor's duty to heed plaintiff's explanation, consisting of such facts, why he presented it for return passage unvalidated in accordance with its terms; so that this not having been done, but

he having been ejected for refusal to pay fare, he was entitled to damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1409, 1410, 1423-1432; Dec. Dig. § 356.*]

Appeal from Common Pleas Circuit Court of Edgefield County.

"To be officially reported."

Action by P. H. Corley against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Abney & Evans and S. M. Smith, for appellant. Thurmond & Timmerman, for respondent.

HYDRICK, J. On June 14, 1907, defendant's agent at Columbia, S. C., sold plaintiff a round-trip ticket to Swannanoa, N. C., with a printed contract on it, which contained, among others, the following provisions: "4th. This ticket shall not be good for return passage unless the holder identifies him or herself by signature on back hereof and otherwise as original purchaser to the satisfaction of the agent of the Southern Railway Company at destination, and when officially signed and stamped by said agent, this ticket shall then be good for return passage of the original purchaser only." "8th. No agent or employé of any line over which the purchaser is entitled to travel by the terms of this ticket has any power to alter, modify, or waive in any manner, any of the conditions named in this contract. In consideration of the reduced rate at which this ticket is sold, I, the original purchaser, hereby agree to be governed by all the conditions as stated above. * * * I will not seek to hold any of such companies liable for damages resulting to me from any statement of any employé thereof, not in accordance with the terms of this contract as expressed upon this ticket." It contained, also, the following notices at different places on the ticket: "This ticket must be signed, witnessed by agent, and stamped at destination before it will be good for return passage. To purchaser: Read the above contract, and take notice that the return portion of this ticket must be stamped and your signature witnessed in the manner prescribed before it will be honored for passage."

This contract was signed by plaintiff, who alleged in his complaint and testified that he bought the ticket and signed it, under the following circumstances: He went to defendant's uptown office in the city of Columbia, and asked the agent for a round-trip ticket to Asheville, N. C. The agent said, if he had come a little earlier, he could have sold him a special round-trip excursion ticket to Swannanoa, N. C., a station about two miles from Asheville on defendant's road to Salisbury, for about two dollars less than the regular round-trip ticket to Asheville, but that was the last day those tickets were on

sale, and it was then nearly time for the last train on which they could be used to leave Columbia. But the agent telephoned to the railway station and ascertained that the train was running late, and that plaintiff would have about 20 minutes to catch it, and advised plaintiff to buy that ticket. Plaintiff told him he did not want to go to Swannanoa, and did not want to buy a ticket to that place, if it would put him to any inconvenience. The agent told him it would not be necessary for him to go to Swannanoa; that, while it was usually necessary to have the ticket stamped by the agent at Swannanoa, if he would present it to defendant's agent at Asheville, he would send it to Swannanoa and have it stamped and returned in time for his return trip, and he assured plaintiff that it was the custom and duty of defendant's agent at Asheville to do this. Relying upon this assurance, plaintiff bought the ticket and signed the contract without reading it. On arriving at Asheville, he presented the ticket to the agent there, and requested him to send it to Swannanoa and have it validated, telling him what the agent at Columbia had said. The Asheville agent told plaintiff that had been the custom, but it had been discontinued, and refused to have the ticket validated. On his return trip, plaintiff undertook to use the ticket, notwithstanding it had not been validated. Fearing the gateman would not allow him to pass to the train on presentation of the unstamped ticket, he bought a ticket to Biltmore, a station about two miles from Asheville on the road to Columbia, upon which he was admitted to the train. After passing Biltmore, the conductor demanded his fare, and he presented the unvalidated ticket, which was refused, after he had informed the conductor what had passed between him and the agent at Columbia and of his efforts to get the agent at Asheville to have the ticket validated. As evidence of his good faith and of the truth of his statement, he offered to pay his fare, if the conductor would agree to go with him to the agent at Columbia, and if he confirmed his statement, pay it back, or see that he got it back. This proposition was declined; and, upon plaintiff's refusal to pay his fare, he was ejected. He returned to Swannanoa, had his ticket validated and was carried on it the next day to Columbia.

At the trial, the Columbia agent admitted that what took place between plaintiff and himself was as narrated by plaintiff, except what he said about having the ticket validated for the return trip. As to that, he said he told plaintiff the ticket would have to be validated at Swannanoa; and that plaintiff asked if the Asheville agent could not do it, as it was all on the same line; that he replied, "You will have to see the agent at Asheville about that." The Asheville agent and the conductor who ejected plaintiff both

admitted that plaintiff told them what had passed between himself and the Columbia agent, as stated by plaintiff, and the Asheville agent further admitted that it had, before his incumbency as agent, been the custom for the Asheville agent to have round-trip tickets for Swannanoa validated, as plaintiff testified the Columbia agent had told him. It also appeared that Swannanoa was reached on this ticket, either by changing cars at Biltmore or at Asheville. Under the instructions of the court, the jury rendered a verdict for plaintiff for \$800.

This court has held, in a number of cases, that when a person signs a contract, like the one here in question, in the absence of fraud, misrepresentation, or mistake, he is conclusively presumed to have known and assented to all of its conditions and stipulations. *Smith v. Railway*, 88 S. C. 424, 70 S. E. 1057, and cases cited. But it is elementary that no one is bound by a contract which he is induced to make in reliance upon false representations as to material matters of fact. The allegations and evidence in this case raised an issue of such misrepresentation, which was properly submitted to the jury, and, by their verdict, it was resolved in favor of plaintiff. In the *Smith Case*, supra, the court said: "It is a ticket agent's duty, and therefore within the scope of his authority, to give passengers correct information with regard to their tickets and to provide them, upon payment of the fare, with proper tickets. Therefore a passenger has a right to rely upon the information given him by a ticket agent. The traveling public are not concerned with the management of the affairs of railroad companies. They are not presumed to know the rules and regulations adopted by the companies for the guidance of their agents; nor are they presumed to know the limitations of the authority of the agents of the companies. * * * The weight of reason and the trend of judicial thought is in favor of the doctrine that a passenger has the right to rely upon the statements and assurances of a ticket agent as to the sufficiency of the ticket furnished him as the evidence of his rights as a passenger, and that the carrier is liable for the errors and omissions of such agents resulting in injury to the passenger. [Cases cited.] The foregoing cases also hold that it is the duty of the conductor, in such circumstances, to heed the reasonable explanations of a passenger as to his ticket, or his right to ride, and our own decisions are to the same effect. [Cases cited.] The rule requiring the conductor to heed the reasonable explanations of the passenger, instead of allowing him to demand the payment of fare, on pain of expulsion from the train, works less hardship, inconvenience, and expense on the carrier than the opposite rule would on the passenger; for it is gen-

erally an easy matter for the conductor to ascertain whether the explanation of the passenger is true or false, because the stations along the railroads are nearly all connected by telephone or telegraph lines, which the agents of the companies may use with little trouble, and at little or no expense. It is a serious matter to expel a passenger from a train. It subjects him to humiliation, and it is calculated to wound the feelings of any self-respecting passenger. Therefore the law allows punitive damages for the wrongful expulsion of a passenger, and also for compelling him to pay money under threat of wrongful expulsion. [Cases cited.] Consequently the law is that a carrier must be allowed to resort to so harsh and extreme a measure only at the peril of being able to justify it."

Under the circumstances, plaintiff had the right to rely upon the representations of the Columbia agent, and it was the duty of the Asheville agent to have the ticket validated, and the duty of the conductor to heed plaintiff's explanation as to his right to ride on it. As was said in the *Smith Case*, the defendant will not be heard to say that it manages its business, so that it makes a contract through one of its agents, which it can violate through another with impunity. The verdict establishes the fact that the real contract was that the agent at Asheville should have the ticket validated, and plaintiff had the right to have that contract performed. A carrier has no right to eject a passenger because his ticket is not properly validated, where the omission is due to the fault of its own agents, or to its own fault. *Head v. Ga. Pac. R. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; *Railway v. Wood*, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536; *Gulf, etc., Ry. Co. v. St. John*, 13 Tex. Civ. App. 257, 35 S. W. 501.

Affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(136 Ga. 778)

TOWN OF CONSTITUTION v. CHESTNUT HILL CEMETERY ASS'N.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§§ 17, 18*)--DE FACTO INCORPORATION--COLLATERAL ATTACK.

With respect to the incorporation of towns, the Political Code of 1895 provides: "Whenever the qualified voters of any town or village, not incorporated, consisting of not less than twenty-five qualified voters, wish to be incorporated, a petition shall be filed, by at least a majority of the male inhabitants of such town or village, in the superior court of the county in which the inhabitants reside, stating in such petition the proposed boundaries of such town, and the name to be given, if incorporated." It also requires that notice be given in a specified way of the

day on which the application will be made, and of the day on which the qualified voters in the proposed boundaries of the town will vote on the question of incorporation. It is further provided that, if a majority of the qualified voters shall vote in favor of incorporation, the managers of the election shall certify the result of the vote to the superior court of the county, and that upon the filing of such certificate the superior court shall by order direct the clerk thereof to issue a specified certificate of incorporation of such town or village. See Political Code 1895, §§ 685 to 687, inclusive (the provisions of which are not embodied in the Civil Code of 1910). A petition by 13 named individuals was filed in the superior court to incorporate the town of Constitution, embracing a specified territory, in which they alleged "that they are a majority of the qualified voters, consisting of more than 25 qualified voters residing" within such territory, that the notices hereinbefore referred to were properly given, that at the election a majority of the qualified voters within the territory named voted in favor of incorporation, and that a certificate so showing had been filed in the superior court, the judge of which granted an order for incorporation as prayed, and the clerk of the court issued a proper certificate, after which officers of the municipality were duly elected and the corporation organized. *Held*, the municipality became at least a de facto corporation, the legal existence of which could not be collaterally attacked. Dillon on Munc. Corp. (5th Ed.) vol. 1, §§ 66, 67; Id. vol. 2, § 644; Id. vol. 4, §§ 1556, 1560; Constantineau on the De Facto Doctrine, §§ 46-50, 58-68; 20 Am. & Eng. Enc. of Law, 1135 (7); 28 Cyc. 172 et seq.; 8 Am. & Eng. Ann. Cas., note at p. 242; 11 Am. & Eng. Ann. Cas., note at p. 1060; 27 L. R. A. (N. S.), note at page 262.

(a) In a proceeding to enjoin the municipal authorities from the enforcement of an ordinance, the legal existence of the corporation could not be assailed on the ground that at the time the election was held, and at the time of the granting of the order of incorporation, there did not reside within the corporate limits 25 qualified voters; nor on the ground that the petition was not filed by a majority of the male inhabitants, as required by the statute; nor on the ground that many of those voting at the election were not qualified voters.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 34-44; Dec. Dig. §§ 17, 18.*]

2. MUNICIPAL CORPORATIONS (§ 12*)—TERRITORIAL EXTENT.

The petition for incorporation and the notices hereinbefore referred to describe the territory to be incorporated as "including the territory within a radius of one mile from the Southern Railway depot at Constitution," in De Kalb county, Ga., a part of which territory was in De Kalb county and a part in Fulton county. The order for incorporation provided that "said incorporation shall extend one mile in every direction from the present location of the Southern Railway depot at Constitution." *Held*, that the territory embraced within the corporate limits of the town was that which was included within a radius of one mile from the center of the location of the depot, and the order for incorporation was not void on the ground that the limits of the incorporation were indefinite. Cook v. Johnson, 47 Conn. 175, 36 Am. Rep. 64.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 12.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In view of the admissions in the answer of the plaintiff in error in regard to the passage

of the ordinance attacked, proof of the existence of the ordinance was unnecessary, and, if the admission of oral evidence regarding the existence of the ordinance was illegal, the error was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4155; Dec. Dig. § 1050.*]

4. ENFORCEMENT OF ORDINANCE—INJUNCTION—BURIALS.

Under the pleadings and evidence the court did not err in granting an interlocutory injunction restraining the enforcement of the ordinance complained of, which was one restricting burials within the corporate limits to the two places prescribed therein, and making penal its violation.

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by the Chestnut Hill Cemetery Association against the Town of Constitution. Judgment for plaintiff, and defendant brings error. Affirmed.

Mark Bolding, for plaintiff in error. H. M. Patty and L. W. Thomas, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent on account of sickness.

(126 Ga. 600.)

McNAUGHTON v. STATE.

(Supreme Court of Georgia. July 13, 1911.)

(Syllabus by the Court.)

1-3. CRIMINAL LAW (§§ 784, 789, 829*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—REASONABLE DOUBT.

The charge of the court was not subject to the criticisms made upon it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. §§ 784, 789, 829.*]

4. CRIMINAL LAW (§ 1156*)—APPEAL—QUESTIONS OF FACT—RULING ON MOTION FOR NEW TRIAL—BIAS OF JUROR.

When, in a criminal case, after verdict, an attack is made upon a juror upon the ground that he was not impartial, the trial judge occupies the place of a trier, and his finding that the juror is competent will not be reversed, unless under all the facts the discretion of the judge is manifestly abused. No abuse of discretion appears in this case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

5, 6. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS.

The grounds of the motion for new trial complaining of the omission to charge and refusal of the court to charge as requested were without merit.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 763, 764.*]

7. HOMICIDE (§ 250*)—SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict. (Atkinson, J., dissents from this ruling.)

[Ed. Note.—For other cases, see Homicide Dec. Dig. § 250.*]

Error from Superior Court, Emanuel County; S. P. Gilbert, Judge.

W. J. McNaughton was convicted of murder, and brings error. Affirmed.

Dr. W. J. McNaughton and Mrs. Mattie Flanders were jointly indicted for the murder of Fred Flanders, the husband of the last-named defendant. The indictment contained five counts, in the first, fourth, and fifth of which it was alleged that the homicide resulted from arsenic poisoning, arsenious oxide poisoning, and other poisons of like deadly character, the names of which were to the grand jurors unknown, administered directly by the defendants in different ways, and in the second and third, by causing the same kinds of poisons to be administered by other named persons. McNaughton was placed on separate trial, and the jury trying the case returned a verdict of guilty, without recommendation. A motion for new trial was made and overruled, and error was assigned upon the judgment.

The testimony submitted, and the prisoner's statement on the trial were in substance as follows: Fred Flanders died June 4, 1910, after illness continuing from the 18th or 19th of the preceding month, during which Dr. McNaughton attended him as physician. The body was exhumed on the second day after burial, and the stomach taken out by physicians, sealed in a jar, and sent to an analytical chemist, who discovered in it 22.6 milligrams of arsenic, "about one-third or one-fourth of a grain." At the instance of the accused or his counsel, the body was again exhumed, and the liver, heart, and kidneys taken out and examined by the same chemist, and arsenic was found in each of these organs. The total quantity found in stomach, liver, heart, and kidneys was 56 milligrams, "practically seven-eighths of a grain." Dr. Everhart, the chemist, testified that arsenic could not have gotten into these organs without having been administered; that he found in the stomach indications leading him to believe it had been administered as arsenic powder, or arsenic acid, "that is, a white powder"; that, although the appearance of the stomach may have been caused by other things, it was indicative of arsenic poisoning. He counted four little effusions on the lining of the stomach, looking very much like little pimples, and arsenic produces that effect. Arsenic goes through the nervous system, and burns the tissues. That which was found in the stomach seemed to have come through the mouth. In the opinion of the witness the arsenic was administered before death. If administered to a dead body, it would not, in his opinion, have produced the effusions or spots found in the stomach. It is active on living flesh and inactive on dead flesh. On a dead body it is more or less inert. In his opinion, judging from the amount obtained, enough arsenic had been given to Flanders to produce his death. Two physicians (Drs. Houston

and Smith, the only other experts examined on the subject) concurred with him in the opinion that the presence of seven-eighths of a grain indicated that a larger quantity had been introduced into the system. Arsenic is carried by the blood into all parts of the body, and is found in the brain, the bones, the marrow, and even in the fingernails; and the full quantity taken into the system is not found after death, for the body throws off the poison as fast as it can. It is eliminated through the kidneys and by the liver, and passes out through the bowels and in the urine, and may be thrown out by vomiting. It manifests itself first usually in vomiting. Vomiting is a revulsion of nature against this irritant, to try to throw it off, and the same kind of revulsion takes place in the bowels, where there is an effort to rid the system of it by purging. In some cases of deaths from arsenic poison no arsenic was found, in some cases as little as one-tenth of a grain; sometimes as much as four or five grains, chiefly in the stomach. "Seven-eighths of a grain must represent the administration of a very much larger dose of arsenic than is used in medicine." The small traces found in certain substances referred to by the authorities, such as sulphate of soda, salts, phosphate of soda, and in the impurities in various chemicals and drugs, would not lead to the finding of as much as seven-eighths of a grain of arsenic in the body. A medicinal dose of arsenic is about one-thirtieth of a grain. The smallest quantity recognized as possibly fatal is about two grains. Authorities differ as to whether two grains might be fatal. Dr. Everhart testified: "They usually suppose that three grains is a fatal dose." Dr. Houston testified that the statement that "probably 10 grains would be likely fatal to most persons, unless prompt and efficient treatment was had," seemed reasonable, though a medical writer had stated that on a search through reported cases no evidence was found as to a smaller fatal dose than 30 grains. Some men are more susceptible to the effects of the poison than are others. There are reported cases of "arsenic fiends" who gradually increase doses until they can take enough to kill several men, but reliable authorities deny that such cases exist.

It was testified that a majority of the deaths from one dose occur within 24 hours, some much sooner; but small doses in excess of a proper dose might be administered from day to day, with the result that the poison would accumulate in the system more rapidly than it could be thrown off, tissue would be destroyed, and kidneys, heart, nervous system, etc., be damaged so that they would be unable to recuperate, and in such cases death might be produced "in a few weeks, or in a week or two." One of the physicians testified that, if a quarter of a grain were given at one time, the last of it would probably be gone from

the body in about two weeks; but that, if that quantity were given daily, it would accumulate faster than it could be thrown off. Another testified that if doses sufficient to make one sick, but not to kill, say one-tenth or one-fifth of a grain, were given from day to day, the effect would become cumulative, though the quantity would not. Fatty degeneration of the organs is one of the means by which arsenic produces death; and in this case the chemist found a considerable quantity of fat which had to be filtered. The fatty degeneration, he testified, might be produced by other causes than arsenic. Arsenic in powdered form may be given in water or other liquid. It is soluble, practically tasteless, and has no odor. In a certificate given by the accused as attending physician, dated June 22, 1910, his answer to a question as to the disease of which Fred Flanders died, its origin, history, and symptoms, was as follows: "A complication of liver, kidney, and stomach; about May 19, when I was first consulted, headache, enlargement of the right side; pain in the right shoulder and spine, retention of urine, vomiting, nephritis acute; also mind impaired from urethra." Testimony as to his symptoms during the illness was given by two of his brothers and other witnesses who visited him, none of whom saw him later than six days before his death. So far as appears from the testimony and from the statement of the accused, the only physician present at any time during his illness other than the accused was Dr. Bell, an uncle of the sick man's wife. He died before the trial. It does not appear that he called more than once, or ever gave Flanders any medicine. From the testimony it appears that the sick man had frequent pains and a burning sensation in the stomach and "up in his breast," nausea, and headaches, often vomited, complained that he was nearly blind, and complained that his kidneys and liver were giving him trouble. His face was very red, and he had a number of pimples on his face and arms. He had red spots on the forehead. His complexion was naturally red. He had frequent evacuations from the bowels. The first time his brother, Jordan Flanders, saw him during his illness was on Sunday, May 21st. He vomited continually while the witness was there, complained of burning sensations in his stomach, and that he had nearly died the night before, that his heart exhausted like a steam engine under a heavy load. He complained of blindness. A good number of pimples had broken out on his face and arms. Dr. McNaughton and the sick man's wife were there. The vomiting seemed to bring up nothing but water, a green solution. The doctor or the wife gave him some medicine that day. According to the recollection of the witness, it was a liquid medicine, which was on the bureau in the sick room. The witness left Sunday

evening and returned on Wednesday, the 24th. The sick man was in bed, but sat up. He seemed better. He was not so sick in the stomach, but, if he took water or anything else, he vomited. The witness did not see Dr. McNaughton give him medicine that day. The witness went back to see him on Saturday, the 27th, found him very sick, worse than he had seen him before, and with like symptoms. The witness did not think that McNaughton gave him any medicine that day until night. About night McNaughton came in with a little jar, or jar-shaped bottle, like a snuff-jar, containing a white looking powder, which he had got from his apothecary shop in the same house, and said that he wanted Fred to have a teaspoonful of it about every three or four hours during the night. The witness stayed there all night and until the next evening, when the sick man seemed a little better. In the morning Dr. McNaughton came in and gave him a dose of liquid medicine through the mouth. The witness went back Monday evening or night. Fred was very sick then. His complaints were the same. He claimed to have no fever. McNaughton was there and said he had no fever. The witness stayed until two hours by sun the next morning. He did not again see his brother alive. One time he saw Dr. McNaughton give Fred an enema, the white of an egg with white looking powders in it. The doctor said that Fred's stomach would not retain anything, and he had to have something to strengthen him. The last night that the witness was there no medicine was given, and Fred was much better the next morning. "Repeatedly he would say, 'The medicine I take makes me worse,' and they would make the remark, 'The medicine is all right, Fred. You will have to take your medicine,' and he would take it, and in a few minutes he would go to throwing it up." The night the witness gave him medicine he threw up about every 10 minutes during the night. The witness gave him the medicine according to directions, every three or four hours. It looked like a white powder, and whenever it was put in a glass of water it would boil up. He could not say whether the doctor gave any tablets or capsules or anything of that sort. He could not tell what the white medicine was. The doctor's prescription on the bottle nearly covered the other label, which looked as if it was the manufacturer's. He did not notice if there was anything on the other side of the bottle. Fred's bowels moved many times while the witness was there. Dr. McNaughton said he was giving the white medicine to him for his kidneys. On Monday night, the last night the witness stayed with him, another brother was with them, and they did not give him any medicine. The next morning Fred seemed much better, and the doctor said: "I have got more hopes of Fred

this morning than I have had at all." The preceding Saturday night the witness gave him three doses as directed. Fred complained that it made him worse, and after 2 o'clock he gave him no more. He was sick through the night and up the next day. He seemed better after dinner. Repeatedly when the witness asked McNaughton what was the matter with his brother the reply was "a complication of troubles." Finally, after being pressed further, he said, "Kidney and liver."

John Allen Flanders, one of the brothers of the deceased, testified that the night he was there Fred vomited and heaved during the first part of the night, and the doctor told him that he had decided not to give any medicine that night, to let his stomach rest. He seemed a great deal better the next morning. Fred frequently called for water, and said he was burning up in his stomach. The witness gave him water every few minutes. The doctor gave some medicine the next morning.

R. A. Wood testified that he was present when Dr. Bell called to see Fred Flanders. Dr. Bell asked what was the trouble, and where did he hurt. Fred said he had no pain, and that he did not seem to be suffering except with sick stomach. He vomited frequently. He told Dr. Bell his kidneys had been out of the ordinary, but had got where they acted again, and that his liver seemed to be giving him a little trouble. Dr. Bell did not give him any medicine. Dr. Bell asked Dr. McNaughton whether he had given Fred a certain medicine, and was told that it had been given; and he advised that a blister be put on the pit of his stomach to stop the vomiting. He told Fred that Fred's kidneys and liver seemed to be a little out of order, but he saw no reason why Fred should not be up in two or three days attending to his business.

J. N. Kitchens testified that Fred Flanders ate supper at his house on Tuesday night, May 17th, and then seemed to be in good health. On the following Thursday he found Fred in bed. Mr. Thompson wanted to know about his ability to swap horses. Fred said he did not know that he felt like it, and Dr. McNaughton said: "No; he is not able. He has just taken a dose of medicine, and he will be mighty sick." He did not vomit while the witness was there.

According to the testimony of the physicians, the symptoms described by the witnesses were usual in cases of arsenic poisoning. Dr. Smith testified that if a man is taken sick and has violent vomiting spells, especially after medicine in the form of a white powder is given to him, and he suffers from about the 17th of May until the 4th of June before he dies, and if spots appear on his face, and he has pains in the stomach and in the region of the esophagus, and he gets better and worse at times until he dies, and if he has also partial blindness or his

sight is clouded to some extent, and after his death seven-eighths of a grain of arsenic is found in the organs, the heart, the liver, the kidneys, and the stomach, and there is also found fatty degeneration of the liver, and four red spots are found in the stomach, the deceased not having had fever, so far as known, he (witness) would say that the death was from arsenic poisoning. According to the testimony of this witness and of Dr. Houston, however, the symptoms stated, or some of them, are similar to those of uremic poisoning or acute nephritis. It was also stated that the vomiting could have been caused by calomel or other medicines. Dr. Smith stated that, notwithstanding these symptoms, the deceased might have died from something else than arsenic poisoning, but, taking them in connection with the finding of the arsenic in the stomach, he did not think so.

The undertaker who prepared the body for burial testified that he had used embalming fluid on the face, giving the face a massage, but that none of the fluid was introduced into the body, and that there was no arsenic in the fluid. The formula of the fluid, as furnished by the manufacturer, gave as the ingredients formaldehyde, carbolic acid, alcohol, and water. The witness stated that the lips were closed, and he did not open them. A cloth and cotton with the fluid on it were kept on the face. On cross-examination he stated that he did not think he put any cotton up the nose of the deceased. He did not know whether he dampened cotton with the embalming fluid and put it up the nose or not, and he did not think that he packed cotton inside the mouth. He used absorbent cotton, which would take up a good deal of the fluid. About a quart of the fluid was used by him and others. Another witness testified that he was present when the undertaker used cotton on the face of the deceased. He was there about two hours and when the undertaker left. The mouth was closed, and the undertaker did not rest the cotton on the top of the mouth or the face so that the liquid could soak in, and did not put it on the nose.

Dr. McNaughton in his statement to the jury said that he found that the formula of the embalming fluid used by the undertaker contained 10 per cent. of arsenate of soda, a substance composed of powdered arsenic and soda, and that the undertaker put cotton saturated with this fluid into the mouth and nostrils of the deceased. Dr. Houston testified that, where arsenic in an embalming fluid is introduced into the stomach after death, the bulk of it will remain there, the blood in a dead body being very sluggish and coagulating soon after death; that small quantities might be diffused through the walls of the stomach, but the relative proportions which the chemist testified were found in the stomach and in the heart, lungs, etc., "would speak most certainly against the

possible idea that the poisoning was introduced in the form of an embalming fluid into the stomach and had diffused in that way." If cotton or a cloth were saturated with the embalming fluid and placed on a dead man's face or over his open mouth, it might very rapidly get into the stomach. On analysis one would not find as much of it in the liver and in the heart and kidneys as in the stomach. If a cloth were placed over the face and none of the fluid got into the mouth, it would probably take weeks for it to penetrate through the body.

At the time of his death and for more than a year Flanders and his wife were residing in McNaughton's house, and McNaughton boarded with them and had his office there. No one else lived with them. McNaughton was a widower. It appears that there was undue intimacy between McNaughton and the wife, but, so far as appears, the relations between the two men and between husband and wife were entirely harmonious. When taken ill, Flanders was preparing to move away with his wife and go into the sawmill business in Thomas county, and had packed his household goods and loaded them on wagons, with the intention of going through the country with them, but on account of his illness he sent them off under the charge of another person, retaining only trunks and clothes. Several times during the illness McNaughton told others that Flanders was very sick, and that it was doubtful whether he would get well. He said this to Flanders' brother Jordan, and Jordan repeatedly proposed to the doctor and the wife that an additional physician be procured. Once McNaughton replied: "You can have a hundred doctors here if you want it. I know what is the matter with him, and I know what to do for him." And the wife said there was no use in having doctors there and piling up costs on them for nothing. Later it was proposed by the brother that Dr. Smith, of Swainsboro, be consulted. McNaughton promised to get Dr. Smith, but did not comply with the promise. In his statement to the jury McNaughton said that when he went to do so Mrs. Flanders objected. She said it was unnecessary; and this was the reason he did not call Dr. Smith. The brother proposed to take the sick man to his own home, but the doctor and the wife objected, saying it would not do to move him. During the illness the wife and the doctor spent much of the time out of the sick room and in private conversation in other parts of the house. One of the brothers testified: "When they were together, she looked to me like a woman that thought more of him than I ever saw a woman thought of a man. I never saw a man's wife pay more attention to him than she did to McNaughton." Others testified to having seen them kissing, etc., before the illness. It was testified that at the funeral "she did not act like a woman that cared. * * * She made some alarm, but

it looked as though it were forced; and on the following morning she went in a buggy with McNaughton to the office of the ordinary of the county in regard to the administration of the husband's estate, and was cheerful and laughing." The value of the estate was several thousand dollars in addition to life insurance amounting to \$3,000, of which she was sole beneficiary, and which had been procured in the preceding March, on a certificate of McNaughton as to the good health of the insured. Mrs. Durden testified that on the day following the burial McNaughton and the widow came to her and wanted her to take charge of his house and board them, but she declined to do so. McNaughton went to Thomas county and assisted in disposing of the property there for the widow. Afterwards he went to Augusta, and while there he was arrested at the home of his brother upon the charge of having murdered Flanders. In his statement to the jury he said that threats contained in an anonymous letter, and rumors of an intention to lynch him, caused him to go to see his brother in Augusta. He had no one in the county to discuss the situation with. He expected to return to the county and demand an investigation; and while in Augusta he rode on the streets with others. Mrs. Flanders remained at his house after the funeral, with her father and sister, until she went with them on their return to Bartow county. The accused denied that there was anything improper in his relations with Mrs. Flanders. He further stated to the jury that about May 18 or 19, 1910, Flanders called on him for treatment. Before that time Flanders had worked hard and often overtaxed his strength, and would come home wet to his knees, tired, and worn out, and he worried about his business. When feeling bad, he would undertake to physic himself, taking salts occasionally, and occasionally he would see a patent medicine recommended and he would think that he had the symptoms it was recommended for, and he would buy it and take it. When he called on McNaughton for treatment at the time mentioned, he told McNaughton that he had taken epsom salts almost every night for two weeks, and said he had been having sudden intense headaches, which would after a while wear off; that he had a bad spell about three weeks before, while in Thomasville, and took a remedy which seemed to relieve him, but he did not tell what it was. He complained of his right side, right shoulder, and spine, and his mind seemed bad, his tongue was heavily coated. He was constipated, his kidneys not acting, his temperature was 98. The statement of the accused continued as follows: "I then gave calomel, 10 grains, 'pto filin' [podophyllin?] two-thirds of a grain, and sodium 10 grains. Not being able to move his bowels with medicine, I gave him an enema of soap and water. * * * After this I was able to keep the bowels fairly open with sal

hepatica and sal laxative. The medicine that Mr. Jordan spoke of was sal laxative. At what I thought to be the proper time I gave him another dose of calomel. * * * It was prepared in Dublin. * * * I then prescribed fringe tree alternative [alterative?], a medicine prepared by Nelson, Baker & Co., of Detroit, Mich. After then Dr. Bell was called in in consultation. He made an examination and diagnosed the case, and agreed with me that he was suffering with or from uremia or uremic poison. He not only examined Mr. Flanders, but questioned him closely as to his condition. After then I went over my treatment, and he said I was doing all that could be done, and that I was giving him the correct medicine. * * * I did not give Mr. Flanders any arsenic, because I didn't think that he needed it, and, if he obtained any from the medicine that I gave him, it was because of that ingredient in the medicine, and not being chemically pure contained arsenic. I find that plaster of paris with which these jars were sealed [the jars in which the stomach and other organs were placed] were sealed with plaster of paris around the glass stopper contained arsenic in appreciable quantities. I find that sodium phosphate, according to the United States Dispensatory * * * in commerce, contains arsenic in dangerous quantities. I gave him laxatives to keep his bowels open. One of the ingredients in such laxative is sodium phosphate, 24 grains. I also gave him fringe tree alternative [alterative?], prepared by Messrs. Nelson, Baker & Co., and highly recommended in cases of stomach and liver trouble. I find that it contains sodium phosphate. I also find in Wilcox on Materia Medica and Pharmacy * * * that calomel contains what is known as impurities of calomel, and denominated as chloride of mercury and arsenic. As I do not deal directly with the manufacturers of calomel, it may be that some of these medicines were not chemically pure, and therefore contained arsenic in appreciable quantities. I did not know this, but I do know that each medicine given was highly recommended for the symptoms that Mr. Flanders had. As a part of the treatment as suggested by Dr. Bell, I applied poultices and counter-irritants to Mr. Flanders' stomach, hoping thereby to allay the vomiting; and on Friday morning, before Mr. Flanders died about 2:45 Saturday morning, he asked his wife for some milk, and she gave him some milk and bread. He drank part of the milk and ate a little of the bread; and, when I left to attend a call, it had remained on his stomach without his having vomited it up. This was the last thing in the shape of food or medicine that Mr. Flanders took, except when I went into him and found he was very weak, and found that possibly his heart had gone back on him. I used certain restoratives as I could to bring over the threatened end."

Dr. Everhart testified that sodium phos-

phate as used in medicine is not the commercial kind, or raw material, referred to in the dispensatory from which the accused read in his statement to the jury, but it is refined, and arsenic is not a part of it, and would not get in it except by accident or from the use of impure materials in manufacture. He had never seen or heard of any that had arsenic in it.

The motion for new trial contained the general grounds, and others complaining of the charge of the court to the jury, and refusal to charge; and another setting up incompetency of certain jurors brought to the attention of the court after verdict, all of which sufficiently appear in the opinion.

A. L. Franklin and Saffold & Larsen, for plaintiff in error. R. R. Arnold, Alfred Herrington, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

ATKINSON, J. [1] 1. The fourth ground of the amended motion for new trial complained of the charge of the court "as follows: 'To warrant a conviction upon circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused. If both theories—that is, the theory of guilt and the theory of innocence—are consistent with the proven facts, then you should give the benefit of the doubt to the defendant and acquit him,' thereby laying down, movant contends, as a final test of when a conviction could be had under circumstantial evidence, the test that, if both theories are of equal consistency, then and only then should the jury give the benefit of the doubt to the defendant, and thereby taking away from the jury the correct law of circumstantial evidence as above charged. In the first part of the charge of the court quoted; and this statement as to the two theories is not the law in a case like the one at bar, where the conviction depended upon circumstantial evidence, the law of circumstantial evidence going one step further than the doctrine of reasonable doubt, to wit, the theory of guilt must not only be consistent, but the evidence must exclude every other reasonable hypothesis, the law being that the evidence should be perfectly consistent with guilt, and the jury would not be authorized to convict unless the evidence went further and excluded every other reasonable hypothesis; and said charge is error, further, because, in order for the defendant to be acquitted under circumstantial testimony, it is not necessary that the evidence be consistent with the theory of innocence in order for the defendant to be acquitted, or to receive the benefit of the doctrine of reasonable doubt, the law being that the burden is on the state to establish the guilt of the defendant to the exclusion of every other reasonable hypothesis, and whether or not the circumstances proven are consistent with the innocence of

the party makes no difference, if said circumstances are not to the exclusion of every other reasonable hypothesis, the defendant could not be convicted, no matter how consistent the evidence might be, or how inconsistent it might be with the theory of innocence. Said charge is further error for the reason that it lays down the rule that the evidence required to acquit, and before a defendant should have the benefit of the reasonable doubt, must establish a theory consistent with the defendant's innocence, the true theory being that the evidence must establish a theory consistent with the defendant's guilt and to the exclusion of every other reasonable hypothesis, and it makes no difference whether or not the theory of innocence is established by the evidence as consistent as the theory of guilt, if the evidence fails to exclude every other reasonable hypothesis, save that of the guilt of the accused; and said charge is error because it qualifies the law of circumstantial evidence." The first part of the charge excepted to is a literal reproduction of section 984 of the Penal Code of 1895. The remainder of the charge excepted to was not subject to the criticisms made upon it.

[2] 2. The fifth ground of the amended motion for new trial complained of the charge "as follows: 'Mathematical certainty is not required and cannot be attained in a legal investigation. Moral and reasonable certainty is all that the law requires. Whenever you are convinced beyond a reasonable doubt, or to a moral and reasonable certainty, that this defendant is guilty, you would be authorized to so find. In the absence of such a degree of conviction on your part, you would not be authorized to find him guilty, but should return a verdict of not guilty which would fully acquit and discharge him.' The error in said charge, movant contends, being that it does not give the law of this case, this case depending entirely on circumstantial evidence, the court saying whenever you are convinced beyond a reasonable doubt, or to a moral and reasonable certainty, that this defendant is guilty, you would be authorized to so find, when the law of this case is not dependent upon the doctrine of reasonable doubt; but is dependent upon the law of circumstantial evidence, and the charge places this case on the doctrine of reasonable doubt, and is therefore error. The charge should have gone one step further and said that in this case, before they would be authorized to convict, that the evidence should exclude every other reasonable hypothesis save the guilt of the accused, this charge of the court placing the conviction or acquittal upon the doctrine of reasonable doubt, which does not apply to cases where the conviction is dependent solely upon circumstantial evidence. This is especial error because of the court having nowhere charged the law of circumstantial evidence." The charge excepted to applies the principle of sections

986 and 987 of the Penal Code, which were codified from the decision rendered in the case of *John v. State*, 33 Ga. 258, that being a case dependent upon purely circumstantial evidence. Section 986 of the Code declares "moral and reasonable certainty is all that can be expected in legal investigation," while 987 declares, "whether dependent upon positive or circumstantial evidence, the true question in criminal cases is, not whether it be possible that the conclusion at which the testimony points may be false, but whether there is sufficient testimony to satisfy the mind and conscience beyond a reasonable doubt." In view of the law as thus stated, it does not affect the ruling in the case that all the evidence relied upon for a conviction was circumstantial. In *Giles v. State*, 6 Ga. 276, it was said: "On the trial of criminal cases, moral, and not mathematical or metaphysical, certainty is all that the law requires, or that is attainable. The doubts of a jury to justify an acquittal should be reasonable, and not a mere vague conjecture or possibility of the innocence of the accused." Also: "Direct and irrefragible evidence cannot and need not be always produced in criminal cases. All that is necessary is that the jury, whether the proof be positive or presumptive, be satisfied of the defendant's guilt." In *Smith v. State*, 63 Ga. 168, the following charge was approved: "Before you can convict, you must believe that the prisoner is guilty beyond a reasonable doubt. This doubt must be a reasonable one, not a fanciful doubt. A mathematical certainty is not required. A reasonable and moral conviction of guilt is all that the law requires." This was also a case which depended upon circumstantial evidence. As stated in the first division of the opinion, the judge in the present case had already charged the section of the Code relative to circumstantial evidence, and the criticisms upon the excerpt from the charge contained in the fifth ground of the amended motion were not sufficient to require the grant of a new trial.

[3] 3. In the sixth to the twelfth grounds of the amended motion for new trial, both inclusive, complaint was made of the charge, the substance of the criticisms being that the court erred in charging on reasonable doubt without going one step further and in immediate connection therewith charging also the law of circumstantial evidence, that, "to warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused." There was no other criticism of the charge in these grounds of the motion for new trial. The judge having elsewhere charged the law of circumstantial evidence as applicable to the entire case, the failure to recharge it in immediate connection with the law of reasonable doubt, as complained of in the excerpts from the charge contained in these

grounds of the motion, was not misleading, or cause for the grant of a new trial.

[4] 4. The fourteenth ground of the amended motion for new trial complained that certain jurors were biased and prejudiced against the accused. On the hearing of the motion for new trial evidence was submitted by affidavits pro and con as to the qualification of the jurors. The evidence so submitted authorized the judge to find, as he did, in favor of the competency of the jurors. Accordingly there was no error in overruling that ground of the motion for new trial which complained of the partiality of the jurors. See *Wall v. State*, 126 Ga. 549, 55 S. E. 484, and citations; *McCrimmon v. State*, 126 Ga. 560, 55 S. E. 481.

[5] 5. The thirteenth ground of the amended motion complained that the judge in his entire charge failed to charge the law of circumstantial evidence, and thereby committed error, because the case was one that depended entirely upon circumstantial evidence. But, as we have already seen, the judge did charge the Code section on that subject, and the criticism is not borne out by the record.

[6] 6. The fifteenth ground of the amended motion for new trial complained that the judge refused, upon written request, timely presented, to charge the jury: "I charge you that if you find from the evidence or statement of the accused that calomel or other medicine was administered to the deceased by the defendant in the court [course?] of his treatment of the deceased, and that it was possible for that medicine to contain arsenic, and that fact was known to the defendant, and that the quantity of arsenic found in the organs of deceased after death was about the quantity of arsenic which was possible to be in the medicine so administered by the defendant, then your verdict should be for the defendant, and you should acquit him, or, if you have a reasonable doubt as to this fact, you should acquit him." There was no error in refusing this request. There might be other objections to it, but it would invade the province of the jury for the judge to instruct them as requested, relative to the effect of the evidence before them. If the jury should find as outlined in the request, such finding would not necessarily call for a verdict of not guilty.

[7] 7. The general grounds complained that the evidence was insufficient to support the verdict. All the other members of the court are of the opinion that the evidence was sufficient; but the writer is of the contrary opinion for the following reasons: The defendant entered upon the trial of the case with the presumption of innocence in his favor. The burden was not upon him to prove his innocence, but it was upon the state to prove his guilt to a moral and reasonable certainty and beyond a reasonable

doubt. This could be done by circumstantial as well as by direct evidence; but, where conviction depended entirely upon circumstantial evidence, the evidence upon every material allegation of the indictment should be not only consistent with the hypothesis of guilt, but should be so conclusive as to exclude every other reasonable hypothesis save that of the guilt of the accused. *Bell v. State*, 93 Ga. 557, 19 S. E. 244; *Williams v. State*, 113 Ga. 721, 39 S. E. 487. The defendant was a practicing physician, and, aside from the evidence as to intimacy between himself and the wife of the deceased, there was no more in the case to point to a homicide than there would be in any case where a physician treated a sick patient who afterwards died. Though there were counts in the indictment to support any evidence that might be adduced on the trial, the evidence was not sufficient to a moral and reasonable certainty and beyond a reasonable doubt to show that death was produced by poisoning. There was no direct evidence that death was produced by poisoning. The presumption is that he died a natural death, the burden being on the state to show the contrary. There was direct evidence of seven-eighths of a grain of arsenic being found in his remains, but no direct evidence that that killed him. Two grains of arsenic, according to the evidence, is the minimum fatal dose. Whether the deceased ever had more arsenic in his system was a matter by no means certain, and whether he ever had as much as two grains at one time was a mere matter of opinion. The evidence fails to disclose the nature and character of the illness of the deceased which caused him to invoke the services of a doctor. The death might have resulted from that illness. It was at least incumbent upon the state to make some explanation with reference to this. If the evidence had been sufficient to show to a moral and reasonable certainty, and beyond a reasonable doubt, that the deceased came to his death by arsenic poisoning, it was still incumbent upon the state to show in like manner that it was administered by the defendant, or by his direction, with felonious intent. In order to do this, the state again relied upon circumstantial evidence, which, in order to convict, is required to be so conclusive as to be not only consistent with the guilt of the defendant, but to exclude every other reasonable hypothesis save that of his guilt. There was evidence that arsenic is administered in a powder, and is tasteless and odorless, and that it would produce certain symptoms, and that the defendant administered from time to time powder medicines, without taste or odor and which produce symptoms of arsenic poisoning, but there was no direct evidence that the medicine so administered was in fact arsenic, while it was testified that the symptoms might result from other causes. It was explained by the prisoner's

statement that the medicines which had been administered by him were calomel, sal hepatica, sal laxative, and "fringe tree alternative" (alterative). If arsenic was administered to the deceased, the evidence is not to any degree of certainty that it was administered by the doctor. The deceased was sick for some two weeks, and different people had nursed him, and they might have administered arsenic to him by mistake or design, or he might have taken it himself during the absence of his attendants. The evidence does not purport to show that he was under the watch of an attendant at all times, but showed affirmatively that different people attended him at different times, and no one attended him at all times. If it were said that there was an inducement for the doctor to poison the deceased in order to get rid of him, so that he might have intimate relations with the wife of the deceased, it might also be said that the same inducement was open to the wife in order that she might have relations with the doctor. There was no evidence of a conspiracy between the wife and the doctor to kill the deceased, and, if the deceased was killed in the manner alleged, it was possible and just as plausible that the wife might have committed the murder as that the doctor did, and that she might have done so without his knowledge or participation in any manner. Had the law cast the burden upon the defendant to prove his innocence, rather than upon the state to prove his guilt, it might be that the defense would have failed to support the burden, but, it being incumbent on the state to prove the guilt of the defendant, the theory of guilt is not borne out by the evidence.

Judgment affirmed. All the Justices concur, except BECK, J., absent, and ATKINSON, J., dissenting.

(136 Ga. 687)

BUTTS COUNTY v. WRIGHT.

(Supreme Court of Georgia. Aug. 18, 1911.)

(Syllabus by the Court.)

1. COUNTIES (§ 200*)—PRESENTATION OF CLAIMS—TIME.

"All claims against counties must be presented for payment within twelve months after they accrue or become payable, or the same are barred, unless held by minors or other persons laboring under disabilities, who are allowed twelve months after the removal of such disability." Civil Code 1910, § 411.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 315; Dec. Dig. § 200.*]

2. COUNTIES (§§ 197, 203*)—PRESENTATION OF CLAIMS—CLAIMS WHICH MUST BE PRESENTED—"CLAIM AGAINST THE COUNTY."

If a person, who seeks to recover money from a county on the ground that the county officers illegally borrowed it from him, but that it was used for specified legitimate current ex-

penses of a given year, has no claim against the county for money, he is not entitled to any recovery. If he has a claim for money against the county on that ground, whether he seeks to assert it by a suit for money had and received, or to set up that, under the circumstances, the law implied a contract to pay him what had thus been received and used for county purposes, in either event it is a "claim against the county," and falls within the requirement of the statute quoted in the first headnote. Maddox v. County of Randolph, 65 Ga. 217.

(a) The suit was not brought within 12 months after the accrual of the right of action, and cannot be urged as a substitute for or equivalent of the presentation of a claim.

[Ed. Note.—For other cases, see Counties, Dec. Dig. §§ 197, 203.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1202-1211; vol. 8, p. 7604.]

3. CLAIMS AGAINST COUNTIES—PRESENTATION—NECESSITY.

In the case at bar it did not appear that the claim had been presented in accordance with the statute, and therefore, if it would otherwise have been legal, it was barred.

4. COUNTIES (§ 203*)—PRESENTATION OF CLAIMS—SUFFICIENCY.

As the county officers had no legal authority to borrow money and give notes for its future payment, the doing of these acts would not suffice as equivalent to a presentation of the claims required by the statute. The giving of the notes was an illegal promise to pay in the future. The presentation required by the statute contemplates present legal action.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 203.*]

5. COUNTIES (§ 197*)—CLAIMS—PRESENTATION—NECESSITY.

The suit was to recover money which it was claimed had been borrowed and used to pay warrants. While there was a general averment of subrogation, there were no such allegations as to show equitable ownership or assignment of the warrants, so as to make the suit in its essence one on such warrants and to render presentation of the claims unnecessary.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 197.*]

6. CONSTITUTIONAL LAW (§ 46*)—DETERMINATION OF CONSTITUTIONAL QUESTIONS.

As this ruling controls the case, it is unnecessary to discuss any constitutional questions which may be involved.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

7. DEMURRER—RULINGS.

Under the preceding rulings, it was erroneous to refuse to dismiss the case on the grounds of the demurrer which set up that the plaintiff's claims were not presented within the time required by law.

Holden, J., dissenting.

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Action by B. A. Wright, as administrator, against Butts County. Judgment for plaintiff, and defendant brings error. Reversed.

W. Ernest Watkins, for plaintiff in error. Jno. R. L. Smith, for defendant in error.

EVANS, P. J. Judgment reversed. All the Justices concur, except BECK, J., absent, and HOLDEN, J., dissenting.

HOLDEN, J. (dissenting). 1. Where one loans to a county money which is used by it in the discharge of its legally incurred liabilities for current expenses, while no action can be maintained against the county by the lender on the loan contract, the lender has a right of action against the county to recover the money thus used by it, in the form of an action for money had and received. *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244; *Peed v. McCrary*, 94 Ga. 487 (4), 21 S. E. 232. See, also, *Nat. Bank v. Appleton*, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443, and authorities cited on pages 1720 and 1721 in 2 *Pomeroy's Equity Jurisprudence*.

2. "The action for money had and received is an equitable action and extensively remedial. It lies, in all cases, where money is in the hands of one, which in equity and good conscience should be paid to another." *McCay v. Barber*, 37 Ga. 424; *Whitehead v. Peck*, 1 Ga. 140.

3. Where one loans to a county money which is used by it in the discharge of its legally incurred liabilities for current expenses, which have been properly audited and approved, and to recover the money thus used the lender brings an action against the county for money had and received, the suit does not involve a claim, within the meaning of Civil Code 1910, § 411, declaring that: "All claims against counties must be presented within twelve months after they accrue or become payable, or the same are barred, unless held by minors or other persons laboring under disabilities, who are allowed twelve months after the removal of such disability."

(126 Ga. 617)

ROBERTS et al. v. NATIONAL BANK OF COLUMBUS.

(Supreme Court of Georgia. Aug. 15, 1911.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1135*)—AFFIRMANCE—ERROR NOT SHOWN.

The assignments of error are to the overruling of the motion for re-reference to the auditor, to the refusal of the judge to approve exceptions of fact to the auditor's report, to the overruling of exceptions of law thereto, and to the decree based on the report of the auditor. In the brief of counsel for plaintiffs in error, filed in this court, the assignment upon the refusal to re-refer the cause is expressly withdrawn. We have most carefully studied the entire record, and thoroughly considered all of the exceptions, and are entirely satisfied that the trial judge did not commit error in declining to approve the exceptions of fact, or in overruling the exceptions of law, or in sustaining the auditor in his rulings as to evidence, or in rendering a decree in accordance with the findings of the auditor.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1135.*]

Error from Superior Court, Muscogee County; W. C. Worrlill, Judge.

Action by the National Bank of Columbus against W. T. Roberts and others. Judgment for plaintiff, and defendants bring error. Affirmed.

C. E. Battle, Howell Hollis, and J. F. Golightly, for plaintiffs in error. J. H. Lewis, J. H. Martin, A. W. Cozart, and Hatcher & Hatcher, for defendant in error.

FISH, C. J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(126 Ga. 700)

CARTER v. WALDEN et al.

(Supreme Court of Georgia. Aug. 18, 1911.)

(*Syllabus by the Court.*)

1. EVIDENCE (§ 432*)—PAROL EVIDENCE—DEED—CONSIDERATION.

A deed reciting a valuable consideration only may be shown by parol to be without any consideration.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1981-1989; Dec. Dig. § 432.*]

2. WILLS (§ 88*)—WILL OR DEED.

An instrument purporting to convey a tract of land to the grantees therein contained the following language: "Jacob Carter [the grantor] is to hold a lifetime lease on said 245 acres of land, more or less [the property conveyed]. Said lease to expire at the death of the party of the first part" (the grantor). *Held*, that the writing was not a will, but a deed, with a reservation of a life estate in the grantor.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 208-217; Dec. Dig. § 88.*]

3. DEEDS (§ 70*)—CANCELLATION OF INSTRUMENTS (§ 84*)—VALIDITY—FRAUD—LACHES.

The petition made, among other allegations, substantially the following: The plaintiff, who was the owner of a tract of land, intending to make a will devising the land to certain persons, made known such intention to another, and the latter prepared a deed conveying the land to such persons, and informed the owner that the writing was a will, and not a deed. The owner was entirely ignorant of the forms necessary to constitute a deed or a will, and did not know the effect of the language of said instrument, or else he would not have signed the same; and petitioner signed the same, verily believing that he was thereby executing a will, and not a deed. The writing was never delivered to any of the grantees as a deed, but was left in the custody of one of the grantees, to be held as the owner's will. The instrument executed was in form a deed conveying the land to the grantees therein named, with a reservation of a life estate in the maker, and was without any consideration whatever. *Held*: (a) Clear proof of the allegations made would entitle the plaintiff to a decree canceling the instrument. (b) The instrument having been made March 9, 1898, the plaintiff was not guilty of such laches as would bar his right to have the writing canceled; the suit for this purpose having been brought February 15, 1910, a few months after he discovered the character of the writing, and it appearing that he has always remained in possession of the property, and there being involved no question as to the rights of third parties or innocent purchasers. (c) The petition was not subject to general de-

murrer, or to any of the grounds of special demurrer.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 185-182; Dec. Dig. § 70; Cancellation of Instruments, Cent. Dig. §§ 49-54; Dec. Dig. § 34.*]

Error from Superior Court, Grady County; Frank Park, Judge.

Action by Jacob Carter against Maggie Walden and others. Judgment for defendants, and plaintiff brings error. Reversed.

R. C. Bell, J. R. Singletary, and W. J. Willie, for plaintiff in error. Roscoe Luke and J. S. Weathers, for defendants in error.

HOLDEN, J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 698)

CENTRAL GEORGIA BRICK CO. v. CAROLINA PORTLAND CEMENT CO.

(Supreme Court of Georgia. Aug. 18, 1911.)

(Syllabus by the Court.)

1. SALES (§§ 62, 418*)—CONTRACT—DELIVERY—BREACH BY SELLER—DAMAGES.

A written contract for the sale of 400,000 hard brick, to be shipped from Macon, Ga., to Charleston, S. C., at the price of \$7.15 per 1,000, f. o. b. cars at Charleston, the shipments to be made one car each day, beginning February 16th, unless prevented by causes beyond the control of the seller, such as strikes, railroad wrecks, and floods, is an entire contract, though the subject-matter is divisible. Under such a contract the seller is not entitled to demand payment upon delivery of each car load of brick, but only upon delivery of the whole. *Erwin v. Harris*, 87 Ga. 333, 13 S. E. 513; *Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 279, 55 S. E. 50; *Shinn v. Bodine*, 60 Pa. 182, 100 Am. Dec. 560; *Catlin v. Tobias*, 28 N. Y. 217, 84 Am. Dec. 183; *Mount v. Lyon*, 49 N. Y. 552; *Kenigberger v. Wingate*, 31 Tex. 42, 98 Am. Dec. 512; *McGeehee v. Hill*, 1 Ala. 140.

(a) Accordingly, where the seller delivered one car load of brick on February 15th, and by reason of floods failed to deliver any more until April, when on the 14th of that month it delivered one car, and on the 19th another, but refused thereafter to deliver any more unless the purchaser would, before delivery, pay a draft for the value of each car attached to a bill of lading, it committed a breach of the contract, which gave the purchaser the right to recover as damages the difference between the contract price and the price which the purchaser was compelled to pay in the market at the place of delivery, in order to obtain brick of the same quality; it appearing that the purchaser bought the brick to be used in the erection of a certain building, that the seller knew the purpose for which the brick were to be used, and that the price paid was the market price at the place of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171-179, 1174-1201; Dec. Dig. §§ 62, 418.*]

2. INSTRUCTIONS.

The instructions of the court to the jury, upon which error was assigned, were in substantial accord with the rulings above announce-

ed, and were adjusted to the evidence. Under the law and the evidence, the defendant was entitled to recover damages by way of recoupment, and the amount of the verdict was authorized by the evidence.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by the Carolina Portland Cement Company against the Central Georgia Brick Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hall & Fowler, for plaintiff in error. Lane & Park, for defendant in error.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 730)

WILLIS et al. v. BONNER.

(Supreme Court of Georgia. Aug. 19, 1911.)

(Syllabus by the Court.)

1. WITNESSES (§ 149*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Decie Thomas and the administrator of Emma Martin brought suit against Anna Bonner and her husband, Clarence Bonner, to recover a tract of land and the mesne profits thereof. Anna Bonner, who was in possession of the land and claimed to be the owner thereof, died pending the suit intestate, leaving as her sole heir at law the other defendant, her husband. Anna Bonner was stricken as a party defendant, and the suit proceeded "against the other defendant, Clarence Bonner, as her only heir at law." *Held*, it appearing that the suit at the time of the trial was against Clarence Bonner as the sole heir at law of his wife, who died intestate, in the absence of evidence that she left debts which are unpaid, he was her "personal representative," and the court did not err in ruling that Decie Thomas was incompetent to testify to any communication or transaction between her and Anna Bonner. *Civ. Code* 1910, §§ 8930, 8961, 5858, par. 1; *Johnson v. Champion*, 88 Ga. 527, 15 S. E. 15; *Killian v. Banks*, 103 Ga. 245, 29 S. E. 971; *McEhanev v. Crawford*, 96 Ga. 174, 177, 22 S. E. 895.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 149.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict.

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by S. H. Willis, as administrator, and others, against Clarence Bonner. Judgment for defendant, and plaintiffs bring error. Affirmed.

Park & Park, for plaintiffs in error. Jas. Davison, for defendant in error.

HOLDEN, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(39 S. C. 456)

CRAWFORD et al. v. ATLANTIC COAST LUMBER CORPORATION.

(Supreme Court of South Carolina. Sept. 6, 1911.)

1. INJUNCTION (§ 252*)—INJUNCTION BONDS—RIGHT OF RECOVERY.

Where defendant is enjoined from interfering with plaintiff's property, and the order deprives defendant of his right to use his property, defendant may recover on the injunction bond any damages suffered from such deprivation.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 586-598; Dec. Dig. § 252*.]

2. INJUNCTION (§ 252*)—UNDEXTAKINGS.

In a suit on an undertaking given by plaintiff on the issuance of an injunction restraining defendant from cutting timber, defendant was not entitled to recover damages sustained from the issuance of the injunction in excess of the amount fixed in the undertaking.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 586-598; Dec. Dig. § 252*.]

3. APPEAL AND ERROR (§ 907*)—OBJECTIONS—PRESENTATION BELOW.

Where there were no pleadings showing the amount of damages claimed in a proceeding upon an injunction undertaking, nor plaintiff's defense to the claim for damages, so that plaintiff could make any argument at trial appropriate to the claim set up, and the master found against him in an amount less than the undertaking, though not referring to any defense made on the ground that the amount allowed defendant could not exceed the amount of the undertakings, it could not be inferred on appeal that that objection was not made below, so as to prevent it from being raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 907*.]

Appeal from Common Pleas Circuit Court of Berkeley County; John S. Wilson, Judge.

Suit by S. L. Crawford and others against the Atlantic Coast Lumber Corporation. From a decree in part for defendant, plaintiffs appeal. Modified, as stated.

Legare & Holman, for appellants. Willcox & Willcox, for respondent.

WOODS, J. This action for injunction arose out of differences as to rights acquired by the defendant under a contract for the sale of standing timber. The plaintiffs obtained a temporary order of injunction, restraining the defendant from cutting any timber on 954 acres of the land described in the agreement, on the ground that the conveyance did not cover timber growing in the bays and branches. The undertaking given under this order was conditioned that the plaintiffs would pay the "sum of \$300, being such damages as the defendant may suffer by reason of an injunction granted by an order of his honor, Judge Charles G. Dantzler, on 28th day of April, 1906." Upon motion before him, Judge Ernest Gary made an order on 15th June, 1906, dissolving the injunction ordered by Judge Dantzler. The plaintiffs appealed from this order, and obtained an order from Hon. Y. J. POPE, Chief Justice, enjoining the defendant from

cutting the timber described in the complaint pending the appeal. Under this order the plaintiffs gave another undertaking, conditioned for the payment of \$200, "being such damages as the defendant may suffer by reason of an order granted by his honor, Y. J. POPE, Chief Justice of the Supreme Court of South Carolina, restraining and enjoining the defendant from committing any further acts of trespass and in cutting timber described in the complaint." The Supreme Court reversed the order of Judge Gary, and thus restored the order of injunction made by Judge Dantzler.

Upon hearing the case on the merits, Judge Klugh sustained the contention of the plaintiffs, and made a decree permanently enjoining the defendant from cutting any timber in the bays and branches, and rendered judgment in favor of the plaintiffs for the sum of \$820, the value of the timber cut in the bays and branches. On appeal from this decree the Supreme Court reversed the judgment of the circuit court on this point, holding that the timber on all the land was embraced in the contract of sale, but adjudged, further, that the contract conveyed only timber measuring at the time of the sale 9 inches in diameter 20 feet from the butt. Thereafter an order was made by Judge Memminger, referring the cause to the master "to take testimony relevant thereto, and to assess and report the damage, if any, which the plaintiffs have sustained on account of the cutting by the defendant of any of the timber on the lands of the plaintiffs, which defendant was not under its contract entitled to cut, and to assess and report the damage, if any, which the defendant has sustained by reason of the issuing of the injunctions in this case, with leave to report any special matter." The master reported that the plaintiffs had been damaged \$68.83 by reason of the cutting by the defendant of timber under the size contemplated by the contract, and that the defendant had been damaged \$529.13 by reason of the loss of trees, which it had rightfully cut, and which it was enjoined from removing. Upon hearing argument upon exceptions filed by both parties to this report, the circuit court found the entire damages suffered by the defendant to be \$3,677.81, and, after deducting \$68.83, the damages found by the master in favor of the plaintiff, decreed that the defendant should have judgment for the remainder, \$3,608.98. From this decree plaintiffs appealed.

[1] The unsoundness of the first point raised by the exceptions is made obvious by the statement of it. The contention is that, since the injunction was sustained in part, the defendant could recover no damages on account of it. Stated more specifically, the proposition is that when a party is properly

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexer

enjoined from interfering with or injuring the property of the plaintiff, and by the same order at the instance of the plaintiff is deprived of the right of using his own property, he has no redress under an undertaking which provides expressly for any damages he may suffer by reason of the injunction. It is obvious that a defendant can suffer no damages from being enjoined from violating the rights of another, and it is equally obvious that the losses which resulted from not being allowed to exercise his own rights are damages suffered by reason of the injunction. 2 High on Injunctions, § 1867.

[2] The second point made by the exceptions is well taken. The court was without power to give judgment in favor of the defendant for an amount in excess of the undertakings. The remedy of injunction invoked by the plaintiff, the protection against damage afforded by the undertaking, and the power of the court to ascertain the damages by reference, or otherwise, are all statutory, and are all interdependent; and it follows that the damages must be sought by the defendant in the same cause by enforcement of the undertaking, and that they are limited by the undertaking. It was expressly so held in *Batson v. Paris Mountain Water Co.*, 73 S. C. 368, 53 S. E. 500, and in *Meyers v. Block*, 120 U. S. 206, 7 Sup. Ct. 525, 30 L. Ed. 642. The decisions of the courts of other states have been to the same effect whenever the question has arisen under similar statutes.

[3] The defendant's contention, however, is that the point is not available to the plaintiffs, because it was not taken in the circuit court. The general and well-recognized rule relied on is not applicable here. We pass by the argument which might be made that the court, in undertaking to give judgment for defendant in excess of that which the statute empowered it to give, went beyond its jurisdiction, because this court cannot infer from the record that the point was not made in the circuit court that the judgment against the plaintiffs could not exceed the sum of the undertakings. There were no pleadings setting out the items and amount of damages claimed, and the defenses to the claim; hence it was open to the plaintiffs to make any defense in evidence and in argument appropriate to the claims set up. There is nothing, therefore, in the record to show that this defense was not argued before the master. It is true that the master's report does not refer to it, and that it is not specifically mentioned in the exceptions to his report. But the absence of such references is not convincing that the point was not made, because on other grounds the master found against the plaintiffs a net amount less than the sum of the two undertakings, thus making

references to the point in the exceptions inappropriate.

A mere inspection of the papers is sufficient to show that the undertaking given under the order of the Chief Justice was intended to supplement the undertaking given under the order of Judge Dantzler; and the defendant is therefore entitled to the protection of both undertakings. We do not understand that there is any serious contention that the defendants were damaged less than \$500, the sum of the two undertakings, and the evidence on that subject will not be recited. It is enough to say that the evidence shows beyond all doubt that the defendant was prevented from using much timber, which belonged to it under the contract, which it had cut, and which was lost by reason of the injunction, that the operation of its mill plant was so interfered with by the injunction against using its own timber that a heavy loss was incurred on that account, and that these losses, after deducting plaintiff's damages of \$68.83, far exceeded \$500, the sum of the two undertakings.

The judgment of this court is that the defendant is entitled to judgment against the plaintiffs and the sureties on their undertakings for the sum of \$500, and that the judgment of the circuit court be modified accordingly.

JONES, C. J., and GARY, A. J., concur.
HYDRICK, J., did not sit in this case.

(155 N. C. 229)

JENKINS v. JONES.

(Supreme Court of North Carolina. May 11, 1911.)

Appeal from Superior Court, Caldwell County; Cline, Judge.

Action by Nicholas Jenkins against John H. Jones. Judgment for defendant, and plaintiff appeals. Affirmed.

Mark Squires and Lawrence Wakefield, for appellant. Edmund Jones, for appellee.

PER CURIAM. Without approving the construction placed upon the deeds by the court below, we are of opinion that there is no error of which the plaintiff (appellant) can complain, and the judgment is therefore affirmed.

(136 Ga. 756)

ELLIS et al. v. BACON.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

INJUNCTION (§ 147*)—INTERLOCUTORY INJUNCTION—CONFLICTING EVIDENCE.

The judge did not err in refusing to grant, on conflicting evidence, an interlocutory injunction.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 822; Dec. Dig. § 147.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by C. R. Ellis and others against

A. O. Bacon. An interlocutory injunction was denied, and plaintiffs bring error. Affirmed.

West & Dasher, Roland Ellis, and Lane & Park, for plaintiffs in error. Miller & Jones, W. D. & Custis Nottingham, and Guerry, Hall & Roberts, for defendant in error.

FISH, C. J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 742)

WINOKER v. WARFIELD et al.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

RAILROADS (§ 282*)—TORTS OF SERVANT—LIABILITY OF MASTER—PETITION.

A railway company is liable for a tort committed by its agent in the business of the company and within the scope of the agent's employment. Applying this doctrine to the allegations of the petition, it was not open to general demurrer.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.*]

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Action by Samuel Winoker against S. D. Warfield and another, as receivers of the Seaboard Air Line Railway Company. The petition was dismissed on general demurrer, and plaintiff brings error. Reversed.

In a suit brought by Winoker against the receivers of the Seaboard Air Line Railway, the substance of the petition here material was: The petitioner went to the freight warehouse of the railway company at Dorchester, a station on the railway line, for the purpose of paying the freight charges due by him to the defendants on a lot of goods shipped to him over the line of the company to Dorchester. When he arrived at the warehouse, the station agent in charge thereof, and to whom he intended to pay such freight charges, was busy delivering freight to another person, and, while waiting for the agent to finish the business in which he was then engaged, the petitioner seated himself upon the steps of the platform in front of the warehouse, and entered into a conversation with a section foreman of the company. During this conversation the petitioner informed the section foreman that a short time previously petitioner had, with the consent of the railway officials, taken the place, for a few days, of the company's agent at Way's station on the company's line, and had, during the temporary absence of the agent at that station, performed his duties, including the selling of tickets to passengers. At this point in the conversation, one Walter Belk, "in the employment of said receivers as special agent," who was standing near by, "with-

out petitioner having addressed a word to [him], * * * said to petitioner that he [Belk] had told petitioner that petitioner must never come around any of the railroad offices again, and that, if he [Belk] ever caught petitioner in any of the railroad offices selling tickets, he [Belk] would kick petitioner out of them, and the said Belk then cursed petitioner [applying to him a vile name], * * * and ordered petitioner to get down off of the steps whereon petitioner was sitting." Petitioner obeyed, whereupon Belk caught his shirt near the collar, again applying to him a vile name, and ordered him to leave the grounds of the railway company, at the same time pulling him across the tracks towards the edge of the company's right of way. "To this treatment petitioner protested, and told said Belk that he had no right to put him off the company's grounds, as he was there on business with the agent, and [that Belk] had no right to curse petitioner. The said Belk refused to desist, but continued his hold on petitioner, and endeavored to pull petitioner across the remaining tracks of said railroad towards the edge of said right of way, and repeatedly called petitioner [a vile name], * * * until finally petitioner replied to him by saying, 'You are another' [applying to Belk the same vile name], * * * whereupon the said Belk knocked petitioner down," violently beating him, and inflicting serious wounds upon his head. "Petitioner says that, for some time previous to and at the time the said Walter Belk cursed, abused, and beat petitioner as aforesaid, the said Belk was in the employment of and a servant of said receivers, occupying the position known as special agent of said receivers in the conduct of the business of said railway, and that the duties of said special agent were, generally, to investigate, detect, and report any delinquencies or wrongdoing by the agents or servants of said receivers, relative to the business of said railway, and to investigate, detect, and to take such steps as were legal to prevent and to punish any wrong committed by any one against said railway or its property, and that at the time the said Belk assaulted and beat petitioner, as aforesaid, he [Belk] was actually on duty for said receivers, as special agent, as aforesaid, the particular duty that called said Belk to said Dorchester station at said time being to investigate, detect, and take necessary action to apprehend the party who had opened and left open a switch on the line of said railway at a point known as Limerick, a short distance from said Dorchester station, and that at the time said Belk assaulted and beat petitioner, as aforesaid, the said Belk was acting upon the claim that your petitioner was an intruder and a trespasser on the property of said railway, and acted in the line of his duty as said special agent to eject petitioner from said

property." The character and the extent of the wounds inflicted by Belk on petitioner were set forth in detail, as well as his physician's bill incurred by reason thereof, and also the pain and suffering he endured on account of the wounds inflicted by Belk, and the damages he had thereby sustained. The petition was dismissed on general demurrer, and the petitioner excepted.

A. S. Way and W. T. Burkhalter, for plaintiff in error. Anderson & Cann and Thos. T. Walsh, Jr., for defendants in error.

FISH, C. J. (after stating the facts as above). The doctrine that a principal is liable for a tort committed by his agent in the business of the principal and within the scope of the agent's employment, is so well settled that no citation of authority is needed for its support. The question is: Did the allegations of the petition now under consideration make out a case of liability against the defendants under the doctrine stated? The petition showed that the plaintiff had a right to be at the defendants' warehouse for the purpose of paying a freight bill due by him, and that while there Belk, an agent of the defendants, unlawfully assaulted and beat him, but not in the presence of the agent who had charge of the freight warehouse and to whom the plaintiff intended to pay freight charges. According to the petition, Belk was the "special agent" of the defendants, and as such it was his duty, among others, generally to investigate, detect, and to take such steps as were legal to prevent, any wrong from being committed against the property of the railway company, and at the time he unlawfully assaulted and beat the plaintiff, while the latter was at the defendants' freight warehouse for the purpose of paying a freight bill, Belk was, in the language of the petition, "acting upon the claim that your petitioner was an intruder and a trespasser on the property of said railway, and acted in the line of his duty as said special agent to eject petitioner from said property." When the plaintiff informed the section foreman of the railway company that he (the plaintiff), a short time previously, had temporarily acted as the agent of the company with the consent of its officials, and as such agent had sold tickets to passengers, Belk interrupted the conversation between the plaintiff and the section foreman, and said to the plaintiff that he (Belk) had told him never to come around any of the railroad offices again, and that if he (Belk) ever caught plaintiff in any of the railroad offices selling tickets he would kick plaintiff out of them, and, cursing plaintiff, ordered him to leave the grounds of the railway company, at the same time making the assault upon him. From these allegations it may be fairly inferred that the general duties of

Belk were of a detective character, and that in his opinion it was to the interest of the company and for the protection of its property that the plaintiff should be ejected therefrom, and that Belk, acting in his capacity as special agent for the receivers of the company, and in the line of his duty as a detective, undertook to eject the plaintiff from the premises of the railway company as an intruder thereon. It follows, therefore, that the petition was sufficient to withstand a general demurrer, and to entitle the plaintiff to go to the jury, in order that they might, under the evidence to be submitted, pass upon the question whether Belk was acting in the business of the railway company and within the scope of his employment when he committed the alleged assault and battery. Judgment reversed.

BECK, J., absent. The other Justices concur.

(128 Ga. 681)

LATSON v. WELLS, Warden.

(Supreme Court of Georgia. Aug. 17, 1911.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 83*)—PROHIBITION AGAINST SLAVERY—STATUTES.

Pen. Code 1910, § 715, providing that, "if any person shall contract with another to perform for him services of any kind, with intent to procure money or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer, or, after having so contracted, shall procure from the hirer money, or other thing of value, with intent not to perform such service, to the loss and damage of the hirer, he shall be deemed a common cheat and swindler," and, upon conviction, shall be punished as for a misdemeanor, is not in conflict with the thirteenth amendment to the Constitution of the United States, providing: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 83.*]

2. STATUTES (§ 64*)—CONSTITUTIONAL LAW (§ 43*)—PARTIAL INVALIDITY—WHO MAY RAISE CONSTITUTIONAL QUESTIONS.

Pen. Code 1910, § 716, is as follows: "Satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced with interest thereon at the time said labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, shall be deemed presumptive evidence of the intent referred to in the preceding section." The provisions of this section, and those of the section referred to in the preceding note, are the provisions, respectively, of the first and second sections of the act of 1903 (Acts 1903, p. 90). The third and only other section of that act provides for a repeal of conflicting laws. The title of the act is as follows: "An act to make it illegal for any person to procure money, or other thing of value, on a contract to perform services, with intent to defraud, and to

fix the punishment therefor, and for other purposes." *Held*:

(a) The main legislative intent and purpose being to make the acts referred to in the first section a crime and to provide for its punishment, the second section, simply providing that proof of specified acts "shall be deemed presumptive evidence of the intent referred to," is not essential to the carrying out of such legislative intent and purpose. This rule of evidence, if eliminated from the act, would not affect the main legislative scheme and purpose; and, if the second section of the act is unconstitutional, the whole act would not be void, and the provisions of the first section would be constitutional and valid.

(b) Where one pleads guilty to accusations in a city court charging him with violating the first section of the act (embodied in Pen. Code 1910, § 715, above quoted), he cannot subsequently be released from custody even if the provisions of the second section of the act (embodied in Penal Code of 1910, § 716) are unconstitutional; the rule of evidence prescribed in the latter section not having been used against him.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 53-66; Dec. Dig. § 64; Constitutional Law, Dec. Dig. § 43.*]

Error from Superior Court, Dooly County; U. V. Whipple, Judge.

Habeas corpus by Mrs. Lawrence Latson to obtain discharge of her husband from the chain gang. Judgment remanding the prisoner, and relator brings error. Affirmed.

R. N. Holtzclaw, for plaintiff in error. W. F. George, for defendant in error.

HOLDEN, J. Lawrence Latson was arraigned in the city court of Vienna on two accusations, each of which charged a violation of Pen. Code 1910, § 715. He pleaded guilty and was sentenced to pay a fine or serve 12 months on the chain gang in each case. While he was in the custody of the defendant in error as warden or superintendent of the chain gang of Dooly county, his wife applied for a writ of habeas corpus. Upon the trial of the case the statements in the application for the writ and the defendant's answer thereto were admitted to be true. To the judgment of the court remanding Lawrence Latson to the custody of the defendant in error and refusing to order his release the plaintiff in error excepted.

[1] 1. Pen. Code 1910, § 715, under which the accusations against Latson were drawn and which he was charged with violating, is as follows: "If any person shall contract with another to perform for him services of any kind, with intent to procure money or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer, or, after having so contracted, shall procure from the hirer money, or other thing of value, with intent not to perform such service, to the loss and damage of the hirer, he shall be deemed a common cheat and swindler, and upon conviction shall be punished as for a misdemeanor." The plaintiff in error contends that the provi-

sions of this section are unconstitutional because of being in violation of the thirteenth amendment to the Constitution of the United States, providing: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The act under review does not seek to punish one for the mere breach of a contract, or the mere failure to pay a debt. The provisions of the act are aimed at the fraudulent practices therein referred to. It is the intent to defraud and the actual defrauding of another by virtue of such intent being carried out that the act makes a crime. The section above quoted is not susceptible of the construction that it seeks to punish one because of a failure to perform a contractual obligation, or to pay a debt, but the gist of the crime referred to in the act is the fraudulent intent with which one obtains "money or other thing of value" from another, who is defrauded by the former by reason of the carrying out of such intent. We fail to see any constitutional objection to a statute making it a crime for one willfully and knowingly to defraud another. If one knowingly and willfully defrauds another "of money or other thing of value," as set forth in the statute above quoted, it is no less a wrong than if he defrauds him in some other way. We have several statutes making fraudulent practices whereby one defrauds another a crime. See Pen. Code 1910, § 703 et seq. The legislative department of the government is not without authority to make an act of fraud, whereby another sustains loss because of the commission of the fraud, a crime. The mere fact that the party committing the fraud after its commission is left under an obligation to the party defrauded to pay him a debt, or to perform a contract made with him, which were involved in the transaction in which the fraud was committed, does not make the act denouncing the fraud unconstitutional on the ground that it seeks to punish one for failure to pay a debt, or to perform a contract. *Banks v. State*, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. (N. S.) 1007; *Townsend v. State*, 124 Ga. 69, 52 S. E. 293; *Lamar v. State*, 120 Ga. 312, 47 S. E. 958; *Lamar v. Prosser*, 121 Ga. 153, 48 S. E. 977; *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022. In the case of *Bailey v. State*, 158 Ala. 18, 24, 48 South. 498, 499, the court in a decision involving an act similar to the one above referred to said: "In *Ex parte Riley*, 94 Ala. 82, 83, 10 South. 528, 529, it was said: 'As the intent is the design, purpose, resolve, or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inferences from the facts and circumstances developed by the proof. In the absence, however, of evidence from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which such inferences may be drawn, the jury are not justified in indulging in mere unsupported conjectures, speculations, or suspicions as to the intentions which were not disclosed by any visible or tangible act, expression, or circumstance.' It is no doubt true that the difficulty in proving the intent made patent by that decision, suggested the amendment of 1903 (Gen. Acts 1903, p. 345) to the statute, which provides that the refusal or failure of a person who enters into such contract to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure or defraud his employer."

Counsel for the plaintiff in error rely on the decision of the Supreme Court of the United States in the case of *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. —. In that case the court had under consideration the Alabama statute referred to in the case from which we have just quoted, and which, as stated, is similar to the Georgia statute, and summarized it as follows on page 227 of 219 U. S., on page 146 of 31 Sup. Ct. (55 L. Ed. —): "The section of the Code as it stood before the amendments provided that any person who with intent to injure or defraud his employer entered into a written contract for service and thereby obtained from his employer money or other personal property, and with like intent and without just cause, and without refunding the money or paying for the property refused to perform the service, should be punished as if he had stolen it." This section of the Alabama Code (section 4730, Code 1896) was amended by the Legislature of that state in 1903 and 1907, by which amendments there was added thereto a provision that "the refusal or failure of any person, who enters into such contract, to perform such act or service or to cultivate such land, or refund such money, or pay for such property without just cause shall be prima facie evidence of the intent to injure his employer or landlord or defraud him." Our interpretation of the decision of the Supreme Court of the United States is that it only decides that the above quoted provisions of the Alabama law, contained in the amendments of 1903 and 1907 (Acts 1907, p. 636) to section 4730 of the Code of Alabama of 1896, are unconstitutional. In the concluding portion of the opinion on page 245 of 219 U. S., on page 153 of 31 Sup. Ct. (55 L. Ed. —), Mr. Justice Hughes states: "The act of Congress deprives of effect all legislative measures of any state through which directly or indirectly the prohibited thing, to wit, compulsory service to secure the payment of a debt, may be established or maintained; and we conclude that section 4730, as amended, of the Code of Alabama, in so far as it makes the refusal or failure to perform the

act or service, without refunding the money or paying for the property received, prima facie evidence of the commission of the crime which the section defines, is in conflict with the thirteenth amendment and the legislation authorized by that amendment, and is therefore invalid." We do not understand that the Supreme Court of the United States decided, or intended to decide, that the provisions in section 4730 of the Code of Alabama of 1896, as this section stood before the amendments thereto of 1903 and 1907, which provisions are similar to those in Penal Code 1910, § 715, of this state, were unconstitutional. We have been requested to review and overrule the decisions in the cases of *Lamar v. State*, *Banks v. State*, and *Lamar v. Prosser*, supra. Under the view we take of the case, as expounded in the subsequent division of the opinion, the question as to whether or not these decisions should be overruled in so far as they hold the provisions of Pen. Code 1910, § 716, are constitutional, is not one for decision under the record before us. In so far as these decisions hold the provisions of Pen. Code 1910, § 715, constitutional, we decline to overrule them.

[2] 2. It is contended that Pen. Code 1910, § 716, which immediately follows the section set out in the first division of the opinion, violates the provision of the Constitution above quoted, and that the two sections, when construed together, make section 715 also unconstitutional. Section 716 is as follows: "Satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced with interest thereon at the time said labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, shall be deemed presumptive evidence of the intent referred to in the preceding section." These two sections of the Code are sections 1 and 2 of the act of 1903 (Acts 1903, p. 90). The third and only other section of the act merely provides for a repeal of all conflicting laws. We deem it unnecessary to decide the question as to whether or not the second section of the act—embodied in section 716 of the Penal Code of 1910—is unconstitutional. The main purpose of this enactment was to make certain acts enumerated in the first section—embodied in section 715 of the Penal Code of 1910—constitute a crime, the chief ingredient of which was the intent referred to in that section. This section alone provides what shall constitute a crime and fixes the punishment therefor. The title to the act is as follows: "An act to make it illegal for any person to procure money, or other thing of value, on a contract to perform services with intent to defraud, and to fix the punishment therefor, and for other purposes."

(136 Ga. 619)

It will be seen that nothing is said in the title with reference to what is contained in the second section of the act. The main legislative intent and purpose being to make the act referred to in the first section a crime and to provide for its punishment, the second section, simply providing that proof of specified acts "shall be deemed presumptive evidence of the intent referred to," is not essential to the carrying out of such legislative intent and purpose. This rule of evidence, if eliminated from the act, would not affect the main legislative scheme and purpose; and, if the second section of the act is unconstitutional, the whole act would not be void, and the provisions of the first section would be constitutional and valid. *Deadwyler v. Karow*, 131 Ga. 227, 62 S. E. 172, 19 L. R. A. (N. S.) 197. Hence we deem it unnecessary to decide whether or not the second section of the act is unconstitutional. Courts will not decide upon the constitutionality of an act at the instance of a party, unless it is put in operation against him. In this case the rule of evidence embodied in the second section of the act was not used against Latson, for the reason that he pleaded guilty to the accusations against him charging him with the violation of the provisions of the first section of the act. If he had been put on trial before a jury, and the rule of evidence referred to in the second section of the act had been given in charge to the jury as the law, or if he had been tried before the judge without a jury, the right would have existed to have brought into question in a proper way the constitutionality of the second section of the act. But he pleaded guilty to violating the first section of the act, and if the second section of the act, relating to a rule of evidence made applicable to the trial of one charged with the offense denominated by the first section, was unconstitutional, he cannot be released from custody because of the unconstitutionality of the provision relating to this rule of evidence. He cannot properly contend that he pleaded guilty because, if he had gone to trial, an unconstitutional act relating to a rule of evidence would have been used against him, for the reason that, if the enactment relating to such rule of evidence is unconstitutional, it is presumed the court trying him would have so declared and would not have allowed it to be used against him on his trial. We make no decision on the question as to whether or not the second section of the act is constitutional. The court committed no error in refusing to release Latson from the custody of the defendant in error.

Judgment affirmed.

BECK, J., absent. The other Justices concur.

STATE v. WESTERN & A. R. CO.

(Supreme Court of Georgia. Aug. 15, 1911.)

(Syllabus by the Court.)

1. TAXATION (§ 148*)—RAILROADS—INCOME TAX.

The income tax referred to in section 11 of the act to lease the Western & Atlantic Railroad (Acts 1889, p. 362), viz., "That said lessee or lessees shall be required to pay all taxes and assessments upon the property of this state in the state of Tennessee, and in Georgia upon all property owned or controlled by them, not received from the state, and such further taxes upon their income as is now paid by the Central Railroad & Banking Company," is a tax levied in the exercise of sovereignty, and not a contractual obligation springing primarily from the contract of lease executed pursuant to the act.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 148.*]

2. ACTION (§ 35*)—STATUTORY REMEDIES—COLLECTION OF TAXES.

When the statute undertakes to provide adequate remedies, and those given do not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie.

(a) The statute provides adequate remedies for the collection of taxes imposed upon railroad companies.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 273-294; Dec. Dig. § 35.*]

3. TAXATION (§ 586*)—ENFORCEMENT—CONDITIONS PRECEDENT—ASSESSMENT.

An assessment made in the manner prescribed by the statute is indispensable in proceedings to enforce the collection of taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1192-1195; Dec. Dig. § 586.*]

4. RAILROADS (§ 134*)—ACTIONS—INDEFINITE ALLEGATIONS—BREACH OF LEASE.

As the petition assigned no specific breach of the lease contract, it is not maintainable as an action for the recovery of damages for breach of contract.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 134.*]

5. DISCOVERY (§ 20*)—IN EQUITY—FAILURE OF MAIN PURPOSE OF BILL—RETENTION FOR DISCOVERY.

Where discovery is merely incidental to the relief prayed, the petition will not be retained for decree, where it discloses that the plaintiff is not entitled to the relief in aid of which discovery is prayed.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 27; Dec. Dig. § 20.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the State of Georgia against the Western & Atlantic Railroad Company. The petition was dismissed on general demurrer, and the State brings error. Affirmed.

The state of Georgia owns a railroad known as the Western & Atlantic Railroad, extending from Atlanta, Ga., to Chattanooga, Tenn. In November, 1889 (Acts 1889, p. 362), an act was passed by the General Assembly providing for its lease. It was stipulated that the Governor should advertise for bids, and no bids for less than a stated minimum

would be received. Among other features it was provided, in section 7, that all improvements and betterments were to be made at the expense of the lessee, and that all attachments to the realty should be considered permanent, and the road be kept in the condition of first-class roads in Georgia. The Governor was empowered to appoint a board of examiners to ascertain and report the condition of the road. It was made the duty of the lessee to file with the Governor an annual report of the condition of the road, which report was to set forth the improvements to the physical property, rolling stock purchased, income from passengers and freight, operating expenses, amount of freight transported and rates charged for the same, and all other facts necessary to furnishing complete information of the condition and operation of the railroad for each year. Section 9 provides for the observance by the lessee of the rules of the railroad commission, and further provides that "said lessee company shall have the exemptions, privileges, immunities, rights and guaranties, and shall be subject to the same laws, liabilities, disabilities, and public burdens on other railroad companies in this state, and no more, in all cases where this act is silent and has made no provisions on the subject." Section 10 is to the effect that the lessees forfeit six months' rental, as damages, if in default for the payment of the monthly rental for 20 days, and that, if the lessee fails to comply with the lease contract, the Governor, at his option, may declare the lease forfeited and take immediate possession. Section 11 is as follows: "That said lessee or lessees shall be required to pay all taxes and assessments upon the property of this state in the state of Tennessee, and in Georgia upon all property owned or controlled by them, not received from the state, and such further taxes upon their income as is now paid by the Central Railroad & Banking Company, and shall not sublet said road, or any part thereof, to any other company, corporation or party: Provided, the lessee may sublet any property not needed for railroad purposes: Provided, that, in the opinion of the Attorney General, that can be done without invalidating the state's title thereto; and all improvements put on said property by the lessees or their tenants shall belong to the state at the expiration of said lease." It was further provided that the lessee shall become a body corporate under the name of the Western & Atlantic Railroad Company during the continuance of the lease, and that, if the lessee be a corporation, it shall operate the road as the "Western & Atlantic Railroad Company."

On July 16, 1890, a contract of lease was entered into between the state and the Nashville, Chattanooga & St. Louis Railway Company, in pursuance of the leasing act, wherein the lessee agreed to pay a monthly rental of \$35,001 for the leased property for the

term of 29 years from December 29, 1890. In June, 1909, the state of Georgia, by its Attorney General and special counsel appointed by the Governor, filed its petition against the lessee, wherein it was alleged that at the time of the lease the equipment of the road was inadequate, which was known to both parties to the contract, and it was in the contemplation of both parties that the lessee would be obliged, for its own interest, to improve the roadbed and structures and add to the movable equipment. By its contract charter the lessee undertook and agreed to make to the state each year a full statement of all property owned or controlled by it not received from the state, and to pay to the state thereon a tax equal in rate to the ad valorem taxes paid by other persons and corporations. From the beginning of the lease the lessee has owned or controlled property and has used and employed the same in the operation of the road; but, in violation of its contract, it has never disclosed to the state either the fact of the existence of such property or the value thereof, and has not paid any sum on this account, except that it has for some four or five years past made partial payments on certain real estate and tracks and other fixtures, which it claims it owned in Georgia and not upon the right of way of said railroad, though the location and identity of said property is not known to the state. When these facts were discovered by the Governor he requested information in reference thereto; but, notwithstanding the express covenant to furnish all information necessary for a full understanding of the condition and operations of the road, the lessee has failed and refused to furnish such information. Neither the state nor its officers know the value or character and amount of said property, but it charges that it amounts to \$1,500,000, or other large sum, and has at all times during the lease been that much. The lessee knows and has full records touching these matters; and the state has no means of ascertaining the same, except by resort to the equitable powers of the court and a discovery from defendant. Some of the property is used in the conduct of local business, and other property is used in operating through trains over its entire system, treating the Western & Atlantic Railroad as an integral part thereof.

The petition then proceeds to set forth what is claimed to be an equitable basis for ascertaining the amount of property subject to an ad valorem tax. The state tax rate for each of the years 1891 to 1908 was alleged, and that certain amounts for each of said years were due as taxes from the defendant to the state because of property used in local traffic, and certain other amounts because of property used in through traffic. It was further alleged that by its charter contract the lessee expressly agreed to make to the state each year a full statement of all its operations and expenditures, and to pay

to the state, in addition to its ad valorem taxes, such further tax upon its income as is paid by the Central Railroad & Banking Company, to wit, one-half of 1 per cent. upon its annual net income. The lessee has never complied with this covenant. It has made certain annual statements purporting to so comply, but the same have not been properly made. The petition then proceeds to state what is claimed to be the true rule of calculation for ascertaining the net income, and wherein the lessee had departed therefrom. It was further alleged that the lessee, in violation of the contract, has made subleases and to parties unknown to the state, and collected from them large sums of money. Some of these subleases were in violation of the contract and some not, but the state has no knowledge and no means of knowledge as to which were and which were not, and how much the lessee derived from them, respectively, and how much was accounted for in the lessee's annual statements. There are many other matters in which the state believes the lessee's accounts have not been kept and rendered according to the contract, but the facts are not so known as to enable the state to allege the same, though they would be so known if the lessee had furnished the reports required by the contract, and many other particulars wherein the lessee has violated the lease contract. As to the things complained of the facts are peculiarly within the knowledge of the defendant; and, though bound by express contract to furnish said knowledge, defendant has failed and refused to do so, notwithstanding repeated requests for said information and repeated promises to furnish the same. The state has no adequate information nor means of procuring the same, except by resort to the knowledge and conscience of defendant and to records kept by it under its other name and in another state.

An interlocutory decree was prayed, requiring the defendant to make a full statement and accounting from the beginning of the lease, in compliance with its contract as set forth in section 7 of the lease act, and all other things necessary to give full information touching the condition and operation of the property, and that the same be decreed to be made as a specific compliance with its contract, and that the state be not bound thereby as by an answer in an equitable suit for discovery. But if the state has mistaken its rights and remedies, and is not entitled to such interlocutory decree, and if the court has no adequate power so to order, then the state will and does ask for such other decree as will accomplish the object of furnishing said information; and if no such order can be granted, and the court should so hold, the state will and does ask leave to search the conscience of defendant and its officers and for complete discovery. The petition thereupon propounded 29 interrogatories, covering in great detail all the

various matters touched upon in the petition, for all the years from the beginning of the lease. The petition prayed for judgment for ad valorem taxes for \$100,000 and interest, for judgment on account of "so-called income tax" of \$100,000, also "that the court will further inquire, upon equitable principles, into all and singular the breaches of said contract of lease, and if any there shall appear to have been made as hereinbefore alleged, or as may be set up hereafter by amendment or by supplemental action, in the light of the information sought by the defendant by the interrogatories propounded, and shall give judgment thereon in favor of the plaintiff according to whatever may be the true measure of damage that may appear legal and equitable, when the facts sought from the defendant by the aforesaid interrogatories shall have been elicited," and for general relief.

The lessee demurred generally and specially, and the court dismissed the petition on general demurrer.

Jno. C. Hart, Atty. Gen., and Alexander & Candler, for the State. Claude Warren and Tye, Peeples & Jordan, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1] The predicate of this action is the eleventh section of the leasing act of 1889, which provides "that said lessee or lessees shall be required to pay all taxes and assessments upon the property of this state in the state of Tennessee, and in Georgia upon all property owned or controlled by them, not received from the state, and such further taxes upon their income as is now paid by the Central Railroad & Banking Company." The ultimate result sought to be obtained is the collection of taxes alleged to be due to the state under this section. In view of the demurrer challenging the right of the state to collect taxes by civil action, it becomes necessary to determine whether the taxes referred to in this section is a tax in the strict sense of the word, or simply a contractual obligation. In approaching a solution of this question, it should be kept constantly in mind that the lessee's rights and obligations are not primarily founded in the contract of lease, but in the act of the Legislature authorizing it. That act defined the terms upon which the state road was to be leased, and the contract was executed agreeably to it. The state declared in the legislative enactment its policy with regard to the public burdens to be imposed on the lessee, and the contract of lease executed pursuant to the act was a guaranty that no greater public burdens would be exacted. *W. & A. R. R. Co. v. State*, 54 Ga. 429. It becomes then a question of legislative intention as to the nature of the taxes mentioned in section 11. In this section the Legislature was dealing with public burdens. It had already been

provided, in another section of the act, that the lessee was to pay a monthly rental, the minimum of which was fixed. It was therefore important for the state, in order to receive the greatest possible benefit from competitive bidding, to declare what public burdens would be exacted of the lessee. If the state clearly defined these burdens, and limited itself to exact no more, this element of certainty respecting the burdens of sovereignty which the lessee was to bear tended to increase the rental value. In proportion as the burdens were more onerous, it is reasonable to infer that the rental price would be depressed. The matter of rent and the matter of taxes were treated in the act as standing on distinct and different footings. They were dealt with in separate sections. The money which the state receives as monthly rental is the state's income derived from the ownership of the leased property; the money which the state receives in the public coffers in the exercise of sovereignty is the taxpayer's tribute to that sovereignty. The requirement to pay the ad valorem tax on property not received from the state, but used in the operation of the road, referred to a tax in its strict sense. Is there any difference in the quality of the income tax required of the lessee in the same sentence of the section?

One of the arguments advanced to support the theory that the requirement of a per centum of the lessee's annual income is not the exaction of a tax is that it was beyond the constitutional power of the Legislature to levy an income tax. The Constitution of this state provides that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Civil Code 1910, § 8553. It is our opinion that this provision has no reference to the levying of a tax upon public property. The ordinary meaning of taxation is a charge levied by the sovereign power upon the property of its citizen. It is not a charge upon its own property. *People v. McCreery*, 34 Cal. 432, 456. The general rule is that public property is not subject to taxation. "This immunity rests upon the most fundamental principles of government, being necessary that the functions of government be not unduly impeded, and that the government be not forced into the inconsistency of taxing itself in order to raise money to pay over to itself." *Penick v. Foster*, 129 Ga. 217, 58 S. E. 773, 12 L. R. A. (N. S.) 1159; *Georgia Fire Ins. Co. v. Cedartown*, 134 Ga. 87, 67 S. E. 410. The quoted provision of the Constitution relates to the collection of taxes from property other than public, and has no application to the impressment of a tax upon the public property of the state. The case presented is not that of a perpetual leaseholder, where the tenant is the virtual owner

of the property, entitled to its use forever and subject to pay taxes thereon as owner, as was the case in *Wells v. Savannah*, 87 Ga. 397, 13 S. E. 442. In making the lease the state reserved the right of forfeiture on broken conditions subsequent, and imposed terms and conditions indicating that no estate was intended to be conveyed to the lessee, but that the lessee was to have only a usufructuary interest during the lease period. The power of the Legislature to impose taxes is inherent, and is only circumscribed by the organic law. When the Legislature authorized the contract which permitted the lessee to have possession of the state's property for a term of years, it was within the constitutional sphere of legislative action either to expressly preserve the status of public property with reference to immunity from taxation or to stipulate that the lessee should pay a specific tax. The latter course was adopted, and a specific tax, to wit, a tax upon the lessee's income (such as was paid by the Central Railroad & Banking Company), was levied.

[2] 2. Having reached the conclusion that the covenant in the lease contract, binding the lessee to pay such taxes upon the lessee's income as was paid by the Central Railroad & Banking Company at the time of the lease, is a covenant between the state and the lessee, fixing and limiting the character and amount of the tax to be exacted by the state as a sovereign, in contradistinction to an obligation in the nature of a debt springing from and supported by the contract, we will next consider the right of the state to enforce collection of it, and also of the ad valorem tax alleged to be in default, in a civil action. There are two lines of authority on this proposition. Some courts hold that taxes are in the nature of a debt due by the citizen to the state, enforceable by an action of assumpsit, and that the common-law right of the state to collect a tax by a civil action is not surrendered by the Legislature in furnishing specific remedies, unless expressly so stated in the statute. On the other hand, the weight of authority is to the point that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie. 1 *Cooley on Taxation*, 17; *Burroughs on Taxation*, 254. It was a rule at common law that, where a statute creates a right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common-law remedies. When this rule is considered in connection with the genius and spirit of our American institutions, its application to the collection of taxes, where adequate statutory remedy is provided, cannot be doubted. A most distinctive feature of the Constitution of the United States and of this state is the division of the powers of government into three separate departments, executive, legislative, and judicial. It was

designed and intended that one department should not usurp the ordinary functions of the others, but that all three should act in harmonious relation. So, when the Legislature authorizes a tax for governmental purposes and provides an adequate remedy for its collection by administrative officers, the necessary intentment is that the collection of the tax is exclusively confided to that administrative department of the government. And it has been held by this court that when the statute undertakes to provide remedies for the collection of taxes, and those given do not embrace an action at law, a common-law action for the recovery of taxes as a debt will not lie. *Du Bignon v. Brunswick*, 106 Ga. 317, 32 S. E. 102; *State v. S. W. R.*, 70 Ga. 33.

However, it is contended that the petition presents equitable features, and that in equity an action may be maintained by the state to collect its revenue. It would be idle to enter into a discussion of possible differentiation between an action in which the equitable powers of the court are invoked and one only seeking purely legal relief. Whatever equitable relief is asked in the petition is predicated upon the erroneous construction of the lease act that the provision for the payment of taxes upon the income of the leased property is a debt arising from the contract executed pursuant to the act, and not a tax. The General Assembly has enacted an elaborate scheme for the assessment of the property of railroad companies and the collection of any tax lawfully levied. Provision is also made for the collection of back taxes from delinquent or defaulting railroad companies, and whatever infirmity may have been in the original statute with reference to assessment without opportunity of the delinquent taxpayer to be heard, as pointed out by the Supreme Court of the United States in *Central of Georgia Railway v. Wright*, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134, has been relieved and cured by the amendment of 1908 (Acts 1908, p. 25). The amendment relates to the remedy, and does not impair any right of the taxpayer. It only supplied a defect in the existing law. The law as amended is applicable to the collection of back taxes without regard to the time of their accrual, if within the statute of limitations. *Du Bignon v. Brunswick*, 106 Ga. 317, 32 S. E. 102.

[3] 3. Another insuperable objection to this effort to collect a tax by civil action in the nature of an action of debt is that there has been no assessment. An assessment is indispensable in proceedings to enforce the collection of taxes. Until an assessment of a per centum tax is made the amount of the tax is not fixed. Tax proceedings are in invitum, and to be valid the statute must be followed, and no tax on property can be

collected until it has been assessed. *Hawkins v. Jonesboro*, 63 Ga. 527. Should the Legislature pass a tax law which inadvertently omits the mention of a return, but requires payment of the tax to be made to a particular officer, it means by necessary implication that the return is to be made to the officer who makes the assessment of the tax. *Smith v. Goldsmith*, 63 Ga. 736. But, as already indicated, the Legislature of this state has provided for an assessment by a particular officer; and the rule is well grounded and followed in this state that, where the statute provides for an assessment by a ministerial officer, the assessment must be made by him, and not by the courts. *Bohler v. Verdery*, 92 Ga. 719, 19 S. E. 36; *Norris v. Coley*, 100 Ga. 553, 28 S. E. 222.

[4] 4. The petition contains a very general allegation suggestive that a recovery of damages for breach of contract is sought. There is, however, no distinct allegation of any breach of the contract. It is alleged that the lessee had "made divers contracts of sublease unknown to the state, and that the lessee has collected from said sublessees from time to time large sums of money. Some of these subleases it is believed and charged were in violation of the contract, and some were not; but the state has no knowledge or means of knowledge as to which of said subleases were in violation of the contract and which were not, and how much it derived from the respective contracts, nor how much thereof was accounted for in the annual statements touching the income tax." It is a fundamental rule of pleading that in order for a plaintiff to recover damages for a breach of contract, the specific breach must be alleged, and the general allegation that the lessee had perhaps breached the contract by making unauthorized subleases is too vague to support the petition as one claiming damages for breach of contract.

[5] 5. As the suit is not maintainable for the collection of taxes, it cannot be retained as one for the discovery of the property claimed to be subject to taxation. Furthermore, as the petition contains no sufficient averments of a breach of contract to support a decree for damages, it cannot be maintained for the discovery of possible breaches. These conclusions result from the well-settled rule that, where discovery is merely incidental to the relief prayed, the suit cannot be maintained when the plaintiff is not entitled to the relief prayed. *Everson v. Equitable Life Insurance Co.* (C. C.) 68 Fed. 258; *Hurricane Telephone Co. v. Mohler*, 51 W. Va. 1, 41 S. E. 421.

Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 723)

UNION & MECHANICS' CLUB v. CITY OF ATLANTA.

(Supreme Court of Georgia. Aug. 19, 1911.)

*(Syllabus by the Court.)***1. INTOXICATING LIQUORS (§ 50*)—CLUBS WHICH MAY KEEP LIQUORS.**

Clubs and associations authorized by the tax act of 1909 (Civil Code 1910, § 933) to keep or permit to be kept in their club rooms intoxicating liquors, are such as are organized for the entertainment and comfort of their members, and not for gain, and which have a fixed place of meeting, a definite organization, with a continuing existence, in contradistinction to an ephemeral gathering for a particular occasion, with no idea of permanency in the fellowship or constituency of its members.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 51; Dec. Dig. § 50.*]

2. INTOXICATING LIQUORS (§ 50*)—TAXATION—NATURE OF TAX.

The tax imposed is not an occupation or business tax, but is laid solely in the exercise of the police power of the state, and is not a license for the sale or for the keeping on hand of intoxicating liquors in any place prohibited by law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 51; Dec. Dig. § 50.*]

3. INTOXICATING LIQUORS (§ 10*)—MUNICIPAL REGULATION.

In the absence of a clear delegation of power by the Legislature to impose and collect a tax on social clubs as a condition precedent to a license permitting them to keep on hand intoxicating liquors, a municipal corporation cannot exact such a tax, the city of Atlanta has no such power in its charter.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]

4. INTOXICATING LIQUORS (§ 11*)—MUNICIPAL REGULATION—POWERS.

Inasmuch as the state, by the enactment of the general prohibition act, has made penal the sale of intoxicating liquors and the keeping on hand of such liquors at any public place or place of business, it is within the power of the city of Atlanta, under its general welfare clause, to establish reasonable rules and regulations designed to regulate social clubs, so as to prevent their conduct in any other manner than as bona fide social clubs and to prevent any violation of the prohibition act.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. § 11.*]

5. INJUNCTION (§ 85*)—INTOXICATING LIQUORS (§ 10*)—ENFORCEMENT OF INVALID ORDINANCE.

The ordinance of the city of Atlanta, imposing a tax as a condition precedent to the issuance of a license to a social club, permitting it to keep on hand intoxicating liquor, is an effort to collect a tax not authorized by its charter, and is therefore void, and its enforcement will be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 156; Dec. Dig. § 85.* Intoxicating Liquors, Dec. Dig. § 10.*]

*(Additional Syllabus by Editorial Staff.)***6. INTOXICATING LIQUORS (§ 143*)—"PLACE OF BUSINESS."**

A "place of business," as used in the prohibition act (Pen. Code 1910, § 426), is a place

where a calling for the purpose of gain or profit is conducted.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 143.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5390-5392.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Union & Mechanics' Club against the City of Atlanta. From an order refusing to continue an injunction pendente lite, plaintiff brings error. Reversed.

On January 19, 1911, the following ordinance was adopted by the mayor and general council of the city of Atlanta:

"Sec. 2. That any firm, person, or corporation desiring to operate, maintain, and to have or open up any club wherein lockers are provided for the use of members, fees charged either for membership or for use of lockers or for other purposes, having a clubhouse, club-room, parlors, or other general places of meeting, shall file a petition with the mayor and general council, asking for license therefor, and such petition shall give the name of the club, the name of the president, secretary or manager in charge thereof, its location, the number of members, and the amount of entrance fees paid or to be paid, dues and charges for lockers or locker service, and such other information as will put the general council in full possession of the facts surrounding such club or proposed club, by which it can decide whether the same is a bona fide social or locker club.

"Sec. 3. That any club already licensed or hereafter licensed shall, when demand is made by any member of the general council or of the police department, at the club-room or place of meeting, exhibit the roll of membership upon which only bona fide members of the club shall be written. Said club, its officers, and employees shall at all times comply with this requirement, and shall keep said roll of membership at the club-room or place of meeting where same can at any time be produced when said demand is made.

"Sec. 4. That any social or locker club licensed as herein provided, charging membership dues and having or operating, in connection with the club, lockers or locker service or serving meals or lunches therein, or having any service such as billiards, cigars, etc., from which revenue is derived, shall pay to the city of Atlanta the sum of three hundred dollars per annum as a license or registration fee, same to be paid as other business licenses are collected.

"Sec. 5. That any person, firm, or corporation, their agents or employees, who shall maintain, operate, or carry on, or take part in the maintenance or operation of any club in violation of the provisions of this ordinance, or without securing the permit or

license therefor as herein provided, or without paying the license therefor as fixed in the preceding section, shall, on conviction in the recorder's court, be punished by a fine not exceeding five hundred dollars, or sentenced to work on the public works for not exceeding thirty days, either or both penalties to be inflicted in the discretion of the recorder.

"Sec. 6. That any club, officer, or employes thereof, who shall refuse to admit any member of the general council or of the department of police therein on demand, who shall refuse to exhibit the roll of membership provided for in this ordinance, or who shall not permit an inspection of such club-room or meeting-place on demand, shall be deemed guilty of an offense, and on conviction in the recorder's court shall be punished as provided in section five of this ordinance.

"Sec. 7. That no license or permit shall be granted to any club or similar organization unless it appears that the same is a bona fide social or locker club, and not instituted or operated, with or without charter, for the purpose of providing a place wherein intoxicating liquors, beers, wines, etc., may be furnished under the form of a club, or in or at which there is now operated or maintained a bona fide social or locker club as herein provided for, and any person or persons, either by themselves or others, who shall undertake, with or without charter, to operate a club or like organization for the purpose of supplying liquors, wines, beers, etc., through the form of a club, without having, maintaining, or operating a bona fide social or locker club, shall be deemed guilty of an offense and on conviction in the recorder's court shall be punished as provided in section five of this ordinance.

"Sec. 8. That no license or permit shall be issued to any club, either with or without charter, unless it appears that same is operated, maintained, or proposed to be operated as a bona fide social or locker club, having a bona fide membership, club-house, room, or place of meeting maintained as a social club at which meals, lunches, etc., are served, lockers are maintained for the bona fide use of members only, charges made therefor, and not as a cloak or subterfuge for the sale of intoxicants, having a membership whose dues or entrance fees are sufficient to provide for the maintenance of such organization and the expenses thereof, and operated and maintained in an orderly manner, [and] comply with all the laws of the state and the ordinances of the city."

On February 23, 1911, a license was issued by the city under the terms of this ordinance, upon the payment of the tax therein provided, to the Union & Mechanics' Club, a corporation organized as a fraternal and social club. After getting the license the club equipped a club room and provided

it with facilities as a locker club. The city, through its committee on police, made an investigation of the books and system of running the club, and recommended the revocation of the club's license. This recommendation of the committee on police was adopted, and the license to operate the club was revoked, and the Union & Mechanics' Club was notified to cease business, or they would be prosecuted if they proceeded to operate the club after the revocation of their license. Whereupon the club filed its petition, alleging that the ordinance was void as being unreasonable and without authority of the mayor and general council of the city of Atlanta to adopt, and praying that the city be restrained from interfering with the club, its officers and employes, in conducting and maintaining the club. On the rule to show cause the city presented its demurrer and answer, and after hearing evidence the court revoked the restraining order and refused an injunction. The plaintiff excepted.

Green, Tilson & McKinney and Moore & Branch, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

EVANS, P. J. (after stating the facts as above). [1] The general prohibition act not only makes it a misdemeanor to sell and barter, either directly or indirectly, intoxicating liquors, but also makes it a misdemeanor for a person to keep such liquors at any public place or at his place of business. Penal Code 1910, § 426. The tax act of 1909 imposed a specific tax of \$500 "upon every social or fraternal club, corporation, association, or organization of any kind of persons who shall keep or permit to be kept in any room or place (or any place connected therewith directly or indirectly) in which the members of such club, corporation, organization, or association assemble or frequent, any intoxicating liquors, or spirituous or malt liquors of any kind: Provided, that nothing in this section shall be construed to license or permit the keeping of any intoxicating, spirituous, or malt liquors in any place now prohibited by law, or which may hereafter be so prohibited." Civil Code 1910, § 933. In the tax act the Legislature was dealing with social or fraternal clubs, associations organized not for the purpose of trade and profit or for carrying on a business. The proviso in the act distinctly disclaims any permission to depart from the general policy of the prohibition act. Under the doctrine of *noscitur a sociis*, all organizations or clubs which permit lockers for the storing of intoxicating liquors must be of a social or fraternal character. The legislative conception of a fraternal club is one organized for the entertainment and comfort of its members—a definite organization with a continuing existence, in contradistinction to an ephemeral gathering for a particular occasion, with no

idea of permanency in the fellowship and association of its constituency. The club contemplated is a voluntary association of individuals organized for fraternal and social purposes, and not for gain, and provided with a place of rendezvous for its members.

[2] The proviso of the tax act is in effect a legislative construction of the prohibition act that the habitat of a social or fraternal club is not to be regarded as a public place or a place of business, since it is declared in the act that the placing of a tax on clubs of this kind shall not be construed to license or permit the keeping of intoxicating liquors in any place prohibited by law. It was within the sphere of legislative action to define the meaning of a public place and place of business, and to classify the place or location of a social or fraternal club, where the members are accustomed to frequent, as not being comprehended within the terms "public place" or "place of business," and the Legislature exercised its powers of classification by putting a tax on social clubs. *Miller v. Shropshire*, 124 Ga. 829, 53 S. E. 335. A place of business, as used in the prohibition act, is a place where a calling for the purpose of gain or profit is conducted. Not only was it made penal to give away liquors to induce trade at any place of business, but the general prohibition act also made it a criminal offense to "manufacture or keep on hand at their place of business" any such liquor. Therefore the specific tax laid by the state upon social and fraternal clubs was imposed, not as a tax upon any business or occupation, but in the exercise of its police power in regulating the storage and use of intoxicating liquors. The exaction of a tax on locker clubs is not a permission to such clubs to do a blind tiger business or to evade the liquor laws prohibiting the sale of intoxicating liquor. Sales of intoxicating or malt or other drinks, which if drunk to excess will produce intoxication, cannot be legally made at such clubs, since such sales are denounced as criminal by the general prohibition act. The authority to store intoxicating liquor in the club room for the use of club members does not embrace permission to sell it or to use it in any way prohibited by law.

[3] The charter of the city of Atlanta contains a general welfare clause of very ample powers. Under the welfare clause the city may establish suitable ordinances for administering the government of the city, the maintenance of peace and order, the preservation of the health of its inhabitants, and for the performance of the general duties required of it in its charter. Where the state has established its policy to regulate under the police powers particular conditions, it is within the power of a municipal corporation, under its general welfare clause, to establish any reasonable ordinance designed to enforce this general policy. The state law prohibits a dealer from pursuing his ordinary calling upon the Sabbath day, and it

was held that it was competent for the city of Atlanta by ordinance to compel all dealers to keep the door of their houses of business shut on the Sabbath day; the design of the ordinance tending to prevent the violation of the state laws, as well as preserving the public respect for the Lord's day. *Karwisch v. Atlanta*, 44 Ga. 204. Where the sale of liquor was forbidden in a county in which a municipality was situated, it was held to be within the police power, under the general welfare clause, to inhibit the keeping of intoxicating liquors for illegal sale, and the keeping of places to conduct such sale. *Bagwell v. Town of Lawrenceville*, 94 Ga. 654, 21 S. E. 903; *Reese v. City of Newnan*, 120 Ga. 198, 47 S. E. 560; *Tucker v. City of Moultrie*, 122 Ga. 160, 50 S. E. 61. While the city may, under its general welfare clause, establish ordinances intended to aid in the regulation of those matters included in the police power as manifested by the general policy of the state in the trend of its legislation, yet a city cannot, solely in the exercise of its police power, impose a tax for revenue, and a license when imposed for revenue is not a police regulation and cannot be upheld under the power of taxation. The city has no power to impose a tax upon a locker club as a business or avocation tax, because a social club authorized to keep intoxicating liquor on storage is not conducting a business within the purview of the general taxing act. The Legislature may confer upon a municipality the power to collect a license tax; but, in the absence of such express authority, the city cannot by ordinance require of a social or fraternal club the payment of a license tax as a permit or condition precedent to the exercise of the privileges of a social club. *Walker v. McNelly*, 121 Ga. 114, 48 S. E. 718.

[4, 5] While the ordinance requiring a license or permit of a social club contains some regulatory features, these are so inseparably connected with the provision for obtaining a license that they become incidental to the main purpose of the ordinance, which is to require a license tax as a condition precedent to the opening and maintaining a social club. As we have pointed out, the city of Atlanta has no express charter power to require a license tax of a social club as a condition precedent to its keeping on hand intoxicating liquors, and such power is not to be implied under the general welfare clause. Treating the ordinance as one requiring a license tax from a social club as a permit or prerequisite to its keeping on hand intoxicating liquors, it is ultra vires and void. It is not to be understood, however, that the city is without authority to adopt a reasonable ordinance regulative of social clubs under the police power contained in its general welfare clause. The policy of the state, as disclosed in the general prohibition act, is to prevent the sale of intoxicating liquor and the keeping of intoxicating liquor at a public place or

at a place of business; and in aid of that policy the city may establish reasonable rules and regulations tending to enforce that general policy by regulating such clubs so as to prevent all but bona fide social clubs (such as are properly licensed by the state) from keeping or permitting to be kept any intoxicating liquors in their club rooms. But as the ordinance in question imposes a privilege tax which the city has no right to exact, and makes the payment of the tax a condition precedent to the issuance of a license, the city should be enjoined from forcing the closing of the club room under penalty of a prosecution under the void ordinance.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 698)

WRIGHT v. STATE

(Supreme Court of Georgia. Aug. 18, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1151*)—APPEAL—DISCRETION OF COURT—CONTINUANCE.

The only grounds of the motion for a new trial were that the court erred in refusing the motion of the plaintiff in error for a continuance and the general grounds that the verdict was contrary to law and evidence and without evidence to support it. The motion for a continuance was one addressed to the discretion of the court. It appearing that the court did not abuse his discretion in refusing the motion for a continuance, and the evidence being sufficient to support the verdict, the judgment overruling the motion for a new trial is affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.*]

Error from Superior Court, Butts County; Robt. T. Daniel, Judge.

Frank Wright was convicted of crime, and brings error. Affirmed.

C. L. Redman, for plaintiff in error. J. W. Wise, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

HOLDEN, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 677)

ETHRIDGE v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Aug. 17, 1911.)

(Syllabus by the Court.)

CARRIERS (§ 43*)—DUTY TO ACCEPT SHIPMENT.

By a long and continuous custom of receiving and transporting cordwood left at a point along the main line of its track, not at a regular station, or side or spur track, a common carrier may obligate itself to continue the custom until it has given reasonable notice that it will be discontinued.

(a) Where such custom has been discontinued

without reasonable notice given of an intention to do so, the carrier is liable for special damage incurred by a shipper in cutting and cording wood for shipment in reliance upon such custom, upon a refusal by the carrier to transport such wood.

(b) In order to recover such damage, it is not obligatory on the shipper to actually deliver the wood thus prepared for transportation at the point on the track where the carrier had been accustomed to receive it, when he has offered to do so, and been notified by the carrier that it will not receive for shipment the wood when so delivered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 112-119; Dec. Dig. § 43.*]

Error from Superior Court, Jones County; H. G. Lewis, Judge.

Action by D. V. Ethridge against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Johnson & Johnson, for plaintiff in error. Ellis & Jordan, for defendant in error.

HOLDEN, J. The plaintiff in error sued the defendant in error for damages, making the following allegations: "The Central of Georgia Railway Company is a corporation under the laws of Georgia, a common carrier of freights, doing business in said county previous to and during the years 1906 and 1907 and up to now, and having an office and resident agent therein. That up to the — day of March, 1907, the defendant company had for many years previous established a continuous custom of receiving for shipment and of shipping cordwood, placed on its right of way in said county, to such points as the shippers desired, the privilege of so placing said wood being extended by said defendant company to all persons, as well as to petitioner, who had prior to said time, to wit, March, 1907, shipped many cars of such wood by such defendant company's railway, which wood had by him been placed on the right of way in said county at points convenient to where the wood was cut, to wit, near the 175th and 177th mileposts on said road. Petitioner, relying on such continuous custom and on its course of past dealings with said company, cut and corded during the months of August, September, and October, 1906, in said county, immediately adjacent to the right of way of such railway," a specified number of cords of wood near the mileposts above mentioned, "with the purpose and intent of hauling the same to the right of way of said company and shipping the same over said railroad to the city of Macon, a station on said railway." That the value of said pine wood on the — day of March, 1907, was and is now \$326, and of the said oak wood \$120, making a total of \$446. That after said wood had been cut, and while plaintiff was engaged in hauling and piling it on the said defendant company's right of way near the 175th milepost in said county,

he was ordered by said defendant company's agent then and there in said Jones county to stop hauling and piling wood on the said right of way, denying to petitioner the right to place said wood, saying that the defendant company would transport no more cordwood except the same be placed at its regular stations or spur tracks, and that said defendant company would not receive it for transportation nor would it transport cordwood from other places than regular stations or spur tracks. Petitioner further shows that said wood so cut is so situated that to deliver it to the said railroad at a station or spur track will cost more than it is worth, and that there is no possible way to get it to market without greater cost than its value, except that it be transported by such railroad, though it could be delivered to the said defendant company at the aforesaid point on its right of way for 25 cents per cord, which facts were well known to the said defendant company, and that, by reason of the said defendant company refusing to so allow petitioner to place the wood on its right of way to be by it so transported, the same has proven to the petitioner a total loss, to wit, in the sum of \$448, which the said defendant company should be required to pay to your petitioner; and he prays that he may have a judgment against said defendant for said sum." The plaintiff amended the petition as follows: "Now comes the plaintiff in the above-stated case, and by leave of the court first had and obtained amends his declaration by adding after the word 'transported' in the tenth line of paragraph 5 of said declaration, the words, 'and in not giving to petitioner reasonable notice that the custom of allowing wood to be placed upon their right of way for transportation, not at a spur track, side track, or station would be discontinued.'" To the order of the court sustaining the defendant's general demurrer and dismissing the petition the plaintiff excepted.

There can be no question that a railroad company as a common carrier has no right to refuse to receive for transportation at a station where it is accustomed to receive for shipment goods of a certain class goods belonging to that class when properly tendered for shipment at the warehouse or other place at such station established by custom for receiving for shipment such goods. Railroad companies as common carriers have the right to establish reasonable rules and regulations as to the time when and the places at which they will receive goods for transportation. It would hardly be expected that they would establish a custom of receiving for shipment large quantities of cordwood at a station in warehouses wherein they receive and discharge their ordinary shipments. Cordwood being bulky and shipped for the most part in car load lots, and frequently in train lots, and being liable to deteriorate but little, if any, in value by exposure to the weather for a short time, it would hardly be expected

that common carriers receiving such property for shipment would by contract, or by an established custom, receive it at their regular stations in warehouses used for receiving and discharging other shipments. They would naturally be expected to receive and load, or have loaded, for transportation shipments of this character at points along their side or spur tracks or the main line. In 4 Elliott on Railroads, § 1411, it is said: "Goods are usually delivered to railroad companies at established stations, and they may refuse to receive them at unusual places. But the delivery may be sufficient although made at an unusual place to an authorized agent, or, under some circumstances, even if made at a place not an established station but where the company has habitually received freight." Also see section 413 of same volume. In 5 Am. & Eng. Enc. Law, 184, the following text is employed: "Custom of Carrier to Receive Goods at Place Other Than Depot.—But such a deposit may amount to a delivery when there is proof of a constant and habitual practice and usage on the part of the carrier to receive goods for transportation when they are deposited for it in a particular place. Proof of such a practice is sufficient to show a public offer by the carrier to receive in that way, and to constitute an agreement between it and the shippers by which goods, when so deposited, shall be considered as having been delivered to it without other formality." Also see 1 Hutchinson on Carriers, §§ 115, 118, 122; Moore on Carriers, 98, 136; Schouler's Bailments & Carriers, § 386; Van Zile on Bailments & Carriers, §§ 431, 432; Montgomery, etc., Ry. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54. In Van Zile on Bailments & Carriers, § 440, the author thus comments: "Has freight by the long uninterrupted usage of the carrier with the particular shipper or with the public been received and shipped when left at the particular place by the roadside, or on the platform or dock, or when delivered to the captain or mate? If these questions can be affirmatively answered according to the proofs, then, as we have seen, the delivery is sufficient." Where a railroad company has by a long and continuous custom received for the public cordwood for shipment at a point on the main line not at any station or spur or side track, it should give reasonable notice of a discontinuance of the custom. Durden v. So. Ry. Co., 2 Ga. App. 66, 58 S. E. 299; 4 Dec. Digest, "Carriers," §§ 39, 41. And where such custom has existed, and no notice of an intention to discontinue it has been given, and an individual who has been accustomed to carry cordwood there for shipment in reliance on the custom incurs expense in having cut and corded wood to be hauled to that point for shipment, without notice that the railroad company will not receive it for shipment at such point, he has a right of action to recover any special damage he may sustain upon the refusal of the company to receive the wood at

that point for shipment. *Durden v. So. Ry.*, supra; *Wilson v. Atlanta, etc., Ry. Co.*, 82 Ga. 386, 390, 9 S. E. 1076; *Atlantic, etc., Ry. Co. v. Howard Supply Co.*, 125 Ga. 478, 54 S. E. 530; *W. & A. R. Co. v. Haig*, 136 Ga. 494, 71 S. E. 792. In Georgia, Southern & Fla. Ry. Co. v. Marchman, 121 Ga. 235, 48 S. E. 961, it was ruled: "As a general rule, a railway company is not bound to receive freight except at stations; but it may as a result of custom, or as a consequence of an express contract, become obligated to receive freight at a point on its line of railway where there is no station, depot, platform, cars, or agent."

It was not necessary that the plaintiff should haul and deposit on the right of way the wood he had cut; in order for him to have a right of action because of the company's refusal to receive it. *Moore on Carriers*, 117; *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225 (7). The plaintiff alleged that he had hauled and deposited on the right of way of the defendant company a part of the wood he had cut and corded for the purpose of having it shipped by the defendant company. It would have been a useless expense to have deposited the rest of the wood on the right of way, if the company would not receive it there. The refusal to receive the wood was based solely on the ground that it was not deposited at "regular stations or spur tracks" of the defendant company. The court erred in sustaining the general demurrer and dismissing the petition.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(126 Ga. 719)

BUTTS COUNTY et al. v. JACKSON BANKING CO. et al.

(Supreme Court of Georgia. Aug. 19, 1911.)

(*Syllabus by the Court.*)

1. STARE DECISIA.

The principles decided when this case was formerly before this court (129 Ga. 801, 60 S. E. 149, 15 L. R. A. [N. S.] 567, 121 Am. St. Rep. 244) are controlling. The findings of fact by the auditor are not such as to differentiate it from those upon which that decision was predicated.

2. COUNTIES (§ 192*)—TAXATION—LEVY.

County authorities, levying taxes, must by order "specify the per cent. levied for each specific purpose," and taxes raised for any specific purpose must be used for such purpose, and none other. Civil Code 1910, §§ 514, 516.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 192*]

3. COUNTIES (§§ 161, 195*)—SPECIAL FUNDS—APPLICATION.

Where there is in the hands of the treasurer, at the end of the year, a fund raised by taxes levied for that year for a particular purpose, and the fund is insufficient to pay warrants

duly drawn thereon to pay the legitimate current expenses of the county for that year, the fund does not, after that year, become a general fund, but must be used toward the payment of such warrants.

Warrants entitled to participate equally in the distribution of such fund, in the custody of the court for distribution, should be paid therefrom ratably, in such proportion as the amount of each bears to the amount of the fund in hand.

[Ed. Note.—For other cases, see Counties, Dec. Dig. §§ 161, 195*]

4. COUNTIES (§§ 160, 195*)—GENERAL FUNDS—WHAT ARE.

When, out of a fund raised by taxation for a specific purpose, all demands and indebtedness properly chargeable against that particular fund have been paid or deducted, and there remains a surplus from such fund in the hands of the treasurer, the same then becomes a general fund which may be lawfully applied to the payment of balances due on warrants drawn against other specific funds not sufficient for their payment, or to any other legitimate liability against the county. *Tate v. City of Elberton*, 136 Ga. 301, 71 S. E. 420; *Field v. Stroube*, 103 Ky. 114, 44 S. W. 363, 19 Ky. Law Rep. 1751; 11 Cyc. 510.

[Ed. Note.—For other cases, see Counties, Dec. Dig. §§ 160, 195*]

Error from Superior Court, Butts County; J. T. Pendleton, Judge.

Action between the Jackson Banking Company and others and Butts County and others. Judgment for the former and the latter bring error. Reversed.

J. B. Wall and Rosser & Brandon, for plaintiffs in error. Y. A. Wright, E. M. Smith, and J. D. Kilpatrick, for defendants in error.

HOLDEN, J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(126 Ga. 699)

HUDGINS v. STATE

(Supreme Court of Georgia. Aug. 18, 1911.)

(*Syllabus by the Court.*)

1. HOMICIDE (§ 131*)—INDICTMENT—DESCRIPTION OF DECEASED.

There was no error in overruling a demurrer to a special presentment charging the crime of murder, on the ground that the name of the decedent was stated as "E. Barksdale," without giving his Christian name in full.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 131* Indictment and Information, Cent. Dig. § 275.]

2. SPECIAL PRESENTMENT—DEMURRER.

The general demurrer to the special presentment was without merit.

3. INDICTMENT AND INFORMATION (§ 8*)—PRESENTMENT—INDORSEMENTS—NAME OF PROSECUTOR.

Where the grand jury returned a special presentment charging the crime of murder, there was no error in overruling a plea in abatement based on the ground that such presentment was "the outcome" of a prosecution instituted by a named person, who swore out a warrant against the defendant, that the latter waived a committing trial, and that the special

presentment did not have the name of such person indorsed upon it as prosecutor.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 43, 46; Dec. Dig. § 8.*]

4. HOMICIDE (§ 340*)—WRIT OF ERROR—REVIEW—HARMLESS ERROR.

The charge of the court on the subject of involuntary manslaughter, and the direction to the jury that if they had a reasonable doubt that the defendant was guilty of murder they should acquit him, notwithstanding they might consider that, under some view of the evidence and the law, he might be guilty of some lesser grade of homicide, was inaccurate; but, in the light of the evidence and statement of the accused and the entire charge of the court, such inaccuracy is not sufficient to require the grant of a new trial.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 340.*]

5. RULING ON MOTION FOR NEW TRIAL.

Many of the other grounds of the motion for a new trial are plainly without merit, and none of them are such as to require a reversal.

Error from Superior Court, Baker County; Frank Park, Judge.

J. F. Hudgins was convicted of homicide, and he brings error. Affirmed.

R. J. Bacon, Benton Odom, Ben T. Burson, and W. I. Geer, for plaintiff in error. W. E. Wooten, Sol. Gen., F. A. Hooper, and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 638)

WASHINGTON v. ATLANTIC COAST LINE R. CO. et al.

CHANDLER v. SAME.

(Supreme Court of Georgia. Aug. 15, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 100*)—INJURIES TO SERVANT—FELLOW SERVANTS—STATUTORY PROVISIONS.

The provision of the railroad employer's liability act of August 16, 1909, embodied in Civ. Code 1910, § 2785, applied to the case of an employé who joined the relief department of a railroad company prior to the passage of such act, and agreed that the acceptance by him from such department of benefits "for injury" (to which department he and other members contributed, as well as the railroad company) should operate as a release and satisfaction of all claims against the company, and that the bringing of a suit for damages should forfeit all rights to benefits, but who was injured by reason of the negligence of a coemployé after the passage of the act, and who accepted certain benefits from the relief department.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 100.*]

2. CONSTITUTIONAL LAW (§ 156*)—MASTER AND SERVANT (§ 11*)—IMPAIRING OBLIGATION OF CONTRACT—EMPLOYER'S LIABILITY ACT.

As applied to such a case, the provision of the act referred to in the preceding headnote, to the effect that the acceptance of benefits should not release the employing railroad com-

pany from liability, but, in case of recovery, the employer might set off any sum it had contributed or paid to any relief or benefit which may have been paid to the injured employé on account of the injury, is not violative of article 1, § 3, par. 2, of the Constitution of this state, which provides that no law impairing the obligation of contracts shall be passed.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 156.* Master and Servant, Dec. Dig. § 11.*]

3. CONSTITUTIONAL LAW (§ 297*)—DUE PROCESS OF LAW—EMPLOYER'S LIABILITY ACT.

The above-mentioned act is not violative of the fourteenth amendment to the Constitution of the United States, on the ground that it abridged the privilege of the railroad company to contract, or deprived it or its relief department of the liberty of contract without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 297.*]

Certified Questions from Court of Appeals.

Action by Turner Washington against the Atlantic Coast Line Railroad Company and others, and action by A. L. Chandler against the same defendants. Heard on questions certified from the Court of Appeals. Questions answered.

The Court of Appeals certified to the Supreme Court the following questions:

"(1) A railway company prior to the year 1909, with the co-operation of certain of its employes, organized what is called the 'relief department,' for the payment to such of its employes as became members (or to their families) monetary benefits in case of illness, accidental injury, or death, and for that purpose a fund known as the relief fund was raised, said relief fund under the regulations adopted consisting of 'contributions from members, income derived from investments and from interest paid by the company, and advances by the company when necessary to pay benefits as they become due.' The contributions of the members were certain stipulated sums deducted from their wages each month by the company. The company had general charge of the relief department, guaranteed the fulfilling of its obligations, and paid the operating expenses thereof, holding the moneys of the relief fund in trust for the department, and paying interest thereon at the rate of 4 per cent. per annum. The company also agreed that 'if the amount contributed by the members of the relief fund, with interest and other income, shall not be sufficient to pay the benefits as they become due, the company shall advance from its own funds whatever sums may be necessary for this purpose, reimbursing itself if and when the contributions of members with interest and other income are sufficient therefor.' An employé of the company in becoming a member made the following agreement as a part of his application: 'In consideration of the amounts paid and to be paid by said company for the maintenance of said re-

relief department, and of the guaranty by said company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company; * * * and, further, if any suit shall be brought against said company, or [any] other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said relief department and of said company created by my membership in said relief fund, shall thereupon be forfeited without any declaration or other act by said relief department or said company.' Each member agreed to be bound by the regulations, one of which provided that 'in case of injury to a member he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company or any companies associated therewith in the administration of their relief departments.' (A full copy of the application, contract, and regulations is incorporated in the record herewith transmitted, to which reference may be had for further details if necessary.) An employé of the railway company in question made application and became a member of the relief department in 1906, and in December, 1909, was hurt through the negligence of another employé of the railway company, who stood to him in the relation of fellow servant. The injured employé brought suit against the company and the fellow servant. It appears that he had accepted a certain portion of the benefits due him from the relief department on account of his injury, and that the railway company had contributed a certain part of the money so paid him. Did the fact that he had accepted these benefits operate to release the defendants, or do the provisions of the act of August 16, 1909, embodied in Civ. Code 1910, § 2785, apply, so that thereunder the defendant was entitled merely to diminish the amount of the plaintiff's recovery by a set-off of the sum it had contributed to the benefit paid to the plaintiff?

"(2) If it be held that the statute referred to in the preceding question is applicable as indicated therein, then is said statute unconstitutional as being violative of article 1, § 3, par. 2, Const. Ga. (Civ. Code 1910, § 6389), which provides that no law impairing the obligation of contracts shall be passed, and that, as applied to the case at bar, the facts of which are indicated in the preceding question, it impairs the obligation of the contract between the plaintiff and the defendant, whereby the plaintiff agreed, in becoming a member of the relief department, that acceptance of the benefits in case of injury should release the defendant from all liability on account of said injury?

"(3) If it be held that the statute referred

to in the first question is applicable to the state of facts presented and therein indicated, is the statute violative of the fourteenth amendment to the Constitution of the United States, on the alleged ground that it abridges the privileges of the railway company to contract, or on the alleged ground that it deprived the railway company and its relief department of their liberty without due process of law, in that it deprives them of the liberty to make the contract in question?"

The foregoing certified questions were certified in the case of Washington. The same questions were certified in the case of Chandler, except that it was stated that the employé became a member of the relief department in July, 1909, and was injured in October, 1909, after the passage of the act of August 16th.

Osborne & Lawrence, Crawley & Crawley, R. L. Berner, and Jno. S. Walker, for plaintiffs in error. P. W. Meldrim, Shelby Myrick, Bennet, Twitty & Reese, and Wilson, Bennett & Lambdin, for defendants in error.

LUMPKIN, J. These two cases were argued together. Three questions are raised: (1) Does the fourth section of the act of 1909, embodied in Civ. Code 1910, § 2785, apply to the character of relief arrangement or agreement and the state of facts described in the first question of the Court of Appeals? (2) If so, is that section unconstitutional as violating the clause of the Constitution of this state which declares that no law impairing the obligation of a contract shall be passed? Civ. Code 1910, § 6389. (3) If such statute is applicable, is it violative of the fourteenth amendment to the Constitution of the United States, on the ground that it abridges the privilege of the railway company to contract? We will take up these questions in the order stated.

[1] 1. Does section 2785 of the Civil Code of 1910 apply to the facts of this case stated in the first question of the Court of Appeals? That section reads as follows: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the three preceding sections, shall, to that extent, be void: Provided, that in any action brought against any such common carrier, under or by virtue of any of said sections, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employé, or, in the event of death, to the person or persons entitled thereto on account of the injury or death for which said action is brought." The three preceding sections contain, in brief, the following provisions: Section 2782 provides that every common carrier by railroad shall be liable in damages for a personal injury to

any of its employes resulting in whole or in part from negligence of its officers, agents, or employes, or from defects or insufficiency in its engines, cars, machinery, road, works, or other equipment, due to its negligence. It declares who may sue in case of death; and that there should be no recovery, if the injured person brought about his injury by the failure to use ordinary care, or if he could have avoided the consequences of defendant's negligence by the use of ordinary care. It also deals with the question of presumption. Section 2783 applies the doctrine of comparative negligence and diminution of damages to the case of an injured employe. Section 2784 declares that the doctrine of assumption of risks of employment shall not apply where the violation by the common carrier of any statute enacted for the safety of the employes contributed to the injury or death.

It was contended that section 2785, when considered together with the other sections mentioned, did not cover a case like the one stated in the question propounded to us. We cannot acquiesce in this contention. The main purpose of the act was to enlarge the liability of common carriers by railroad for damages to employes, and to declare that certain things which previously would have prevented a recovery should not thereafter do so. One of these was the character of arrangement here involved.

A glance at the legislation in this state on the subject of recoveries for injuries to the persons of railroad employes will throw light on the legislative intent. Under the act of 1856, as codified in section 2980 of the Code of 1863, it was declared: "If the person injured is himself an employe of the company and the damage was caused by another employe, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery." This made a change in the common-law rule. Thereafter contracts were made by which railroad employes assumed the risks of their employment. It was held that they were binding, except as against damages resulting from criminal negligence. By the act of 1876 the definition of criminal negligence, as applied to employes of railroads, was greatly enlarged. Acts 1876, p. 111; Penal Code 1895, § 115. By the act of 1895 (Acts 1895, p. 97; Civ. Code 1895, § 2613), it was declared: "All contracts between master and servant, made in consideration of employment, whereby the master is exempted from liability to the servant arising from the negligence of the master or his servants, as such liability is now fixed by law, shall be null and void, as against public policy." Here, then, prior to the act of 1909, was a prohibition against contracts whereby the master was exempted from liability to the servant arising from the negligence of the master or his other servants. But a new arrangement was made, which was called a relief department. The employes of the railroad company who be-

came members had certain amounts deducted from their wages to go to the relief fund. The company had general charge of the department, paid amounts for the maintenance of the relief department, and guaranteed the payment of the benefits provided to be paid. There was no direct agreement to release the company from liability for negligence; but, if an injured employe took the benefits arising in part from his own contributions and those of his coemployes, he forfeited any right to hold the company liable. If he sued the company, he forfeited any claim for benefits or relief. It is unnecessary to discuss the merits or demerits of this system. Suffice it to say that under its operation the employe was put upon his election. Whichever way he elected, he released or forfeited something.

In this state of the law, it was held that such an agreement was not illegal. *Petty v. Brunswick & Western Ry. Co.*, 109 Ga. 666, 35 S. E. 82. There was no intimation that the Legislature could not change the law. They did change it, and passed the act of 1909, which is quoted above. If that act was not intended to apply to the situation here involved, it is difficult to say what was intended. If it only dealt with a direct contract to relieve an employer from liability, it added nothing to the law as it already stood, and was mere surplusage. If there were any doubt as to the effect of the general words in the beginning of the section, the statement as to setting off any sum contributed or paid by the common carrier to any "insurance, relief, benefit, or indemnity" shows clearly that such arrangements were included in the legislative intent. In 2 Lewis' *Sutherland, Statutory Construction* (2d Ed.) § 347, pp. 663, 664, it is said: "The inquiry, where any uncertainty exists, always is as to what the Legislature intended, and, when that is ascertained, it controls." And in the same volume, on page 672, it is said: "The exception of a particular thing from the operation of the general words of a statute shows that in the opinion of the lawmaker the thing excepted would be within the general words had not the exception been made."

To the first question propounded by the Court of Appeals we answer that the act of 1909 applies to the present case; so that acceptance of benefits did not operate to release the defendant company, but entitled it to diminish any recovery which might be had as in the act provided.

[2] 2. The second question is whether, as applied to the state of facts set out in the first question, the act of 1909 is violative of article 1, § 3, par. 2, of the Constitution of the state, which provides that no law impairing the obligation of contracts shall be passed. The question is an important one. The Constitution of the United States contains a similar declaration to that contained in the state Constitution, though the latter only is here invoked. The federal employ-

ers' liability act of 1906 (Act April 22, 1906, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]) contains a clause like that in the legislative act of 1909, which is under consideration. Other states have enacted similar laws. As both a theoretical and a practical question, it is one of great interest. The injured employé became a member of the relief department of the railway company in 1906. The act of the Legislature under discussion was approved August 16, 1909. The employé was injured in December, 1909. Thereafter he accepted a certain portion of the benefits due him from the relief department. The railway company had contributed a part of the money from which such benefit payments were made.

In *Boston & Maine R. Co. v. County Com'rs*, 79 Me. 386, 10 Atl. 113, although the charter of a railroad company provided that it should not be altered, amended, or repealed, it was held that an act requiring the expense of building and maintaining a highway where it crossed a track at grade should be borne by the railroad company was a legitimate exercise of the police power, and was constitutional. Emery, J., said: "This power of the Legislature to impose uncompensated duties, and even burdens, upon individuals and corporations for the general safety, is fundamental. It is the 'police power.' Its proper exercise is the highest duty of government. The state may in some cases forego the right to taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty and consequent power override all statute or contract exemptions. The state cannot free any person or corporation from subjection to this power. All personal as well as property rights must be held subject to the police power of the state. * * * This important power must be extensive enough to protect the most retiring citizen in the most obscure walks, and to control the greatest and wealthiest corporations. Its exercise must become wider, more varied and frequent, with the progress of society." In *Coates v. Mayor, etc., of New York*, 7 Cow. (N. Y.) 585, interments of the dead were made in a certain part of the city of New York by persons having a right under grants of, or titles to, land held in trust for the sole purpose of interment, some of which land had been used for that purpose for more than a century, and to some of which certain fees for interment were incident and belonged to the person interring. A further right was also claimed by individual vault owners, in whose behalf some of the interments were made. It was held that an act which authorized the city to make by-laws for regulating, or, if found necessary, preventing, the interment of the dead, was not unconstitutional, either as impairing the obligation of contracts, or taking private property for public use without compensation. In *Lindenmuller v. People*, 33 Barb. (N. Y.) 548, 577, an act

of the Legislature of New York prohibiting exhibitions of dramatic performances on Sunday was held to be constitutional, as against a claim that the plaintiff in error had leased certain property with a view to its occupancy for the purpose of a Sunday theater. It was added that "the contract with the performers, if one exists, for their service on the Sabbath, stands upon the same footing." In *City of New York v. Herdja*, 68 App. Div. 370, 74 N. Y. Supp. 104, an act amending the law regulating the construction of tenement houses was upheld as against a contention that plans and specifications had previously been filed and a contract for the construction of the building had been made. In *People v. Hawley*, 3 Mich. 330, a manufacturer of malt liquors in Michigan entered into a written contract with a firm at Chicago, Ill., whereby he agreed to sell and forward to the firm all quantities of malt liquors which they might need in their business for five years thereafter. Nineteen days later an act was passed by the Legislature of Michigan prohibiting the manufacture of intoxicating beverages and the traffic in them. Upon being indicted, the manufacturer set up that the law impaired the obligation of his contract. The Supreme Court of the state held the law valid, and declared that in the exercise of its police powers the state may prohibit the exercise of any trade or employment which is found to be hazardous or injurious to its citizens, and that, "where the exercise of such power operates to prevent the performance of a contract previously made, the same principle applies, and the law is not within the prohibition of the Constitution of the United States." While the clause of the Constitution of the United States inhibiting any state from passing a law impairing the obligation of a contract is not invoked in this case, it is substantially the same as that contained in our state Constitution, and the construction given to the former will throw light on the proper construction of the latter. In *New York, etc., Railroad Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 260, a law requiring the removal of grade crossings on a railroad was attacked as unconstitutional. It was contended, among other things, that the company could not meet the expense entailed upon it thereunder, and have any income left to pay its fixed charges, interest, and dividends on preferred stock, and that it impaired the obligation of the contracts made by the company with the holders of its bonds and preferred stock by making it impossible for the company to pay the interest on the bonds and dividends on such stock, as it had agreed to do, and also maintain and operate the railroad efficiently. The law was held to be constitutional. In the opinion of the court, delivered by Mr. Chief Justice Fuller, it was said (page 567 of 151 U. S., page 440 of 14 Sup. Ct. 438 L.

Ed. 269)): "It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of the legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury." See, also, *Chicago, etc., R. Co. v. State*, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557; *Chicago, etc., Railroad v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948; *Beer Company v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 228, 17 Sup. Ct. 581, 41 L. Ed. 979; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672, 6 Sup. Ct. 252, 29 L. Ed. 516; *Gillam v. Sioux City, etc., R. Co.*, 26 Minn. 268, 3 N. W. 358. In some of the cases cited, the contract set up arose from the charter of the corporation. In the *Dartmouth College Case*, in the absence of a reservation of a right to alter or withdraw franchises, a charter was held to constitute a contract with the state. In that case, however, it was not held that the police power of the state was destroyed; and in cases cited above the rule that such power may be legitimately exercised, although to some extent it may interfere with the manner of enjoying or using the grants contained in the charter, is asserted. In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516, supra, a legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of service by the grantee, after performance by the grantee, was held to be a contract within the protection of the Constitution of the United States against state legislation impairing the obligation of contracts. Nevertheless in the opinion Mr. Justice Harlan said (page 672 of 115 U. S., page 264 of 6 Sup. Ct. [29 L. Ed. 516]): "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all

property, whether owned by natural persons or corporations." In *Manigault v. Springs*, 189 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274, riparian owners of land entered into an agreement to remove a dam obstructing a creek and to allow the creek to remain open and unobstructed. Later the Legislature of South Carolina passed an act reciting the necessity for draining the lowlands of the Santee river, and authorizing the defendants by name to erect and maintain a dam across the creek. It was held by the Supreme Court of the United States that such an act for the draining and reclamation of swamps and the erection of dams, levees, and dikes for that purpose was a legitimate exercise of the police power, and was not unconstitutional as impairing the obligation of the previous contract between the parties.

In this state, since the Code of 1863, a law has existed which reserves the right to withdraw corporate franchises, and later a constitutional prohibition against the grant of irrevocable franchises has been added. Code 1863, § 1636; Code 1910, §§ 6389, 6390. So that the question of irrevocable grants by the state after 1863 does not arise. But authorities on that subject are useful in dealing with the principle involved where such contracts could be made. It will be seen that the clause of the Constitution of the United States inhibiting the states from passing laws impairing the obligation of contracts is not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals, and that the governmental power of protection of the people cannot be contracted away. This is true of contracts between a state and a corporation or individual, and also of a municipality as to its legislative or discretionary governmental power. *Macon Consolidated Street R. Co. v. Mayor and Council*, 112 Ga. 782, 38 S. E. 60. "Neither can private individuals and corporations, by entering into contracts among themselves, invoke the contract clause of the Constitution for the protection of those contracts to the extent of withdrawing the exercise of rights granted, or the use of property involved, from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury." 9 Enc. U. S. S. C. R. 499, and citations.

The expression "police power" is sometimes used in a very broad sense, including all legislation and almost every function of civil government. At other times it is used in a somewhat more restricted sense. The Legislature cannot arbitrarily prohibit either the making or the carrying out of all contracts under the claim of exercising police power. Thus it is clear that the Legislature could not declare that debtors could satisfy promissory notes by paying less than the amount called for by them, or that such notes should bear a greater or less rate of interest than that included in them, if valid

when the contract was made. Other illustrations of contracts beyond the reach of interference by the Legislature might be given. At the other extreme stand such contracts as those involved in the liquor and lottery cases above cited. Between these two extremes lies a legal territory where cases must be determined as they arise. No inflexible line can be drawn in advance as a test for the determination of what is a legitimate exercise of the police power of the state which does not conflict with the contract clause of the Constitution, and what is an arbitrary interference with the obligation of contracts or with the liberty of contract.

In Iowa a statute was passed which made railway companies liable to employes for damages in consequence of the negligence of its agents or other employes, and declared that no contract which restricted such liability should be legal or binding. By amendment it was added that no contract of insurance relief, benefit, or indemnity in case of injury or death entered into prior to the injury, and no acceptance of any such relief, insurance, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury, should constitute any bar or defense to any cause of action brought under the provisions of the act. This act was attacked on the ground that it violated the fourteenth amendment of the Constitution of the United States, in that it impaired the liberty of contract. In *Chicago, etc., R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. —, the constitutionality of the act was upheld. In the syllabus it was said: "A state has power to prohibit contracts limiting liability for injuries made in advance of the injury received, and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received after the contract. Such a statute does not impair the liberty of contract guaranteed by the fourteenth amendment." In the opinion Mr. Justice Hughes said: "In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. * * * The power to prohibit contracts, in any case where it exists, necessarily implies legislative control over the transaction, despite the action of the parties. * * * If the Legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like substitution of its performance." Pages 570, 572, of 219 U. S., pages 263, 264, of 31 Sup. Ct. (55 L. Ed. —). The power to enact such law was thus

distinctly treated as based upon the fact that it was a legitimate exercise of the police power in the protection and promotion of health, safety, and good order. It was analogized to laws prohibiting the manufacture and sale of intoxicating liquors, limiting employment in underground mines and smelters to eight hours a day, prohibiting contracts of options to sell or buy grain or other commodity at a future time, and prohibiting the employment of women in laundries more than 10 hours a day. Page 568 of 219 U. S., page 263 of Sup. Ct. (55 L. Ed. —). It is true that in the case cited the employé became a member of the relief department of the railroad after the passage of the act, and that the contention was that the statute conflicted with the fourteenth amendment to the Constitution of the United States, and not with the clause in reference to the impairment of the obligation of contracts. But "it has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution." Page 566 of 219 U. S., page 262 of 31 Sup. Ct. (55 L. Ed. —). If so, it cannot be arbitrarily destroyed by state legislation. Nevertheless it was held that the statute then under review was a legitimate exercise of the police power of the state, looking to the preservation of the safety of a considerable class of the public, who could be legitimately dealt with as a class, and that the constitutional guaranty of liberty to contract did not prevent the exercise of such police power. See, also, *Louisville, etc., R. Co. v. Mottley*, 219 U. S. 467, 484, 31 Sup. Ct. 265, 55 L. Ed. —, and citations; *Texas, etc., R. Co. v. Miller*, 221 U. S. 408, 31 Sup. Ct. 534, 536, 55 L. Ed. —.

Statutes changing, as to railroad companies, the general rule which exempts the master from liability to a servant for injuries caused by the fault or negligence of a fellow servant, have been upheld by various courts. The peculiar nature of the business conducted, the conferring on railroad companies of the power of eminent domain, the dangers incident to such employment, the number of people engaged in it, and the necessity for the state to protect them have all been advanced as reasons for making a classification as to such employes, and enacting laws looking to their safety. *Georgia Railroad & Banking Co. v. Miller*, 90 Ga. 571, 16 S. E. 939, and citations; *Florida East Coast R. Co. v. Lassiter*, 58 Fla. 234, 50 South. 428, 19 Am. & Eng. Ann. Cas. 192, and note. It is not easy to see how a statute like the one under consideration can be held to be the legitimate exercise of the police power of the state looking to the public safety and welfare, or the safety of a class of the public which may be dealt with as such, and therefore valid as against a claim that it interferes with the constitutional right to contract, and yet be declared

void because it affects the future operation of the contract by preventing "the like substitution of its performance" in the language of Mr. Justice Hughes. If it is a legitimate exercise of the police power for public safety in the one case, it should be so held in the other.

The theory on which agreements of the general character of that here involved have been sustained, in the absence of legislation like that contained in the act of 1909, is that the contract does not itself agree to relieve the railroad company from the legal consequences of its negligence, or that of its servants; and that the release of the company arises only upon the acceptance of benefits, which is optional with the employé after he has been injured. For this reason it has been held that such contracts did not violate statutes prohibiting contracts exempting a master from liability to a servant arising from the negligence of the master or his other servants. Thus in *Petty v. Brunswick Railway Co.*, 109 Ga. 666, 671, 35 S. E. 82, 84, in the opinion of the court referring to the argument that the benefit agreement violated a statute of the character mentioned, it was said: "As should be readily apparent, the weakness of this position lies in the fact that it is based upon an entire misconception of the meaning and effect of the contract thus assailed. It did not, as claimed, in any of its terms or conditions stipulate that the defendant company should be absolved from the legal consequences of its own negligence or that of its servants. On the contrary, it merely provided an additional remedy to that given by law to an employé who might suffer injury by reason of the negligence, actual or imputable, of his master. The latter remedy was left intact, undisturbed, and unimpaired, and the injured employé might or might not, at his option, take advantage thereof." In *Ringle v. Penn. R. R.*, 164 Pa. 529, 30 Atl. 492, 44 Am. St. Rep. 628, a case often cited on the subject, it was held that "In such a case it is not the signing of the release, but the acceptance of benefits after the accident, that constitutes the release."

If this view is sound when urged for the purpose of sustaining benefit or relief agreements, it must be equally sound when urged against them, under a changed condition of the law. Thus, under these rulings, at the time the plaintiff in the present case was injured, there was no contract releasing the railroad company from damages arising from the result of its own negligence or that of its other servants, nor any fixed contract that the company should be so released; and, if a contract releasing the company was made, it resulted from the acceptance of certain benefits, and became a definite contract of release only at that time, though springing from the former con-

tract. In the meantime the Legislature declared that no such contract of release should be valid, and that acceptance of benefits from a relief department of a railroad should not destroy a plaintiff's right of action, but that the amount of the payments or contributions of the company through such department could be set off in its favor, if it were liable in damages. The plaintiff's right of action against the railroad company for the injury to his person arose after the passage of the act of 1909, and the liability of the railroad company is to be determined by that act. It gave him a right to recover for an injury arising from the negligence of the coemployé, although he might himself have been guilty of some negligence, and declared that he should not be debarred by the doctrine of assumption of risks of employment, as therein stated. This was different from what would have been the status had he been injured before its passage. It also contained the clause under discussion. Before any contract of release by accepting benefits from a fund arising from a common contribution had been made, the act of 1909 was adopted. We have endeavored to show that the act was a legitimate exercise of the police power of the state for the preservation of the safety and welfare of a considerable class of the public. If the benefit agreement should be held to prevent such exercise of the police power of the state from being effective, the power of the state to preserve and protect the safety and welfare of its citizens could be much curtailed by contract. Under such a construction, although a police law might be on its passage, and about to take effect, prohibiting a certain thing from being done, parties might enter into an agreement, not making a present settlement, or a contract now fixing liability, but reserving the right to do such thing, or to elect to do it, after the passage of the act, and in spite of its provisions. This would subordinate the police power of the sovereign state to the operation of contracts, not the reverse, as the authorities declare. The second question of the Court of Appeals is answered in the negative.

[3] 8. The contention that the act of 1909 is violative of the fourteenth amendment to the Constitution of the United States is practically covered by what has already been said. It is only necessary here to again cite the case of *Chicago, etc., R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259 (55 L. Ed. —); *Mobile, etc., R. Co. v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. —; *Louisville & Nashville R. Co. v. Melton*, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921. The third question of the Court of Appeals is answered in the negative. All the Justices concur, except BECK, J., absent, and ATKINSON, J., disqualified.

(136 Ga. 634)

WHITE et al. v. CITY OF FORSYTH et al.
(Supreme Court of Georgia. Aug. 15, 1911.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 979*)—PARTIES (§ 95*)—MUNICIPAL TAXES—COLLECTION—AMENDMENT AS TO PARTIES.

A municipality and its ministerial officer charged with the collection of municipal taxes are proper parties defendant to a suit to enjoin the collection of city taxes. The municipality should be declared against in its corporate name; but a petition to enjoin the collection of municipal taxes, wherein the ministerial officer of the municipality charged with the enforcement of the tax is made a party defendant and the municipality is also attempted to be made a party, but its corporate name is incorrectly given, is amendable by making the municipality a party in its true corporate name.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2120-2123; Dec. Dig. § 979; *Parties*, Cent. Dig. §§ 160-166; Dec. Dig. § 95.*]

2. MUNICIPAL CORPORATIONS (§ 979*)—TAXES—COLLECTION—PARTIES.

In a suit to enjoin the collection of municipal taxes, on the ground that the act of the General Assembly authorizing the tax and extending the territorial limits of the municipality so as to embrace the plaintiffs' property upon which the tax is levied is unconstitutional and void, the municipality is a necessary party.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 979.*]

3. MUNICIPAL CORPORATIONS (§ 980*)—TAXES—COLLECTION—IRREGULARITIES IN EXECUTION.

A municipality delegated with the power of collecting its taxes by execution should pursue the statutory direction as to form, if any is given. Where the statute prescribes that a certain official shall issue the execution, an omission to state that the execution issues in the name of the municipality, or, if the corporate name of the municipality is incorrectly given, such omission or error will not render the execution void if it can be gathered from the whole writ that it is issued pursuant to statutory authority, such omission or error will be treated as a harmless irregularity. In order to call into question the legal sufficiency of a tax execution issued by a municipality, the *fi. fa.* must be set out literally or in substance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 980.*]

Error from Superior Court, Monroe County; Robt. T. Daniel, Judge.

Action by Joseph White and others against the City of Forsyth and others. From a judgment for defendants, plaintiffs bring error. Reversed.

Robt. L. Berner and Fletcher & Zellner, for plaintiffs in error. Willingham & Willingham and Bloodworth & Bloodworth, for defendants in error.

EVANS, P. J. Joe White and several others, in behalf of themselves and such others as might desire to become parties plaintiff, filed their petition, alleging that the corporate limits of the municipality of Forsyth embraced the territory within a radius of one-half mile of the courthouse by virtue of

the act of February 1, 1866 (Acts 1866, p. 279); that by the act approved August 19, 1907 (Acts 1907, p. 649), the limits of the city were extended an additional one-half mile, so as to include all the territory within a radius of one mile from the courthouse; that the act of 1907 was amended by the act approved August 14, 1909 (Acts 1909, p. 897), by striking therefrom section 3, and substituting in lieu thereof a provision that when as many as five property owners on any street shall file their petition to the mayor and aldermen of the city of Forsyth, asking that the water mains, sewers, or electric lines be extended on their street, it shall be the duty of the mayor and aldermen, within one year after the filing of their petition, to extend the water mains, sewers, or electric lines, and the failure to extend in the time given shall exempt the petitioners and others on the street from taxation for the support of water mains, sewers, or electric lines, as the case may be, until the petition is granted, provided petitioners obligate themselves to become users thereof for at least one year under the regulations imposed by the mayor and aldermen; that the municipality of Forsyth has assessed taxes upon petitioner's property located within the territory annexed by the act of 1907, and has issued executions against petitioners and placed them in the hands of the city marshal for collection; that the city marshal has levied such tax executions and is advertising the property of petitioners for sale for the purpose of enforcing the collection of the tax; and that the tax is illegal, because the act of 1907 extending the territorial limits of the city, and the act of 1909, are unconstitutional for certain specified reasons. The "City of Forsyth" and the marshal were named as parties defendant, and the prayer was to enjoin the defendants from proceeding with the enforcement and collection of the tax *fi. fas.*; that the *fi. fas.* be decreed to be illegal and void; that the corporate limits of the city of Forsyth be decreed to extend only one-half mile from the courthouse as a center, for general relief, and for process against the "City of Forsyth and J. W. Mays, Marshal of said City."

A rule nisi was issued; and upon the hearing for interlocutory injunction the mayor and aldermen of the city of Forsyth demurred to the petition on the grounds that the suit is brought against "The City of Forsyth" and not against "The Mayor and Aldermen of the City of Forsyth," the corporate name of the municipality, as provided by the acts of 1902, p. 427; that there is no proper defendant, nor is there any cause of action set forth; and that the petitioners have an adequate common-law remedy. Subject to its demurrer the city of Forsyth filed its answer. The plaintiffs then moved to amend their petition by striking the words

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

"The City of Forsyth" wherever it may appear in the petition, and substituting therefor "The Mayor and Aldermen of the City of Forsyth," and praying that the mayor and aldermen of the city of Forsyth be made a party defendant, and that the case proceed against the municipal corporation and its marshal, J. W. Mays, and that the *fi. fas.* described in the petition be decreed to be void for the reason that they are issued in the name of the "City of Forsyth," instead of "The Mayor and Aldermen of the City of Forsyth." This amendment was disallowed. The plaintiffs then further moved to amend by striking the words "its marshal" from the first line of the prayer, and the words "marshal of said city" from the prayer for process. This amendment was also disallowed. The case then proceeded to a hearing, and, after the submission of evidence, the court refused the injunction. The plaintiffs excepted to the refusal of the injunction, and to the disallowance of the amendments.

[1] 1. In a suit against a municipality to restrain the collection of taxes, the officers of the municipality attempting to enforce the collection of the tax and the municipal corporation are proper parties; and, if the municipal corporation is not named originally a party defendant, it is competent by amendment to make it a party in its proper corporate name. *Gelders v. City of Fitzgerald*, 135 Ga. 400, 69 S. E. 569. The petitioners sought to declare against the municipality in the first instance, but its correct corporate name was not given, and in effect the city was not a party to the action. The suit, however, was not a nullity, because the ministerial officer of the city was a proper party, and the city could be made a party by amendment. *Civ. Code* 1910, § 5687. If the marshal had not been a party, the suit would have been against the "City of Forsyth," and, as a corporation can be sued only in its corporate capacity and by its corporate name, the suit would have been a nullity, and there would have been nothing to amend by. *Town of East Rome v. City of Rome*, 129 Ga. 290, 58 S. E. 854. But the marshal was a property party to the suit, and the petition was amendable by adding the city as a party defendant.

[2] 2. Indeed, according to the case made by the petition, the city was not only a proper, but was a necessary, party. Petitioners not only sought to enjoin the collection of specific *fi. fas.*, but also prayed for a decree invalidating them and the acts of the Legislature by authority of which they were issued. The marshal is not the general representative of a municipality, and a decree against him would only bind him as to the particular *fi. fas.* which he was attempting to enforce. The petition is filed by the plaintiffs in behalf of themselves and other taxpayers similarly situated, and the litigation is pri-

marily directed against the municipality. It is a fundamental rule of equity that all persons interested in the subject-matter of a suit should be made parties thereto. The municipality of Forsyth is vitally interested in the attack on the constitutionality of the legislative enactments which enlarged its territory and its source of municipal revenue. Where an injunction will affect property rights or interests of a municipal corporation, such municipal corporation must be made a party defendant, and not merely the particular officer sought to be enjoined. 10 Enc. Pl. & Pr. 914; 22 Cyc. 914. The acting marshal might resign, die, or the office might otherwise become vacant; and, if he alone was a party to the decree, his successors would not be bound. The plaintiffs are also interested in having the municipality a party defendant, since, if the attacks made upon the constitutionality of the various acts amendatory of the charter of the municipality are good, they will not be put to the necessity of bringing other suits to restrain the collection of taxes for each year the tax is sought to be enforced. The municipality is a necessary party defendant to this cause; and, as the court erroneously refused an amendment to make it a party, the judgment denying the interlocutory injunction must be reversed and the case remanded for another hearing after the municipality of Forsyth has been duly made a party defendant in its corporate name.

[3] 3. By section 20 of the act approved December 18, 1902 (Acts 1902, p. 427), authority was given to the mayor and aldermen of the city of Forsyth to enforce by execution the collection of taxes, the executions to be issued by the clerk of the city, attested in the name of the mayor. The allegation in the rejected amendment was that the tax *fi. fas.* "were void for the reason that they are issued in the name of 'The City of Forsyth,' instead of 'The Mayor and Aldermen of the City of Forsyth.'" Nowhere in the record is there any allegation giving the substance of the *fi. fas.* or a copy of them. The averment of the amendment is insufficient to show the invalidity of the *fi. fas.* Where the statute prescribes that a certain official shall issue the execution, an omission to state that the execution issues in the name of the municipality, or an error in giving the corporate name of the municipality, will not render the execution void if it can be gathered from the whole writ that it is issued pursuant to the statutory authority. 1 Freeman on Executions, § 39. This allegation is insufficient as a challenge that the execution did not show upon its face that the statute was not complied with; and an informality or irregularity not going to the essence of the writ will not be regarded as vitiating the process. *Black on Tax Titles*, § 202.

Judgment reversed. BECK, J., absent. The other Justices concur.

(136 Ga. 632)

SLAPPEY v. SUMNER et al.

(Supreme Court of Georgia. Aug. 13, 1911.)

(Syllabus by the Court.)

1. WITNESSES (§ 359*)—TRIAL (§ 252*)—IMPEACHMENT OF WITNESS—INSTRUCTIONS ON EVIDENCE IMPROPERLY ADMITTED.

After a witness has testified on the trial of a case, an indictment, without more, previously found, charging him with embezzlement, is inadmissible in evidence for the purpose of impeaching him. See, in this connection, *McCray v. State*, 134 Ga. 416, 68 S. E. 62; *Killian v. Georgia Railroad & Banking Co.*, 97 Ga. 727 (2), 25 S. E. 334; *Gardner v. State*, 81 Ga. 144 (2), 7 S. E. 144.

(a) After admitting the indictment, it was error for the court to instruct the jury that it could be considered in passing upon the credibility of the witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1161, 1162; Dec. Dig. § 359;* Trial, Cent. Dig. § 598; Dec. Dig. § 252.*]

2. WITNESSES (§ 406*)—IMPEACHMENT—RELEVANCY OF EVIDENCE.

Upon the trial of an action instituted against an administrator for the purpose of establishing the fact that the plaintiff was an heir at law of the defendant's intestate and to recover her distributive share of the estate, though as a witness for the plaintiff the plaintiff's husband had testified as to friendly relations with the intestate, and that during the last years of his life the intestate had lived at the home of the witness, it was error to admit in evidence, over the objection that it was irrelevant, an execution in favor of the administrator of the deceased against plaintiff's husband.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1276-1279; Dec. Dig. § 406.*]

3. TRIAL (§ 251*)—INSTRUCTIONS—RULES OF EVIDENCE.

The provisions of Civil Code 1895, § 5193 (Code 1910, § 5780), as to the admissibility of admissions of privies in blood, etc., and the inadmissibility of their declarations after title has passed out of them, had no relevancy to the case on trial, and should not have been given in charge to the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

4. TRIAL (§ 234*)—INSTRUCTIONS—RULES OF EVIDENCE.

There was evidence tending to show that the intestate had made admissions to the effect that the plaintiff was one of his heirs at law. The court instructed the jury: "If any admissions have been testified to before you as having been made as to any matters material to the issues in this case, I charge you that admissions should be scanned with care and are to be considered, if at all, by you in determining the truth or falsity of the issue to which such admissions may or may not relate." The use of the words "if at all" might have had a tendency to mislead the jury into the belief that they might have arbitrarily declined to consider the admissions, and it would have been better to have omitted them.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 234.*]

5. NEW TRIAL (§ 157*)—PROCEEDINGS TO PRODUCE—QUESTIONS CONSIDERED.

Certain grounds of the motion for new trial with respect to newly discovered evidence and the alleged disqualification of certain jurors need not be considered, as a new trial must

be granted on other grounds, and the questions presented will not likely arise on another trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 314-318; Dec. Dig. § 157.*]

6. WEIGHT OF EVIDENCE.

The evidence did not demand the verdict.

7. OTHER ASSIGNMENTS OVERULED.

Except as above stated, none of the other assignments of error require the grant of a new trial.

Error from Superior Court, Worth County; Frank Park, Judge.

Action by M. E. Slappey against G. S. Sumner, administrator, and others. Judgment for defendants. Plaintiff brings error. Reversed.

J. J. Forehand and Shipp & Kline, for plaintiff in error. Claude Payton, J. G. Polhill, Mark Tison, L. D. Passmore, T. R. Perry, and J. H. Tipton, for defendants in error.

ATKINSON, J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 632)

MERCER et al. v. MORGAN.

(Supreme Court of Georgia. Aug. 15, 1911.)

(Syllabus by the Court.)

1. MORTGAGES (§ 32*)—ABSOLUTE DEED OR MORTGAGE—ADMISSIBILITY OF EVIDENCE.

A deed absolute in form may be shown to have been made to secure a debt, where the maker remains in possession of the land conveyed. Civil Code 1910, § 3258.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 32.*]

2. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASERS—NOTICE—POSSESSION.

Actual possession of land is notice to the world of the right or title of the occupant. Possession of land by the husband with the wife is presumptively his possession, but the presumption may be rebutted. Civil Code 1910, § 4523.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

3. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASERS—NOTICE—POSSESSION.

A purchaser cannot in all cases rely blindly on the presumption of the husband's possession, if there are other facts putting him on inquiry. *Bates v. Harris*, 112 Ga. 32, 37 S. E. 106.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

4. VENDOR AND PURCHASER (§ 243*)—BONA FIDE PURCHASERS—NOTICE—POSSESSION.

Suit to recover land was brought against a husband and wife, who were both alleged to be in possession, and the defendants answered that the wife alone was in possession. The plaintiff claimed title under a deed from the wife to the husband, a conveyance from the husband to a third person, and one from such third person to the plaintiff. He testified that the husband and wife lived together on the land, and that, before buying, he made inquiries of the wife, and was informed that he could buy it, and it would be all right. The wife testified that the plaintiff made no inquiry of her, but

informed her that he had bought the place and had come to see her about it, and that she responded that the person to whom she had made the deed had done her "a shabby trick, because they promised it [to me] for a home as long as I lived." Held that, under such pleadings and evidence, it was error to reject testimony of the wife tending to show that she had been in actual possession for about 20 years, and was so at the time the plaintiff bought the land, that the deed was made by her to secure a debt of her husband, that the amount of it had been tendered to the grantee, and that she never consented for the plaintiff to buy the property from the grantee or any one else.

(a) It is not held that the witness could testify in mere general terms or as to her conclusions, but that she could testify to the facts on the subjects mentioned in the preceding head-note.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 606-608; Dec. Dig. § 243.*]

5. VENDOR AND PURCHASER (§ 239*)—BONA FIDE PURCHASERS—TITLE ACQUIRED.

If a wife made a fee-simple deed to secure a debt of her husband, it would not be declared void as against a bona fide purchaser from the grantee for value and without notice; and this is true, although the amount of the debt secured by the deed may have been tendered to the grantee therein before he conveyed the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583-600; Dec. Dig. § 239.*]

6. ADMISSIBILITY OF EVIDENCE—DIRECTION OF VERDICT.

It was error to cut off the defendants from seeking to prove their defense, and to direct a verdict for the plaintiff.

Error from Superior Court, Tattnall County; P. E. Seabrook, Judge.

Action by W. J. Morgan against Wealthy Mercer and another. From a judgment for plaintiff, defendants bring error. Reversed.

W. T. Burkhalter, for plaintiffs in error.
J. D. Kirkland and Saffold & Larsen, for defendant in error.

LUMPKIN, J. Judgment reversed.

BECK, J., absent. The other Justices concurred.

(138 Ga. 774)

CLYATT v. TAYLOR.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

INJUNCTION (§ 153*)—RECEIVERS (§ 42*)—APPOINTMENT—PRELIMINARY INJUNCTION—CONDITIONS.

Under the pleadings and the evidence there was no abuse of discretion in granting an interlocutory injunction, nor in appointing a receiver, it being provided that such appointment was to become effective only upon the failure of the defendants to give bond "conditioned to pay the plaintiff his eventual condemnation money in case said property or any part thereof is found subject to the plaintiff's judgment," especially in view of the fact that it appears from the brief of counsel for the plaintiff in error that he "offered to consent to the grant-

ing" of the injunction, and in view of the offer in his plea as to the giving of a bond.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 838; Dec. Dig. § 153.* Receivers, Cent. Dig. § 68; Dec. Dig. § 42.*]

Error from Superior Court, Dooly County; U. V. Whipple, Judge.

Action by J. W. Taylor against J. J. Clyatt. An interlocutory injunction was granted, and a receiver appointed, conditionally, and defendant brings error. Affirmed.

J. T. Hill, J. W. Dennard, and Robley D. Smith, for plaintiff in error. Fulwood & Murray and J. E. Hall, for defendant in error.

HOLDEN, J. Judgment affirmed.

BECK, J., absent. The other Justices concurred.

(9 Ga. App. 635)

CENTRAL OF GEORGIA RY. CO. v. MACON RY. & LIGHT CO. (No. 2,991.)

(Court of Appeals of Georgia. June 7, 1911. Rehearing Denied Sept. 11, 1911.)

(Syllabus by the Court.)

1. INDEMNITY (§ 14*)—CONCLUSIVENESS OF FORMER ADJUDICATION.

Where one of the parties to a pending action claims that a third person is liable over to him in the event he loses in the suit, and vouches that person by notifying him of the pendency of the suit and giving him opportunity to appear therein, the judgment in that suit is conclusive on the person vouched as to the correctness of the judgment, but is not conclusive of the fact that there is such a relationship between the person vouched and the person vouching as that a right of action over exists.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 41; Dec. Dig. § 14.*]

2. INDEMNITY (§ 13*)—CONTRIBUTION (§ 1*)—NATURE OF OBLIGATION.

A right of action over against some third person for contribution or indemnity in favor of the party cast in a prior suit may arise from relationships either contractual or noncontractual.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29-35; Dec. Dig. § 13.* Contribution, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. INDEMNITY (§ 13*)—IMPLIED CONTRACT—LIABILITY OVER FOR TORT.

Generally speaking, one of two or more joint wrongdoers has no right of action over against those connected with him in the tort for either contribution or indemnity where he alone has been compelled to satisfy the damages resulting from the tort. In some cases two or more persons may be liable as joint wrongdoers, so far as concerns a person injured by a tort, and yet as among themselves the tort may not be joint; and in some cases of this kind a right of action over may exist in favor of the one who has been compelled to pay the damages as against another who as between them was the sole author of the wrong.

(a) Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him; but this is subject

to the proviso that no personal negligence of his own has joined in causing the injury.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29-35; Dec. Dig. § 13.*]

4. CONTRIBUTION (§ 5*)—INDEMNITY (§ 13*)—COMMON LIABILITY—JOINT WRONGDOERS.

The negligence of two persons may be truly concurrent, even as among themselves, though the negligence of the one began antecedently to the negligence of the other, and may, in a greater or less degree, have induced it; and in such cases no right of contribution or indemnity exists between the wrongdoers. Where two separate persons owe to a third person the same concurrent duty as to a particular thing, and by reason of the negligent failure of each and both of them to perform that duty, the third person is injured and he sues only one of those who owed him the duty (basing his right of action solely upon the tortious state of affairs brought about by this joint and common neglect of duty), and recovers damages, no action over arises in favor of the person thus subjected to the sole liability against the other person who owed the same duty.

[Ed. Note.—For other cases, see Contribution, Dec. Dig. § 5; Indemnity, Cent. Dig. §§ 29-35; Dec. Dig. § 13.*]

5. INDEMNITY (§ 14*)—CONCLUSIVENESS—MATTERS CONCLUDED.

Where a right of action over against a third person is asserted by the defendant in a prior tort action who has been compelled by the judgment thereon to pay damages, the plaintiff in the second action is estopped from showing that the causes alleged in the prior action were not the true causes of the damage. The only theory on which the second suit in such a case can proceed is that the judgment in the first case was based on a correct finding of the facts, and that that state of facts, taken in connection with the relationship of the parties to the second suit as to that state of facts, is such as to give an action over in favor of the one as against the other.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 14; Dec. Dig. § 14.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the Central of Georgia Railway Company against the Macon Railway & Light Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Minor, who was an employé of the Central of Georgia Railway Company, was killed through an electric shock which he received while attempting to unload coal from a chute into a locomotive tender. The apron of the chute was to be lowered by a steel cable which Minor caught hold of. An electric wire leading to an arc lamp had been fastened upon the chute. This wire sagged against the cable, and the insulation had become worn or was originally inadequate, so that the current leaked from the electric wire to the cable, and when Minor, standing on the engine tender, reached and touched the cable to lower the apron of the chute, he completed the circuit, and was killed. His widow sued the railway company on account of the homicide, and recovered a judgment, which, on review, was sustained by this court. See Central of Ga. Ry. Co. v. Minor, 2 Ga. App.

804, 59 S. E. 81, where a somewhat fuller report of the facts is given. As disclosed by the opinion in that case, "whether the wires were unsafely located in the beginning, whether the railroad company by ordinary care could have discovered this fact, whether an inspection, reasonable under all the circumstances, would have disclosed the probability of danger, were the questions involved; and as to these things there was evidence pro and con." While that suit was pending the railway company furnished a copy of the plaintiff's petition to the Macon Railway & Light Company, and requested them in writing to defend the action on the ground that, if any liability existed, the railway company had a right of action over against the light company. The present action was brought by the railway company against the light company to recover the amount of the judgment it was forced to pay, together with costs and expenses incurred in connection with the defense of the suit. On the trial it appeared that, while the arc lamp and the wires leading thereto were located on the railway company's property and were used by it for the lighting of its switchyards, they were erected by the light company and belonged to it. The contract between the two companies was in evidence, and provided, so far as is here material, that the light company would furnish the lamps and the current for the lighting agreed on at a specified price. The railway company's agent designated the places where the lights were to be placed, and the light company's employes placed them there. The railway company's agent made some protest against the placing of the light wires on the coal chute, but, after some assurance from one of the electricians of the light company as to the safety of so doing, allowed it. The evidence authorized a finding that the wires were negligently placed upon the coal chute; also that there had been negligence in inspecting them, and in allowing the insulation to become worn; also, that the light company had allowed its circuit to become "grounded" in some other place whereby contact with the wire was rendered especially dangerous. The record of the former suit was introduced in evidence and the touching of the light company regularly shown. The court granted a nonsuit, and on exception to this judgment the case reaches this court.

R. C. Jordan, for plaintiff in error. Guerry, Hall & Roberts, for defendant in error.

POWELL, J. (after stating the facts as above). [1] Codifying a common-law doctrine, Civ. Code 1910, § 5821, declares: "Where a defendant may have a remedy over against another, and vouches him into court by giv-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing him notice of the pendency of the suit, the judgment rendered therein will be conclusive upon the party vouched, as to the amount and right of the plaintiff to recover." The steps necessary to vouch the present defendant were regularly taken, and the judgment against the present plaintiff was duly rendered against it as defendant in the former suit, so in the present case the sole question is, "Does the present plaintiff have a remedy over against the present defendant?" The former judgment does not answer this question.

[2] 2. The right of one who has had a judgment rendered against him to maintain an action over against a third person may arise from relations contractual or noncontractual existing between the two. The duty to indemnify may arise from some express or implied agreement to indemnify, or may arise by operation of law, independently of contract. The natural, legal, and proximate result of a tort committed by A. may be to subject B. to legal liability and to a necessity to respond in damages to some third person, say C., and in some such cases B., when subjected to liability by C., may recover from A. the amount of the damage which has thus been caused to him. Familiar examples of contractual right of action over are to be found in cases where the loser in the first action holds the warranty of a third person or holds his agreement to indemnify.

The present case proceeds *ex delicto*. The petition alleges no warranty or contract for indemnity, but bases the right of the railroad company to recover over against the light company exclusively upon acts of negligence—negligent installation of the wires, negligent failure to insulate them properly, negligent failure to make adequate inspections, the negligent allowing of the electric circuit to become grounded. Hence we must determine whether through one or more of these alleged torts there arose in favor of the railway company a right of action over against the light company on the theory that the loss, which the railway incurred through its employé's widow establishing liability against it on account of her husband's death, can be considered as damages naturally, legally, and proximately flowing to the railway company from the light company's wrongful acts. To state it somewhat differently, was the railway company in the first suit subjected to liability, not for its own immediate wrong, but solely because of the wrong of the light company?

[3] 3. In approaching the consideration of the questions just proposed, it is well to notice at the out-set a doctrine too well settled to admit of doubt or to require the citation of authority. It is the general rule that, where a person has been damaged by the concurrent negligence of two or more joint wrongdoers, he may sue either one or more, or all of them, and that, if he sues only one or only a part of them, those so sub-

jected to liability can claim no contribution from those not sued; and in such cases it is unquestionable that no right of action over ordinarily exists. But there may be cases in which a person who has suffered loss or damage may have the right to sue two persons as if they were joint wrongdoers, without their being, as among themselves, joint wrongdoers. A's servant, B., negligently injures C. in the performance of A's work. From C's standpoint, A. and B. are joint wrongdoers, but as among themselves B. is the wrongdoer and A. is subjected to liability merely by the doctrine of *respondent superior*; so that, if C. sues A. alone and compels him to pay the damage, A., in turn, may compel B. to indemnify him for the loss. So in this class of cases it is always relevant to inquire, "Whose wrong really caused the damage?" For, if it is a joint wrong as between those whom the person originally damaged might have held liable, no right of contribution or indemnity survives to the one whom the person damaged has subjected to the sole liability. Thus, although, as stated above, a master may sometimes have a right of action over against a servant because of whose negligent act he has been subjected to liability to a third person, this is not the case where the master's own negligence has concurred with that of his servant in creating the liability. Generally speaking, a right of action over in such cases exists only where the negligence of him who has been compelled to satisfy the damages is imputed or constructive only, and the negligence of him against whom the remedy over is asserted was actual or more immediately causal.

[4] 4. The very able argument of counsel for the plaintiff in error and the examination of the many cases cited on his excellent brief have convinced us that the widow of the decedent, Minor, could have sued the light company in the first instance, and have recovered for the homicide. That company was using for its purposes a dangerous current of electricity at a place where the decedent and other employés of the railway company were expected to be, and from this fact arose the duty upon the light company of exercising due care to prevent the current's escaping and doing damage. The breach of this duty resulting in the homicide would have given the widow a right of action against the light company. But the fact that the light company owed the decedent this duty, and that a breach of this duty caused the damage, does not necessitate the holding that its wrong alone is to be considered as the proximate cause of the injury, either as between the decedent's widow and the two companies involved in the case, or as between the two companies themselves. After carefully considering the facts of the case in the light of numerous authorities on the general question, the case looks thus to us: When the light company

installed these dangerous appliances in the defendant's switchyards, they became the instrumentalities of two businesses, the light company's business of furnishing light and the railway company's business of making up and operating trains. The decedent who was employed to work in these yards sustained such a relationship to this matter which primarily and contractually concerned only the two companies as that the law imposed upon both companies a joint and several duty owing to him to see that these wires should be kept in reasonably safe condition. As to him, the light company had no right to install these dangerous wires or to maintain them, and the railroad company had no right to allow them to be installed and maintained as a part of its plant, except on the condition, applicable alike to each of the companies, that reasonable care would be taken to safeguard the decedent from injury through them. The judgment in the former case was as against the plaintiff, in the present case, a conclusive finding of one or more of the following facts: That it allowed the wires to be installed in a negligent manner in the first instance; that it was neglectful in allowing them to remain where they were, after the insulation had worn away; that it was neglectful as to inspection; and that one or more of these things was the proximate cause of the homicide. The railway company does not sue the light company in the present case for the breach of any contract on its part to install the wires in a proper manner, or to maintain them or to inspect them, but sues because that company was guilty of substantially the same tortious delinquency as it itself had committed. Thus viewed, the case seems to be on all fours with the case of *Union Stockyards Co. v. C., B. & Q. R. Co.*, 196 U. S. 217, 25 Sup. Ct. 228, 49 L. Ed. 453. In that case the Circuit Court of Appeals certified to the United States Supreme Court the following question: "Is a railroad company which delivers a car in bad order to a terminal company—that is, under contract to deliver it to its ultimate destination on its premises for a fixed compensation, to be paid to it by the railroad company—liable to the terminal company for the damages which the latter has been compelled to pay to one of its employes on account of injuries he sustained while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?" Accompanying the question and for the purpose of illustrating, it was a statement of the facts as follows: "The plaintiff, the stockyards company, is a corporation which owns stockyards at South Omaha, Neb., railroad tracks appurtenant thereto, and motive power to operate cars for the purpose of switching them to their ultimate destinations in its yards from a transfer track which connects

its tracks with the railways of the defendant, the Burlington Company. The Burlington Company is a railroad corporation engaged in the business of a common carrier of freight and passengers. The defendant places the cars destined for points in the plaintiff's yards on the transfer track adjacent to the premises of the plaintiff, and the latter hauls them to their points of destination in its yards for a fixed compensation, which is paid to it by the defendant. The plaintiff receives no part of the charge to the shipper for the transportation of the cars, but the defendant contracts with the shipper to deliver the cars to their places of ultimate destination in the plaintiff's yards, and receives from the shipper the compensation therefor. The defendant delivered to the plaintiff upon the transfer track a refrigerator car of the Hammond Packing Company, used by the defendant to transport the meats of that company, to be delivered to that company by the plaintiff in its stockyards. This car was in bad order, in that the nut above the wheel upon the brake staff was not fastened to the staff, although it covered the top of the staff, and rested on the wheel as though it was fastened thereto, and this defect was discoverable upon reasonable inspection. The plaintiff undertook to deliver the car to the Hammond Company, and send Edward Goodwin, one of its servants, upon it for that purpose, who, by reason of this defect, was thrown from the car and injured while he was in the discharge of his duty. He sued the plaintiff and recovered a judgment in one of the district courts of Nebraska for the damages which he sustained by his fall, on the ground that it was caused by the negligence of the stockyards company in the discharge of its duty of inspection to its employé. This judgment was subsequently affirmed by the Supreme Court of Nebraska (*Union Stockyards Co. v. Goodwin*, 57 Neb. 138, 77 N. W. 357), and was paid by the plaintiff." The Supreme Court, conceding for the sake of the argument that the injured employé could have sued either company or both of them, said: "The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before putting it in use by those who might be injured thereby. We do not perceive that because the duty of inspection was first required from the railroad company that the case is thereby brought within the class which hold the one primarily responsible, as the real cause of the injury, liable to another less culpable, who may have been held to respond for damages for the injury inflicted. It is not like the case of the one who creates a nuisance in the public streets, or who furnishes a defective dock, or the case of the gas company, where it created the condition of unsafety by its own wrongful

act, or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other. In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed by proper inspection to discover the defective brake. The terminal company because of its fault has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another. For the reasons stated, the question propounded will be answered in the negative." In the course of the opinion the cases of *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712, *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685, *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324, and *Boston Woven Hose Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478, are distinguished from cases such as the one then before that court, and such as the one now before this court.

[5] 5. Counsel for the plaintiff in error stresses the fact that it appears from the testimony that the probable cause of the homicide in this case was the fact that at some point on the light company's lines outside of the railroad yards the wire has become grounded, and that but for this fact the touching of the wire against the cable at the coal chute would not have done any harm, that electricity is harmless until a circuit is completed, and that, unless the wire had been grounded elsewhere, the fact that the body of the deceased employe supplied the connection between the cable and

ground would not have completed the circuit. Concede that this is so, and still the right of an action over is not established. The present plaintiff was not mulcted in damages in the former case because of the grounding of the wire elsewhere. If that fact existed and was an act of negligence and was the sole proximate cause of the injury, then the situation is simply that the jury in the first case by reason of the full facts being undisclosed held the wrong person liable. Of course, the very nature of the right of an action over in such cases requires that the second action shall proceed in the theory that the jury found correctly in the first case as to the facts giving rise to the cause of action therein asserted. If the jury made a mistake in saying that the railway company's negligence as to the erection, maintenance, and inspection of the wires was the direct and proximate cause of the decedent's death, and held that company liable when it should not have been held liable, then the error of the jury, and not the act of the present defendant, has caused the present plaintiff the loss sued for, namely, the amount expended in paying off the judgment in the former suit. But, even if this were not true, still under the theory of fact here presented the light company's negligence in allowing the wire to become grounded elsewhere would not have caused the homicide in this case. If the negligence for which the jury held the present plaintiff liable had not concurred with it, if the wire had not been allowed to sag and come in contact with the wire cable, if the proper inspection had been made as to the portion of the wire located in the railway yards. Hence, in this view of the case the negligence was truly concurring, and there can be no action over for contribution or indemnity.

We have read a great many cases bearing more or less directly on the general question presented, and, after considering them all, we cannot escape the conclusion that the case is squarely within the doctrine of the case of *Union Stockyards Co. v. C., B. & Q. R. Co.*, supra; and while, of course, that decision is not absolutely binding on us, still it is very persuasive authority.

Judgment affirmed.

(30 S. C. 490)

TAGGART et al. v. TAGGART.

(Supreme Court of South Carolina. Sept. 11, 1911.)

1. SLAVES (§ 25*)—SLAVE MARRIAGE—LEGITIMACY OF ISSUE.

Whether the issue of a slave marriage is legitimate depends on whether there was a moral marriage between its natural parents in slavery, and whether the father recognized the issue as his son after the enactment of the statute of December 21, 1865 (13 St. at Large, p. 291).

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 115; Dec. Dig. § 25.*]

2. TRIAL (§ 404*)—FINDINGS—CONSTRUCTION.

A finding in a partition action involving the legitimacy of a child of a slave marriage that the testimony of a certain witness, "eliminating the part thereof founded upon hearsay," is not sufficient to establish a moral marriage, did not involve a ruling that reputation was incompetent to prove marriage or pedigree; it not appearing what part of the testimony was excluded as hearsay.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 404.*]

3. APPEAL AND ERROR (§ 928*)—PRESUMPTIONS—ACTION OF TRIAL COURT.

Where a part of a witness' testimony was inadmissible as hearsay, and it cannot be determined from the record on appeal what part of the testimony was excluded as hearsay, the decree merely reciting the elimination of a part thereof as hearsay, it must be presumed that the part excluded was inadmissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8735-8747; Dec. Dig. § 928.*]

Appeal from Common Pleas Circuit Court of Abbeville County; S. W. G. Shipp, Judge. "To be officially reported."

Action by Bessie Taggart and others against Reese Taggart. From the judgment, plaintiff Lonnie Salles and defendant appeal. Affirmed.

Wm. N. Graydon and E. L. Richardson, for plaintiffs. Wm. P. Greene, for defendant.

HYDRICK, J. This action was brought to partition a tract of land, owned by Wash Taggart, deceased, among his heirs. The defendant, Reese Taggart, claims to be the sole owner of the land under an agreement, which he alleges his father made with him, whereby his father agreed to devise the land to him, subject to the support of his mother for life, if he would live with him and help him pay for it, which he alleges he did.

[1] The only other question is whether Lonnie Salles is an heir of Wash Taggart. She is the daughter of Tom Taggart, deceased, who, it is alleged, was the son of Wash Taggart by Caroline Foster. Whether Tom was the legitimate son of Wash and Caroline depends upon whether there was a moral marriage between them during slavery time, and whether Wash recognized Tom as his son after the passage of the act of December 21, 1865 (13 St. at Large, p. 291). *Watson v. Ellerbe*, 77 S. C. 232, 57 S. E. 855. The mas-

ter, to whom the issues of law and fact were referred, reported that the defendant, Reese Taggart, had failed to establish the agreement under which he claims the land, and that the evidence failed to establish a moral marriage between Wash and Caroline previous to the birth of Tom. He therefore recommended that the land be partitioned between the plaintiffs, except Lonnie Salles, and the defendant, Reese Taggart. This report was confirmed by the circuit court. The exceptions of Lonnie Salles and Reese Taggart which raise questions of fact are overruled. A careful consideration of the evidence fails to convince us that the preponderance of it is against the findings of the circuit court.

[2, 3] One of the exceptions of Lonnie Salles raises a question of law, to wit, that the court erred in excluding certain testimony as hearsay. The part of the decree upon which this exception is based reads as follows: "Certainly the testimony of Mary H. Taggart taken at the last reference, eliminating the part thereof founded upon hearsay, is not sufficient to establish a moral marriage." Appellant contends that hearsay—that is, reputation—is competent to prove marriage, pedigree, etc. It does not appear that the circuit court held otherwise. It cannot be said, from the sentence above quoted from the decree, just what part of the testimony of Mary H. Taggart the circuit court eliminated as hearsay. But there was a part of her testimony which was inadmissible, even under the exception to the rule against hearsay evidence, under which that kind of evidence is admitted to prove marriage, pedigree, etc. We must assume, therefore, that the court excluded only what was inadmissible. But, even if all her testimony is admitted, we cannot say that, when its own inconsistencies are considered, and when it is taken in connection with the other testimony in the case, it makes the evidence preponderate in favor of a moral marriage between Wash and Caroline before the birth of Tom.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(30 S. C. 470)

SENECA CO. v. CRENSHAW.

(Supreme Court of South Carolina. Sept. 6, 1911.)

1. SALES (§ 363*)—ACTION FOR PRICE—OWNERSHIP OF DEBT—EVIDENCE—CORPORATIONS—CHANGE OF NAME.

No question for the jury as to whom defendant's debt for goods sold him belongs is raised by the fact that the seller contracted in one corporate name, and the action is brought by plaintiff in another corporate name; there being in evidence the charter, and its amendments showing that the name of a corporation had been changed from that in which the sale

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was made to that in which the action was brought.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 363.*]

2. SALES (§ 113*)—RESCISSION—RETURN OF GOODS.

The contract for sale of goods by plaintiff to defendant having provided that the order should not be subject to countermand, reshipment of the goods by defendant to plaintiff would not affect his liability for the price, in the absence of proof that plaintiff accepted or agreed to accept them.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 113.*]

3. PRINCIPAL AND AGENT (§ 22*)—PROOF OF AGENCY.

Agency cannot be proved merely by one's declaration that he was agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

4. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR.

Any error in admitting an irregular deposition was harmless, there having otherwise been complete documentary proof of plaintiff's case, and no evidence of a defense.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Appeal from Common Pleas Circuit Court of Lancaster County; Ernest Moore, Special Judge.

"To be officially reported."

Action by the Seneca Company against E. L. Crenshaw. Judgment for plaintiff. Defendant appeals. Affirmed.

J. Harry Foster, for appellant. R. B. Allison, for respondent.

WOODS, J. In this action on a written contract for the sale of goods the presiding judge directed a verdict in favor of the plaintiff, the seller, for \$36 and interest thereon.

[1] The exception assigning error in not submitting to the jury as an issue of fact whether the debt was due to the Seneca Chemical & Stock Food Company, and not the plaintiff, the Seneca Company, is without merit. The contract was made and the goods sold under the former corporate name, but the charter and its amendment were introduced showing that the corporate name had been changed to that in which the action was brought.

[2] The contract provided that the order for the goods should not be subject to countermand, and therefore reshipment of the goods by the defendant to the plaintiff would not affect the obligation of the contract, as there was no proof that the plaintiff had accepted or agreed to accept the goods. The testimony offered by the defendant that a man claiming to be the agent of the plaintiff had told him that the goods had been accepted by the plaintiff and put back in stock was properly excluded by the court, for there was no evidence whatever that the person named was an agent of the plaintiff. Agency

cannot be proved by the mere declaration of the person claiming to be agent. General Electric Co. v. Southern Ry., 72 S. C. 251, 51 S. E. 695, 110 Am. St. Rep. 600.

[3, 4] The position taken that the deposition of E. C. Stacy, the vice president and manager of the plaintiff corporation, should have been excluded, even if sustained, would not be material. The contract of sale was in writing and its execution admitted by the defendant, the bill of lading was introduced showing shipment of the goods to the defendant, and there was in evidence a letter of defendant in which he wrote, "I am to-day shipping your goods back, as I cannot handle them." This documentary evidence made out a complete case of sale and delivery of goods to the defendant at a specified price. As there was no evidence of any defense, the presiding judge was required by the law to direct a verdict for the plaintiff. It is therefore evident that consideration of the alleged irregularity in the deposition would be of no practical consequence.

The judgment of this court is that the judgment of the circuit court be affirmed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(89 S. C. 508)

HUNTER v. D. W. ALDERMAN & SONS CO.†

(Supreme Court of South Carolina. Sept. 6, 1911.)

1. MASTER AND SERVANT (§ 279*)—INJURY TO SERVANT—NEGLIGENCE—EMPLOYING INCOMPETENT SERVANT—EVIDENCE.

A single act of negligence of a servant does not tend to prove he was incompetent, much less show the master knew or ought to have known he was incompetent, so as to make it liable, on the ground of negligent employment of him, for injury through his negligence to a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 974; Dec. Dig. § 279.*]

2. MASTER AND SERVANT (§ 238*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A servant who, having two ways of performing his duty, one entirely safe, the other obviously and greatly dangerous, adopts the dangerous way, and as a result is injured, is guilty of contributory negligence, though it was customary to perform the duty in that way.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 747; Dec. Dig. § 238.*]

3. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACT.

A requested charge that, even if plaintiff was negligent in doing a certain thing, he could recover if it be found that was not, but the letting off of steam was, the proximate cause of plaintiff's injury, was objectionable, as assuming that the letting off of steam was negligent, and was the negligence of defendant, and not of plaintiff's fellow servant, when those matters were questions of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

†Rehearing denied October 2, 1911.

4. MASTER AND SERVANT (§ 185*)—INJURY TO SERVANT—FELLOW SERVANTS OR VICE PRINCIPAL—TEST.

The test of whether a servant by whose act a coservant was injured was a fellow servant or a representative of the master, is the character of act being performed by him, whether or not it was the performance of some duty which the master owed the injured servant, performance of which duty the master intrusted to the offending servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

5. MASTER AND SERVANT (§ 190*)—INJURY TO SERVANT—VICE PRINCIPAL.

If as testimony that the manager of a saw-mill the general representative of the master assured an employé that it would be all right for him to adjust the mill, as the machinery would not run that day tends to show the master assumed the special obligation to keep the place of labor safe by not starting the machinery, the starting thereof, injuring such employé, by the direction of a person who was intrusted by the master with the authority to require an act to be done which would start the machinery, was the act of the master, and such person was the representative of the master in that particular act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

Appeal from Common Pleas Circuit Court of Clarendon County; J. C. Klugh, Judge.

"To be officially reported."

Action by Walker F. Hunter against the D. W. Alderman & Sons Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

L. D. Jennings, for appellant. Charlton Du Rant and Davis & Weinberg, for respondent.

WOODS, J. The plaintiff was employed in June, 1906, as a saw filer in the defendant's large sawmill at Alcolu. On the morning of June 2d, plaintiff inquired of Robert Alderman, the manager, if the mill would run that day, and on being informed that it would not he went into the saw pit to adjust the mill. The valve in the pipe between the boiler and the engine having been opened, the blowing of the whistle at the noon hour caused the saw to move and cut the plaintiff. For the injury so received this action was brought, and on the trial the verdict was in favor of the defendant.

There was no doubt that the injuries were caused by the negligence of some one. The issues on the trial were: Was there any negligence of the defendant operating as a proximate cause of the injury? Was the injury due solely to the negligence of the plaintiff, or to the negligence of a fellow servant? Was the plaintiff guilty of contributory negligence? On the part of the plaintiff there was evidence that he was charged with the duty of adjusting the mill as well as felling the saws, that he went into the pit after notifying the manager that he wished to adjust the mill and receiving his assurance that

the mill would not run, and that he was employed in that work in the saw pit, a very dangerous place, when the saws were started without warning, in consequence of the blowing of the whistle by Simon Wither-spoon, the fireman. That the fireman was a fellow servant of the plaintiff was not in dispute, but plaintiff undertook to prove that he blew the whistle in obedience to the order of D. G. Hankinson, and that Hankinson was the representative of the master. The plaintiff admitted that there was a safety device called a "tightener," and that, if he had raised it before going into the pit, the saws would not have moved when the engine started; but he and others testified that the raising of the tightener would have interfered in some degree with the adjustment of the mill. On the part of the defendant, Robert Alderman, the manager, admitted that he had told the plaintiff that the mill would not run that day, but denied that the plaintiff was charged with the work of adjusting the mill. There was evidence that the tightener was provided for the express purpose of disconnecting the saws from the engine so that work could be done on the saws and in the saw pit without danger of injury.

[1] There was no evidence whatever tending to prove negligence in the employment of incompetent servants, and the circuit court was right in so charging the jury. Plaintiff's counsel contend that there was such evidence of negligence on the part of the negro fireman who blew the whistle as to warrant the inference of incompetency. The fireman was a witness for the plaintiff, and testified that, contrary to the order of the manager, he opened the valve in order to blow the whistle and thus started the machinery without notice to employes working around the mill. Assuming this to be an act of negligence on his part, the general rule is that a single act of negligence by a servant does not tend to show that the servant was incompetent. Much less is it to be regarded evidence that the master knew or ought to have known at the time of the accident that the offending servant was incompetent. *Galveston, etc., R. Co. v. Davis*, 92 Tex. 372, 48 S. W. 570; *Bank v. Chandler*, 144 Ala. 286, 39 South. 822, 113 Am. St. Rep. 39; *Smith v. Chicago, etc., Ry.*, 236 Ill. 369, 86 N. E. 150; *Spring Valley Co. v. Pating*, 86 Fed. 433, 30 C. C. A. 168; 26 Cyc. 1297; 2 Thompson on Negligence, 1064.

[2] The following instruction to which exception is taken has been approved in numerous cases: "If the plaintiff, Mr. Hunter, while in the discharge of his duty to the defendant had the choice of two ways of performing it, one entirely safe, and the other obviously and greatly dangerous, and adopted the dangerous way and as a result was injured, he was guilty of negligence, which will

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

bar a recovery by him in this action based on the defendant's negligence, and he cannot relieve himself of the consequences of such contributory negligence by showing that it was customary to perform the duty in the dangerous way." *Stephens v. Southern Ry.*, 82 S. C. 542, 64 S. E. 601; *Lyon v. Charleston & W. C. Ry. Co.*, 84 S. C. 364, 66 S. E. 282; *Lowe v. Southern Ry. Co.*, 85 S. C. 363, 67 S. E. 460, 137 Am. St. Rep. 904; *Dover v. Lockhart Mills*, 86 S. C. 229, 68 S. E. 525; *Lewis v. Gallivan Building Co.*, 87 S. C. 210, 69 S. E. 212.

[3] There was no error in refusing to charge the request that, even if the plaintiff was negligent in not raising the tightener before going into the saw pit, he could nevertheless recover if the jury should find that not to have been the proximate cause of the injury, and that the letting off of the steam was the proximate cause. The request was not sound because it assumed that the letting off of the steam was negligent, and was the negligence of the defendant and not of a fellow servant.

[4] The only point of difficulty is whether the circuit judge erred in charging the jury that Hankinson at whose instance the fireman opened the valve and blew the whistle was a fellow servant of the plaintiff. The following rule stated in *Brabham v. Telegraph Co.*, 71 S. C. 53, 50 S. E. 716, has been followed in many cases: "In determining who are fellow servants the test or rule in this state is not whether the servants are of different grade, rank, or authority, one of them having power to control and direct the services of another, but the test is in the character of the act being performed by the offending servant, whether it was the performance of some duty which the master owed to the injured servant, the performance of which duty the master intrusted to the offending servant."

[5] Applying this rule, we think there was some evidence for the consideration of the jury on the issue whether Hankinson was a fellow servant or the representative of the master in directing the fireman to blow the whistle. He testified that he was foreman of a gang of laborers with authority to employ and discharge, that he did not employ the fireman, but was allowed to direct him to the extent of telling him when to blow the whistle so as not to work the laborers over time, and that on this occasion he did direct the fireman to blow the whistle. The testimony of the plaintiff that the manager who was the general representative of the defendant had assured him that it would be all right for him to adjust the mill as the machinery would not run that day tended to show a special obligation assumed by the master with respect to the safety of the place of labor. If it be true that the master assumed this special obligation to keep the

place of labor safe by not starting the machinery, and it was started by the direction of a person who was intrusted by the master with the authority to require an act to be done which would start the machinery, such act would be the act of the master and such person the representative of the master in that particular act.

There was evidence tending to show that Hankinson was not the representative of the master, but a mere fellow servant; but the considerations above set out show that there was also evidence tending to show that he was the representative of the master. In charging the jury that they could draw no other inference from the evidence than that Hankinson was a fellow servant of the plaintiff we think the circuit court erred, but we express no opinion as to what conclusion the jury should draw from the conflicting evidence on the subject.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause be remanded to that court for a new trial.

JONES, C. J., and GARY, A. J., and HYDRICK, J., concur.

(80 S. C. 283)

**MONTGOMERY v. UNITED STATES
FIDELITY & GUARANTY CO.†**

(Supreme Court of South Carolina. Sept. 6, 1911.)

1. CONTINUANCE (§ 20*) — DISCRETION OF COURT—ABSENCE OF COUNSEL.

There is no abuse of discretion in requiring defendant to go to trial on the call of the case, disregarding a telegram of counsel in another state merely stating the impossibility of their getting to the trial, it being for the court to say whether the circumstances were such as to excuse their absence, and defendant being represented by capable local counsel, and this, though defendant's counsel is given short notice of demand for production of letters; they being letters which defendant should have produced and placed in the hands of its counsel before the call of the case for trial.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 51, 53, 57; Dec. Dig. § 20.*]

2. INSURANCE (§ 627*)—SERVICE ON AGENTS—FOREIGN INSURANCE COMPANIES.

Code Civ. Proc. 1902, § 155, making service on any agent of a defendant corporation sufficient, is not repealed, as to foreign insurance companies, by Act March 8, 1910 (26 St. at Large, p. 775) § 17, requiring such companies to appoint as agent the state insurance commissioner to accept service on their behalf.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 627.*]

3. INSURANCE (§ 28*)—BOND OF COMPANY TO PAY JUDGMENT — ACTION — PROOF AS TO JUDGMENT.

Plaintiff suing on a bond required by Act March 1, 1909 (26 St. at Large, p. 11) § 13, to be given by an insurance company licensed to do business in the state, conditioned for payment of any judgment entered against it in a court of competent jurisdiction in the state, need not prove the sufficiency of the service in

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† Remittitur held up by order of court September 15, 1911.

which the judgment was rendered; the judgment being regular on its face, and so presumed to be valid.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 26.*]

4. INSURANCE (§ 26*)—BOND OF COMPANY TO PAY JUDGMENT—ACTION—PARTIES.

By express provision of Act March 1, 1909 (26 St. at Large, p. 11) § 13, the judgment creditor of an insurance company licensed to do business in the state may sue on the bond required to be deposited by it with the insurance commissioner for satisfaction of any judgment against it, so that the action does not have to be brought by the commissioner.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 26.*]

Appeal from Common Pleas Circuit Court of Clarendon County; J. W. De Vore, Judge.

"To be officially reported."

Action by J. M. Montgomery against the United States Fidelity & Guaranty Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Ryals, Grace & Anderson and J. H. Lesesne, for appellant. Davis & Weinberg, for respondent.

WOODS, J. The statute law of this state provides: "Before licensing any insurance company to do business in this state, the insurance commissioner shall require each such company to deposit with him an approved bond or approved securities, in the discretion of the commissioner, as follows: * * * Each fire, or accident, or casualty, or surety insurance company, or any company not herein specified, ten thousand dollars. * * * If a bond be given, it shall be conditioned to pay any judgment entered up against any such company in any court of competent jurisdiction in this state, and such judgment shall be a lien upon the bond or securities. In case a bond is given, the judgment creditor shall have the right to bring suit on said bond for satisfaction of the judgment in the county in which the judgment is received." Act March 1, 1909 (26 Stat. 7) § 13. On June 20, 1910, the plaintiff recovered a judgment for \$1,045.43 against the Florida Home Insurance Company on a fire insurance policy issued by that company. The execution having been returned nulla bona, the plaintiff brought this action under the statute above quoted, and recovered judgment against the defendant as surety on the statutory bond of the Florida Home Insurance Company, filed with the insurance commissioner.

[1] The first exception assigns error in requiring the defendant to go to trial on the call of the case. There was no abuse of discretion in disregarding a telegram from counsel in Atlanta merely stating that it was impossible for them to get to the trial. The defendant was represented by counsel of the Manning bar quite capable of taking care of its interests, and it was not for the

absent counsel, but for the court, to determine whether the circumstances were such as to excuse their absence. It is true that defendant's counsel was given short notice of demand for the production of certain original letters, but the notice related to letters which the defendant ought to have procured and placed in the hands of its counsel before the call of the case for trial. Aside from that, there is no intimation against the correctness of the copies introduced by plaintiff. The circuit judge overruled a demurrer to the complaint, and sustained a demurrer to special defenses set up in the answer. The defendant offered no testimony, and at the conclusion of the evidence the presiding judge directed a verdict in favor of the plaintiff for the amount claimed. The questions raised will be considered without special reference to the pleadings.

[2] The defendant first contended that there was no valid judgment in favor of the plaintiff against the Florida Home Insurance Company on the ground that the Florida Company had not been served according to law. The judgment roll showed service of the summons and complaint on B. C. Wallace as agent of the insurance company at Sumter, S. C. Under section 155 of the Code of Procedure of 1902, service on any agent of a defendant corporation is sufficient. Section 17 of the act of 1910 (26 Stat. 775), requiring foreign insurance companies to appoint as agent the state insurance commissioner to accept service on their behalf, contains no intimation of an intention to repeal the provision of section 155 of the Code of Procedure above recited.

[3] The position taken by defendant's counsel that it was incumbent on the plaintiff to prove in this action that Wallace was the agent of the Florida Home Insurance Company when the summons in the suit against the company was served upon him is without foundation. The judgment was valid on its face, and was itself evidence that the court on the hearing of the case in which it was rendered had passed on the sufficiency of the service of the summons. "The judgment of a domestic court having general and superior jurisdiction is always to be presumed regular and valid and founded upon jurisdiction properly and duly acquired, until the contrary is definitely made to appear in some permissible manner." Black on Judgments, 329; Ex parte Pearson, 79 S. C. 302, 60 S. E. 706; Voorhees v. Jackson, 10 Pet. 449, 9 L. Ed. 490. The judgment against the Florida Home Insurance Company, being regular on its face and not subject to collateral attack, and not having been set aside by a direct proceeding instituted for that purpose, stood as a valid judgment before the court when this suit was instituted, and when it was tried. When introduced in evidence unsatisfied, the judgment

against the Florida Home Insurance Company established the liability of the defendant as surety, for its bond was conditioned as required by the statute to pay "on demand the full and just sum of any judgment entered up against said Florida Home Insurance Company in any court of competent jurisdiction in this state."

[4] There is nothing in the objection that the action should have been brought in the name of the insurance commissioner, for the reason that the statute expressly provides that the judgment creditor shall have the right to bring suit on the bond. There was no issue for the jury on the evidence offered, and the circuit court properly directed a verdict for the plaintiff for the amount claimed.

The judgment of this court is that the judgment of the circuit court be affirmed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(89 S. C. 454)

BAMBERG v. HARRISON et al.
(Supreme Court of South Carolina. Sept. 6, 1911.)

SALES (§ 235*)—BONA FIDE PURCHASER—NOTICE—DELIVERY OF CHATTEL MORTGAGE FOR RECORD.

A purchaser of a horse is not charged with constructive notice of a mortgage thereon merely seasonably lodged with the recording officer, but not recorded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 684; Dec. Dig. § 235.*]

Appeal from Common Pleas Circuit Court of Barnwell County; W. B. Gruber, Special Judge.

"To be officially reported."

Action by G. Frank Bamberg against C. Harrison and another. Judgment for defendants. Plaintiff appeals. Affirmed.

H. M. Graham and J. E. Davis, for appellant. J. E. Tobin and R. A. Ellis, for respondents.

WOODS, J. On February 10, 1909, the plaintiff, G. Frank Bamberg, sold a horse to the defendant C. Harrison, taking as security for the purchase money a mortgage on the horse. On March 10, 1909, the mortgage was mailed to W. B. Causey, clerk and ex-officio register for Hampton county, to be recorded. Causey died on April 12, 1909, and J. L. Thames, probate judge, under the requirements of the statute, took charge of the clerk's office the next day. The mortgage had not then been recorded, and was not among the papers on file for record, but was handed to Thames by a brother of the deceased clerk and recorded on April 25, 1909. The deputy clerk indorsed on the paper "Recorded the 16th March, 1909," for the reason that the deceased, Causey, had marked on the paper "3-16," thereby indicating that the paper had reached him for filing on

March 16th. In the meantime before the recording of the paper the defendant J. L. Ellis on February 22, 1909, took a bill of sale or mortgage on the same horse, and on March 16th purchased him for valuable consideration.

In this action of claim and delivery Ellis claims the horse as a purchaser for valuable consideration without notice. The question whether he had actual notice of the Bamberg mortgage was submitted to the jury and decided in his favor. The circuit judge charged the jury, in effect, that a mortgagee is not protected against a subsequent purchaser or creditor for value without actual notice of the mortgage by the mere fact that the mortgagee had lodged his paper for record within the time allowed by law for the recording of papers; that, on the contrary, the subsequent purchaser or creditor without notice is protected if the mortgage has not been actually recorded. The question made by the appeal, then, is whether under a statute which requires a mortgage to be recorded before it can operate as constructive notice a mere delivery of the mortgage to the recording officer can operate as constructive notice to subsequent creditors and purchasers. The courts of highest resort are in direct conflict on the question, as will be seen by reference to the cases collated in notes in 96 Am. St. Rep. 398, and 4 Am. & Eng. Ann. Cas. 561. But in this state the rule is firmly established that the purchaser of mortgaged property in the absence of express notice may safely rely on the record and is not bound by the neglect or errors of the recording officer. *Building & L. Ass'n v. McCartha*, 43 S. C. 72, 20 S. E. 807; *Burris v. Owen*, 76 S. C. 481, 57 S. E. 542. A cogent reason for preferring this rule is that one who files a paper for record always has it in his power to examine the records and satisfy himself that his paper has been duly and accurately recorded, while it is impossible for a prospective purchaser or creditor to anticipate and inquire about and ascertain the innumerable forms which the negligence or mistakes of the officer may assume.

The judgment of this court is that the judgment of the circuit court be affirmed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(156 N. C. 24)

HINTON v. HICKS et al
(Supreme Court of North Carolina. Sept. 13, 1911.)

MORTGAGES (§ 158*)—PRIORITY—TIME OF TAKING EFFECT—"CONCURRENT ACTS."

A mortgage given by a purchaser before his deed was delivered and registered is subject to a purchase-money mortgage executed and registered at the time of the delivery and registration of the deed, though the first mortgage was first registered, for the purchaser had no title when he executed the first mortgage, and as the deliv-

ery of the deed and execution of the purchase-money mortgage were concurrent the title did not rest in the purchaser for any appreciable length of time, but passed immediately under the purchase-money mortgage, for "concurrent acts" are in law but one act.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 341; Dec. Dig. § 158.*]

Appeal from Superior Court, Camden County; Justice, Judge.

Action by C. L. Hinton against G. W. Hicks and another. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial ordered.

W. A. Worth, for appellant. Wm. I. Halstead, for appellees.

BROWN, J. The plaintiff's evidence tends to prove these facts: In November, 1907, D. E. Williams and W. T. Stafford agreed to sell to G. W. Hicks the tract of land described in the pleadings. A deed was prepared by Williams and Stafford for the purpose of conveying to Hicks the said lands, and the mortgage to secure the purchase price was also prepared. Both instruments were dated November 8, 1907. The evidence shows that Stafford was out of the state at the time the contract to sell was made, and Williams held the deed until Stafford's return, when on December 2, 1907, they both signed and acknowledged the deed, and Hicks, having previously acknowledged the mortgage for the purchase money, delivered the mortgage and note to Williams, who, on the same day of acknowledgment, to wit, December 2, 1907, placed the deed and mortgage in an envelope and mailed them together to the register of deeds for registration. The mortgage given by Hicks was for the purpose of securing the purchase money of the lands. On the 19th day of November, 1907, G. W. Hicks executed and delivered to Willie Hicks a mortgage, wherein he attempted to convey the lands contracted to be conveyed to him by Williams and Stafford to secure the payment of \$300 alleged to be due Willie Hicks. This latter mortgage was recorded on the 23d of November, 1907, before G. W. Hicks had acquired any title whatever in the lands. Hicks failing to pay the note given to Williams and Stafford to secure the purchase price, these mortgagees made sale, and conveyed the property to the plaintiff in this action. Willie Hicks also foreclosed under his mortgage because of the nonpayment of the indebtedness therein mentioned, and made deed, as mortgagee, to the defendant Etheridge.

Under this evidence his honor ruled that plaintiff could not recover, presumably on the ground that the mortgage to Williams and Stafford to secure the purchase money was recorded after the mortgage given by G. W. Hicks to Willie Hicks, and that therefore the latter took precedence. In this there is error. The question appears to be

well settled by adjudications of this court. The execution and registration of the deed to the purchaser and of the mortgage for the purchase money were not only intended to be, but in law were, concurrent acts, and concurrent acts are one act. The title was not in G. W. Hicks when the mortgage to Willie Hicks was registered. It vested in G. W. Hicks but for a moment, possibly, when the vendor's deed was filed for registration, but passed simultaneously into the purchase-money mortgagees, as that mortgage was filed at the same moment. As said by Justice Reade in *Bunting v. Jones*, 78 N. C. 243 (a similar case): "The title did vest, but it did not rest in Jones, but like the borealis race, that flits ere you can point its place." See, also, *Moring v. Dickerson*, 85 N. C. 466; *Belvin v. Paper Co.*, 123 N. C. 138, 31 S. E. 655.

New trial.

(156 N. C. 586)

GRADED SCHOOL TRUSTEES OF ELIZABETH CITY v. HINTON et al.

(Supreme Court of North Carolina. Sept. 13, 1911.)

APPEAL AND ERROR (§ 66*)—NECESSITY OF FINAL JUDGMENT.

Though exceptions are noted, an appeal before a final judgment is rendered is premature, and will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 329-343; Dec. Dig. § 66.*]

Appeal from Superior Court, Pasquotank County; O. H. Allen, Judge.

Action by the Graded School Trustees of Elizabeth City against R. L. Hinton and others. Judgment for plaintiffs, and defendants appeal. Dismissed.

C. E. Thompson and Pruden & Pruden, for appellants. J. K. Wilson and R. W. Turner, for appellees.

PER CURIAM. This appeal is premature, and upon motion is dismissed. Exceptions should be noted, and, when a final judgment is rendered, an appeal may be taken. *Hendrick v. Railroad*, 96 N. C. 431, 4 S. E. 184; *Railroad v. Warren*, 92 N. C. 620; *Telegraph Co. v. Railroad*, 83 N. C. 420.

Appeal dismissed.

(156 N. C. 15)

GRANT v. MITCHELL

(Supreme Court of North Carolina. Sept. 13, 1911.)

1. WITNESSES (§ 58*)—HUSBAND AND WIFE—CRIMINAL PROSECUTION—WIFE INCOMPETENT TO TESTIFY.

Under Revisal 1905, § 1636, providing that no husband or wife shall be competent to give evidence for or against the other in an action for criminal conversation, plaintiff's wife is an incompetent witness for defendant in an action

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for criminal conversation to rebut plaintiff's evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 162; Dec. Dig. § 58.*]

2. WITNESSES (§ 52*) — COMPETENCY — HUSBAND AND WIFE.

At common law the wife was incompetent as a witness for or against the husband.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124-136; Dec. Dig. § 52.*]

3. EVIDENCE (§ 186*) — SECONDARY EVIDENCE — CONTENTS OF LETTERS — SUFFICIENCY.

A witness in an action for criminal conversation, after facts upon which secondary evidence as to the contents of letters written to plaintiff's wife by defendant was found admissible, testified that there were 10 or a dozen or maybe 15 of them, and that "they were what I would call love letters, and were couched in very passionate terms." Held that, while it is not required that secondary evidence of the contents of letters should repeat the words used, the witness must be able to state the substance of the letters, and that the witness' statement of the impression or effect of the letters was incompetent to show their contents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 663; Dec. Dig. § 186.*]

4. HUSBAND AND WIFE (§ 348*) — CRIMINAL PROSECUTION — EVIDENCE — DEFENDANT'S LETTERS AND HER CONDUCT.

In an action for criminal conversation, a letter of defendant to plaintiff's wife, and the testimony of witnesses as to the conduct of the defendant, and conversations with him, are admissible in evidence.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 348.*]

Appeal from Superior Court, Bertie County; Carter, Judge.

Action by Claude Grant against John W. Mitchell. Judgment for plaintiff, and defendant appeals. New trial.

The plaintiff introduced evidence tending to prove the allegations of his complaint, and evidence to the contrary was introduced by the defendant. In support of the contention that an improper relationship existed between the wife of the plaintiff and the defendant, the plaintiff introduced J. N. Vann, who, after testifying that he knew the handwriting of the defendant, and to facts from which the court found that secondary evidence was admissible, testified as follows: "I read the whole batch of letters given me by Asa Rice, and can give the substance of them. There were 10 or a dozen, or maybe 15 of them. They were written to plaintiff's wife, and were what I would call love letters, and were couched in very passionate terms. They were written by the defendant." The defendant in apt time objected to all of the above testimony. Objection overruled, and defendant excepted. The defendant offered the wife of the plaintiff as a witness to rebut the evidence of the plaintiff. She was held to be incompetent, and the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Martin, Winborne & Winborne, J. R. Mitchell, and John H. Kerr, for appellant. Peebles & Harris and Winston & Matthews, for appellee.

ALLEN, J. [1] The wife of the plaintiff was not a competent witness under Revisal 1905, § 1636, which reads as follows: "In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation. No husband or wife shall be compellable to disclose any confidential communications made by one to the other during their marriage."

[2] The wife was incompetent as a witness for or against the husband at common law. The statute removes this disability in certain actions, but specifies those actions in which she cannot testify, and as to the one under consideration, "on account of criminal conversation," says: "Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding on account of criminal conversation." The rule denying the right to the wife to be heard when her character is so seriously assailed seems cruel, but we cannot permit this consideration to induce us to refuse to give effect to the legislative act. She was offered as a witness against the husband in an action on account of criminal conversation, and this the statute says cannot be done. The case of *Broom v. Broom*, 130 N. C. 563, 41 S. E. 673, which was an action for divorce, is not an authority for the plaintiff. In that case the wife was a party, and the decision is upon the ground that she was not testifying "for or against" her husband, but in her own defense.

[3] The objection to the evidence of the witness Vann is well taken. He was introduced to testify to the contents of 10, 12, or 15 letters, and, instead of telling what was in the letters, he gives the impression made on his mind in one sentence: "They were what I would call love letters, and were

couched in very passionate terms." Evidence of the contents of a paper, which has been lost, of conversations, and of the testimony of a deceased witness on a former trial, rest on the same principle. It is not required that the words used should be repeated, but the witness must be able to state the substance of what was written or said, and not its effect. "In attempting to supply the loss of the testimony of a deceased witness, the secondary evidence ought manifestly to be as full, and as nearly the same as that for which it is offered as a substitute, as possible. The very words which the deceased witness spoke would be the best, and were formerly supposed to be necessary (see *King v. Joliffe*, 4 Term Rep. 290), but that strictness, having made the rule impracticable, has long since been abandoned. The secondary witness may now give the substance, but not the mere effect, of the former testimony. To allow him to state the latter only would be to permit him to decide upon the effect of the testimony, instead of submitting it to the jury to whom it properly belongs." *Jones v. Ward*, 48 N. C. 26, 64 Am. Dec. 590. "Upon the death of a witness who has been examined in a judicial proceeding, such examination is admissible as secondary evidence in a subsequent trial between the same parties. Here it is required that the secondary evidence should be full, because it is offered as a substitute. The testimony of the deceased witness should be placed before the new, as the law required it to be placed before the former, triers. Both are entitled not only to the truth, but to the whole truth. The copy must be ascertained to be faithful before it is admitted as a representative of the original. Besides, to receive an avowedly imperfect account of what had been formerly testified in lieu of the former testimony itself would be to encourage the party to offer partial instead of full secondary evidence. He would be interested to seek out such witnesses as remembered only those portions of the former testimony as made in his favor." *Ingram v. Watkins*, 18 N. C. 444. The principle here announced has been approved many times in this court. *Wright v. Stowe*, 49 N. C. 518; *Bule v. Carver*, 73 N. C. 265; *Paine v. Roberts*, 82 N. C. 452; *Carpenter v. Tucker*, 98 N. C. 317, 3 S. E. 831. The purpose of the rule is to place before the jurors, as near as possible, the substitute for the original, and let them pass on its effect. If it were otherwise, the opinion of an adverse witness would be evidence, or the jury might hear the parts of a writing prejudicial to a party, when in the same writing there are expressions, qualifying what is testified to, of which the jurors would have no knowledge.

[4] The letter of the defendant to the wife of the plaintiff was competent, as was also the evidence of witnesses as to the conduct

of the defendant and conversations with him.

We find no error in the charge of his honor, or in his refusal to give certain instructions prayed for by the defendant. There must be a new trial.

New trial.

(156 N. C. 615)

STATE v. VAUGHAN.

(Supreme Court of North Carolina. Sept. 18, 1911.)

1. CRIMINAL LAW (§ 539*)—EVIDENCE—DECLARATIONS—CAUTION TO DEFENDANT.

Where the record shows that defendant, who was without counsel at his preliminary examination, was not cautioned by the justice before the examination commenced, as required by Revisal 1905, § 3194, that he was at liberty to refuse to answer any question that may be put to him, and that his refusal to answer could not be used to his prejudice, but was "sworn" with other witnesses at the preliminary examination, and on his request to testify was examined as a witness, the admission in evidence at the trial of declarations then made by defendant is reversible error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1230; Dec. Dig. § 539.*]

2. CRIMINAL LAW (§ 235*)—PRELIMINARY EXAMINATION—CAUTION AS TO RIGHTS.

Where defendant at his preliminary examination is represented by attorney and is placed upon the stand as a witness in his own behalf, no caution as to his rights is necessary.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 235.*]

Appeal from Superior Court, Hertford County; J. S. Adams, Judge.

Lonnie Vaughan was convicted of larceny, and he appeals. New trial.

Winborne & Winborne, for appellant. The Attorney General and J. C. Little, for the State.

BROWN, J. The insufficiency of the evidence to convict was strongly urged by counsel for defendant; but, as there is to be another trial, it is unnecessary to pass on the exception.

[1] The second exception is to the ruling of the court admitting declarations of the defendant before the justice of the peace upon a preliminary examination, upon the ground that it did not appear that the defendant was duly cautioned in accordance with the statute. Revisal 1905, § 3194. It appears in the record that the justice "swore" the defendant along with all the other witnesses at the preliminary hearing, and then asked the defendant if he desired to be a witness. Defendant said he did and was examined. The defendant is a young, ignorant negro, and was not represented by counsel before the justice. We think both the letter and spirit of the statute requires that the defendant should have been advised of his rights by the justice to the effect that he was not required to testify; that he was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

at liberty to refuse to answer any question put to him; and that his refusal to answer shall not be used to his prejudice. *State v. Parker*, 132 N. C. 1018, 43 S. E. 830; *State v. Simpson*, 133 N. C. 677, 45 S. E. 567.

[2] When the defendant is represented by counsel and placed upon the stand as a witness in his own behalf, no caution is necessary. In this case the prisoner was not advised of his rights, but was practically invited by the justice to take the stand.

New trial.

(136 Ga. 633)

BUTLER v. CENTRAL GEORGIA BRICK CO.

(Supreme Court of Georgia. Aug. 15, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§§ 259, 260*)—INJURIES TO SERVANT—PLEADING.

In a suit for damages against the Central Georgia Brick Company, a corporation, for the homicide of her husband, the petition of Mattie B. Butler, as amended, alleged, among other things: Aaron Butler was an employé of defendant, engaged with other employés in loading certain railroad flat cars with brick, and shoving the loaded cars out of the way along the track to give place on the railway track for other empty cars to be loaded. Bradley Ward, an officer of the corporation, was foreman of all of these employés; not being engaged in the work himself, but it being his duty to direct and supervise it, he having also authority to employ and discharge employés working under him. One car had been loaded, and the plaintiff's husband, with other employés, under express direction of Bradley Ward, who was then supervising the work, undertook to push the loaded car away. While so engaged, in full view and speaking distance of Bradley Ward, and before the loaded car was out of the way, Ward negligently directed other employés to move an empty car from the rear to the place for loading, knowing that the plaintiff's husband was in a position so that he could not see and did not know the second car was moving onto him, and negligently failed to notify him of the approach of the empty car, which, being pushed by the other employés of defendant, under direction of Ward, crushed and killed the plaintiff's husband. *Held*:

(a) That, though it was alleged that the plaintiff's husband and Bradley Ward were engaged in serving the same corporation relative to loading cars, the allegations were not of such character as to charge that they were fellow servants.

(b) Nor were the allegations of such character as to show that the danger was as obvious to the plaintiff's husband as it was to the master.

(c) Accordingly it was erroneous to dismiss the petition on demurrer, which complained that: (1) "The sole negligence alleged is the failure to give warning to said Aaron Butler, and Bradley Ward is shown to have been simply fellow servant with said Aaron Butler, because at the time of the alleged injury with respect to the corporation he was simply engaged with Aaron Butler in the same work, and his part in the particular work in which Aaron Butler was injured was not different in his relation to the master from that of the others engaged in that work." (2) "And because under the allegations in the petition as amended it is

not shown that the damage was not as obvious to said Butler as to the others."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 837-848; Dec. Dig. §§ 259, 260.*]

2. DEMURRER OVERULED.

Other grounds of demurrer were urged, but the court overruled them, and the defendant did not except to the judgment.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by M. B. Butler against the Central Georgia Brick Company. From a judgment for defendant, plaintiff brings error. Reversed.

J. W. Preston, Sr., and L. D. Moore, for plaintiff in error. Hardeman, Jones, Callaway & Johnston, for defendant in error.

ATKINSON, J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 629)

PARKER v. GEORGIA COAST & P. R. CO.

(Supreme Court of Georgia. Aug. 15, 1911.)

(Syllabus by the Court.)

RAILROADS (§ 344*)—OPERATION—ACCIDENTS AT CROSSINGS—PLEADING.

The petition was not subject to general demurrer. *Shaw v. Georgia Railroad Co.*, 127 Ga. 14, 55 S. E. 960; *Southern Railroad Co. v. Chatman*, 124 Ga. 1023, 53 S. E. 692, 6 L. R. A. (N. S.) 283; *Lavier v. Central R. Co.*, 71 Ga. 222; *Cleveland v. Central R. Co.*, 73 Ga. 793; *Brunswick & Western R. Co. v. Gibson*, 97 Ga. 489, 25 S. E. 484.

(a) By the terms of the order the judge only sustained the general demurrer, and does not appear to have ruled upon any of the grounds of the special demurrer.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.*]

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Action by Katie R. Parker against the Georgia Coast & Piedmont Railroad Company. Judgment for defendant. Plaintiff brings error. Reversed.

Mrs. Katie R. Parker instituted suit for damages against the Georgia Coast & Piedmont Railroad Company for the homicide of her husband. The defendant filed general and special demurrers, and afterwards the plaintiff offered an amendment, which was allowed and made a part of the record. The defendant renewed its general demurrer to the petition as amended, and after argument had the demurrer was sustained and the petition dismissed, and the plaintiff excepted. The petition as amended, in substance, alleged the following: In the incorporated town of Ludowici the railroad track of the defendant runs east and west, and crosses at right angles the track of the Atlantic Coast Line Railroad Company. At a point about

100 yards east of the intersection a side track of the Atlantic Coast Line connects with the main line of the defendant, by means of which cars are shifted from one railroad to the other. About 4 o'clock in the afternoon a passenger train was standing about 300 yards east of the intersection of the main lines of the two railroads, and 200 yards east of the intersection of defendant's main line with the side track first mentioned, on another of defendant's side tracks which ran parallel to its main line. At the same time a freight train, consisting of an engine and cars at either end of the engine, was standing on the side track which connected the two railroads. The passenger train was due to leave, but was still receiving passengers intending to leave Ludowici. Plaintiff's husband contemplated departure on the passenger train, and for that purpose he walked from his house eastwardly along defendant's main line track in the direction of the standing passenger train. Plaintiff was at a house near the railroad track, intending to leave there and meet her husband at the train. Her husband was intent on catching the train, and also looking ahead at a slight angle toward the house from which plaintiff intended to leave. The wind was blowing from the direction in which the husband was going, so he could not hear an approaching train from behind him. He saw the freight train standing on the side track, but did not think that it would at that time run out on the main line and endanger pedestrians walking along the main line for the purpose of reaching the passenger train; but after he had passed the point of intersection of the side track (on which the freight train was standing) with defendant's main line, the freight train, without warning and without his knowledge, and without ringing the bell, blowing the whistle, or giving other signals (as the rules of the defendant required), backed out upon the main line and proceeded "to back" in the direction of the passenger train, and, though plaintiff's husband was in plain view of defendant's agents and servants who were operating the freight train on the main track, they ran over and killed him. The railroad track was the usual and necessary way for pedestrians to reach the train, and the husband was walking along the track in accordance with a long-continued custom and license by defendant.

The specific grounds of negligence were:

(a) That the engineer who was engaged in operating the engine did not ring a bell, blow a whistle, or give other warning at the time the engine was set in motion, which warning, according to the rules of the company and long-established custom, should have been given, and on the giving of which petitioner's husband had the right to and did rely, and which, if given, would have apprised plaintiff's husband of the moving of the engine, and would have enabled him to have left

the track in safety. (b) The engineer operating the engine, after the engine was set in motion, did not give warning to petitioner's husband of the approach of the engine and cars, after it became apparent to him, in the exercise of ordinary care, or should have become apparent to him, had ordinary care been exercised by him, that plaintiff's husband was not aware of the approaching train; and after it was apparent to the engineer, in the exercise of ordinary care, that plaintiff's husband would not get off the track without warning, the engineer did not blow the whistle, ring the bell, or give other warning, but negligently, carelessly, and with recklessness amounting to wantonness, ran down petitioner's husband and killed him. (c) The engineer, after seeing the position of peril in which petitioner's husband was placed, did not slacken the speed of his engine, did not have the same under control, but negligently permitted the cars attached to the engine to overtake petitioner's husband and run him down and kill him, when in the exercise of ordinary care the speed of the engine could have been checked, the engine could have been under proper control, and no harm would have resulted. (d) Defendant company violated its rules in not having a watchman, flagman, or lookout on the front of the cars as they were backing towards plaintiff's husband, to give signals to the engineer, and also to give warning to parties then and there using the track of the defendant as a passageway toward the passenger train.

The grounds of demurrer were: (1) That the petition set forth no cause of action against the defendant, and set forth no facts on which a recovery could legally be based. (2) That the allegations were not sufficiently definite or certain, nor sufficiently full and explicit as to the manner in which the alleged acquiescence and permission of the defendant was manifested with respect to persons walking along its roadbed and between its tracks, nor as to the permission or assent of the defendant to such use of its tracks or roadbed by pedestrians, nor as to the alleged license by which it is claimed that pedestrians were entitled to the use of said roadbed; that said petition was defective in failing to state whether such consent, license, acquiescence, or permission was manifested by acts or by words, and, if by words, in failing to state whether the same were oral, as coming from some authorized representative of the defendant, or were in writing, and, if in writing, in failing to state what the writing was and the language thereof; that the petition was further defective in failing to state any facts showing any custom or license, acquiescence, or permission in respect to the matters alleged. (3) That the petition was further defective in not setting out the rules of the company referred to, or designating them with sufficient

certainly to enable the defendant to determine what rules were referred to.

Upon the hearing the judge passed the following order: "Upon consideration of defendant's demurrer to plaintiff's amended petition, and of the argument of counsel thereon, it is considered, ordered, and adjudged that the general demurrer be and the same is hereby sustained, and the petition dismissed."

Oliver & Oliver, for plaintiff in error.
Hitch & Denmark, for defendant in error.

ATKINSON, J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 618)

MERRITT et al. v. JONES et al.

(Supreme Court of Georgia. Aug. 15, 1911.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 384*)—SALES UNDER ORDER OF COURT—OPERATION AND EFFECT.

The sale of realty by an administrator at public sale, who is duly authorized to sell by an order of the court of ordinary, to an innocent purchaser, divests the title of the heirs at law of the intestate, although there may be irregularities in the sale. Civ. Code 1895, § 3463 (Civ. Code 1910, § 4039).

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1569; Dec. Dig. § 384.*]

2. EXECUTORS AND ADMINISTRATORS (§ 347*)—SALES UNDER ORDER OF COURT—SUFFICIENCY OF ORDER.

Where the application by an administrator for an order to sell lands for the purpose of paying the debts and making distribution among the heirs of the intestate set forth that the intestate "owned at the time of her death two tracts of land, one lying in Worth county, known as the home place, where the deceased resided at the time of her death, containing 50 acres, and another tract of improved land, containing 202½ acres, lying in the county of Randolph," and an order was duly granted to sell "the lands belonging to said estate (for the purpose of paying the debts and distribution among the heirs) lying in said county, of the home place, and a tract of land lying in Randolph county, the one in Worth county containing 50 acres, and the one in Randolph county, improved, containing 202½ acres, more or less," such order was legal authority to the administrator to sell an improved lot of land in Randolph county of a given number belonging to the intestate at the time of her death, where it appeared that such lot was the only land owned by the intestate at the time of her death in Randolph county. Hall v. Davis, 122 Ga. 252, 50 S. E. 106, and cases cited.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1445; Dec. Dig. § 347.*]

3. EXECUTORS AND ADMINISTRATORS (§ 388*)—SALES UNDER ORDER OF COURT—EFFECT OF IRREGULARITY.

The action was to recover a lot of land No. 158 in the Fifth district of Randolph county. The plaintiffs and the defendants claimed under a common grantor, Mary F. Freeman. The plaintiffs claimed as the heirs at law of Mary

F. Freeman, and under a deed made to them by John M. Freeman, also an heir at law of Mary F. Freeman. The defendants claimed through a deed made by the administrator of Mary F. Freeman. The application of the administrator to sell, and the order authorizing him to sell, set forth the facts stated in the next preceding headnote. The advertisement of the administrator's sale described the land as "lot of land No. 157, Fifth district of Randolph county, Georgia, containing 202½ acres, more or less." At the sale the administrator made public the announcement that he was going to sell the "old Trippe place." Pridden was the purchaser at the administrator's sale at the price of \$750, and the administrator, as such, executed to him a warranty deed for the purpose of conveying the property sold at the administrator's sale, and describing the land as lot No. 158 in the Fifth district of Randolph county. Pridden subsequently conveyed the land by warranty deed to Mrs. Trippe, in consideration of \$750, describing the land by the number last above mentioned. Mrs. Trippe in turn conveyed the land by such number by warranty deed to William Jones for a consideration of \$800. Thereafter Jones died intestate, leaving the defendants as his only heirs at law, and no administration was ever had upon his estate. There was nothing tending to show that the purchaser at the administrator's sale, or those holding under him, had notice of any irregularity as to the advertisement of the administrator's sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1573-1582; Dec. Dig. § 388.*]

4. EXECUTORS AND ADMINISTRATORS (§ 388*)—SALES UNDER ORDER OF COURT—EFFECT OF IRREGULARITY.

The facts above stated were shown by competent evidence.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 388.*]

5. EXECUTORS AND ADMINISTRATORS (§ 388*)—SALES UNDER ORDER OF COURT—EFFECT OF IRREGULARITY.

It follows, upon the application of the legal principles above announced to the facts stated in the third headnote, that the plaintiffs were not entitled to recover, and that the verdict in favor of the defendants was demanded.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 388.*]

6. APPEAL AND ERROR (§ 1029*)—REVIEW—HARMLESS ERROR.

In view of the foregoing, it is unnecessary to deal specifically with the assignments of error upon the allowance of the amendment to the defendant's answer, upon the charge of the court, or to the rulings on the admission of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.*]

Error from Superior Court, Randolph County; W. C. Worrill, Judge.

Action by Ruby Merritt and others against M. A. E. Jones and others. Judgment for defendants. Plaintiffs bring error. Affirmed.

Robt. L. Moye and Pottle & Glessner, for plaintiffs in error. M. C. Edwards, for defendants in error.

FISH, C. J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 709)

KING et al. v. STATE.

(Supreme Court of Georgia. Aug. 19, 1911.)

*(Syllabus by the Court.)***1. USURY (§ 149*)—CRIMINAL LAW (§ 5*)—CONSTITUTIONAL LAW (§§ 82, 258, 87*)—DUE PROCESS OF LAW—OBLIGATION OF CONTRACTS—STATUTES—ACTS PROHIBITED.**

The act of 1908 (Acts 1908, p. 83), embodied in Civ. Code 1910, §§ 3444, 3445, providing, among other things, that it shall be a crime "to reserve, charge, or take, for any loan or advance of money or forbearance to enforce the collection of any sum of money, any rate of interest greater than five per cent. per month, either directly or indirectly, by way of commission for advances, discount, exchange, the purchase of salary or wages, by notarial or other fees, or by any contract, or contrivance, or device whatever," does not make unlawful a transaction wherein there is a charge by way of commission for advances, discount, exchange, or fees, or the purchase of salary or wages, save where connected with a loan and directly or indirectly constituting all or a part of a reservation, charge, or taking for a loan or advance of money, or forbearance to enforce the collection of a sum of money, a rate of interest greater than 5 per cent. per month.

(a) The Legislature has the power to fix the maximum rate of interest which may be exacted for the use of money, and to make penal the exaction of a greater rate of interest than 5 per cent. per month.

(b) The act in question does not violate article 1, § 1, par. 2, article 1, § 1, par. 3, or article 1, § 5, par. 2 of the Constitution of this state, nor does it violate the ninth or fourteenth amendment to the Constitution of the United States. The act does not violate article 1, § 4, par. 1, of the Constitution of this state.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 441; Dec. Dig. § 149;* Criminal Law, Cent. Dig. §§ 3, 4; Dec. Dig. § 5;* Constitutional Law, Dec. Dig. §§ 82, 258, 87.*]

2. USURY (§ 149*)—STATUTES (§ 76*)—GENERAL AND SPECIAL LAWS—ACTS PROHIBITED.

The act in question does not prohibit the sale and assignment of "chooses in action arising ex contractu."

(a) The fact that "there existed at the time of the passage of this act general laws having uniform operation throughout the state, fixing the rate of interest that might be charged, and providing penalties for the violation of these general laws," does not cause the act to be in conflict with the provisions of article 1, § 4, par. 1, of the Constitution of this state, that no special law shall be enacted in any case for which provision has been made by an existing general law.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 441; Dec. Dig. § 149;* Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.*]

3. STATUTES (§§ 107, 118*)—SUBJECTS AND TITLES—USURY LAWS.

The act does not refer to more than one subject-matter, and does not contain matter different from that expressed in its title; and therefore does not violate article 3, § 7, par. 8, of the Constitution of this state, providing: "No law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof," the title of the act being as follows: "An act to make it a misdemeanor to charge any rate of interest greater than 5 per cent. per month, either directly or indirectly, and for other purposes."

[Ed. Note.—For other cases, see Statutes, Dec. Dig. §§ 107, 118.*]

Certified Questions from Court of Appeals.

R. D. King and others were indicted for a violation of the statute prohibiting the taking of interest above 5 per cent. a month. On questions certified by the Court of Appeals. Questions answered.

The Court of Appeals certified the following questions:

"In the foregoing case an act of the General Assembly of this state, to wit, an act approved August 15, 1908 (Acts 1908, p. 83), entitled 'An act to make it a misdemeanor to charge any rate of interest greater than 5 per cent. per month, either directly or indirectly, and for other purposes,' is attacked as being unconstitutional; and a decision of the following constitutional questions involved is necessary to a proper determination of the case:

"First. Is said act unconstitutional, null, and void upon the following alleged ground: 'Said act denies to the defendants [who have been indicted for a violation of it by charging and reserving from a named person a sum of money greater than 5 per cent. per month as interest for a loan of money] the impartial and complete protection guaranteed under article 1, § 1, par. 2 (Civ. Code 1895, § 5699), of the Constitution of this state, and denies to the defendants the rights reserved and retained in the ninth amendment (Civ. Code 1895, § 6022) of the Constitution of the United States, for that all persons are guaranteed the right to sell, own, and buy every species of property not evil in itself, and whose use is not hurtful to the public health and public morals. The aforesaid act denies the impartial and complete protection to persons owning and desiring to sell accounts for salary and wages. And for that all persons are guaranteed the right to contract and receive for their services such price as may be agreed upon between the contracting parties. The act in question seeks to deny this impartial and complete right by limiting the compensation that may be contracted for for services rendered, for that the statutes of this state fix notarial fees. The act aforesaid denies to the notary rendering services in cases where money is loaned the impartial and complete protection of this general law fixing notarial fees.'

"Second. Is said act unconstitutional, null, and void upon the following alleged ground: 'Said act is in violation of article 1, § 1, par. 3 (Civ. Code 1895, § 5700), of the Constitution of this state, and is in violation of the fourteenth amendment of the Constitution of the United States (Civ. Code 1895, § 6030), in that it deprives the defendants of their liberty and property without due process of law, and in that it denies to these defendants the equal protection of the laws.'

"Third. Is said act unconstitutional, null, and void for the following alleged reason: 'Said act is in conflict with article 1, § 4,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

par. 1 (Civ. Code 1895, § 5732), of the Constitution of this state, in that it is a special act concerning matters for which provision has been made by existing general laws. For illustration, there existed at the time of the passage of this act general laws having uniform operation throughout the state, fixing the rate of interest that might be charged, and providing penalties for the violation of these general laws. There also existed at the time of the passage of this act general laws permitting the selling and assignment of choses in action arising ex contractu, and the aforesaid act is a special act in conflict with these general laws.'

"Fourth. Is said act unconstitutional, null, and void for the following alleged reason: 'Said act is in violation of article 1, § 5, par. 2 (Civ. Code 1895, § 5735), of the Constitution of this state. The people of this state have always enjoyed the inherent right to sell, buy, and own and assign every species of property not evil in itself and not hurtful to the public health or public morals, and not destructive of the public peace. The aforesaid act seeks to deprive the defendants of this inherent right.'

"Fifth. Is said act unconstitutional, null, and void for the following alleged reason: 'The aforesaid act is in violation of article 3, § 7, par. 8, of the Constitution of this state (Civ. Code 1895, § 5771), in that it refers to more than one subject-matter, and in that it contains matter in the body of the act different from what is expressed in the title thereof. The title of the act only prohibits the charging of a greater rate of interest than 5 per cent. per month. The body of the act seeks to prohibit the charging of commission, the charging of exchange, the sale or purchase of accounts for salary or wages, and the charging of notarial fees.'

Rosser & Brandon, Candler, Thomson & Hirsch, R. B. Blackburn, Lamar Hill, and J. D. Kilpatrick, for plaintiffs in error. C. D. Hill, Sol. Gen., D. K. Johnston, Jno. L. Hopkins & Sons, H. W. Dorsey, Sol. Gen., and Ogburn, Dorsey & Shelton, for the State.

HOLDEN, J. [1] 1. The title to the act attacked as unconstitutional is as follows: "An act to make it a misdemeanor to charge any rate of interest greater than five per cent. per month, either directly or indirectly, and for other purposes." Section 1 of the act, omitting an exception with respect to licensed pawnbrokers, which is hereinafter set out, is as follows: "Be it enacted by the General Assembly of the state of Georgia, that it shall be a misdemeanor, punishable under section 1039 of the Penal Code of this state, for any person, company, or corporation to reserve, charge or take for any loan or advance of money or forbearance to enforce the collection of any sum of money, any rate of interest greater than 5 per cent. per month, either directly or indirectly, by way of commission for advances, discount,

exchange, the purchase of salary or wages, by notarial or other fees, or by any contract, or contrivance, or device whatever; save and except only * * * [an exception with reference to licensed pawnbrokers]." Section 2 is as follows: "Be it further enacted, that this statute shall not be construed as repealing or impairing the usury laws now existing, but as being cumulative thereof." Section 3 repeals conflicting laws. This act was designed to prohibit, and does prohibit, transactions "for any loan or advance of money or forbearance to enforce the collection of any sum of money," where the rate of interest reserved, charged, or taken is greater than 5 per cent. per month. Under the act a transaction really involving usury amounting to a charge for the use of money of interest in excess of 5 per cent. per month would involve a crime on the part of the one reserving, charging, or taking the usury, where there was a charge "by way of commission for advances, discount, or exchange," or a charge of fees referred to in the act, or the purchase of salary or wages, where such charges or purchase are connected with a loan and directly or indirectly constitute all or a part of a reservation, charge, or taking, for a loan or advance of money, or forbearance to enforce the collection of a sum of money, a rate of interest greater than 5 per cent. per month. It has often been held that the purchase of property by one with the right of the seller to rebuy at an advanced price, if a bona fide transaction, is valid; but where the transaction was put in the shape of a sale, with a right of the seller to rebuy at an advanced price, as a cover for usury, the court would declare the deed made by the seller void for usury, at his instance. See *Rogers v. Blouenstein*, 124 Ga. 501, 52 S. E. 617, 3 L. R. A. (N. S.) 213. If the language "by way of commission for advances, discount, exchange, the purchase of salary or wages, by notarial or other fees," had been omitted from the act, a transaction really involving an exaction of interest exceeding 5 per cent. per month in the ways specified would none the less have been unlawful under the act. The General Assembly perhaps considered that a common evil existed in the covering up of usury by making the charges referred to in the act and in purchases of the kind referred to therein, and thought it best, by way of emphasis, to enumerate these methods in the act itself. In the act, after the language above quoted, follow these words: "Or by any contract, or contrivance, or device whatever." The usury against which the act was aimed was not usury confined to the transactions specifically mentioned, but extends to any exaction of usury exceeding 5 per cent. per month by "any contract, contrivance, or device whatever," by which either directly or indirectly the statute is sought to be evaded. In *re Berger*,

193 Mo. 16, 90 S. W. 759, 3 L. R. A. (N. S.) 530, 112 Am. St. Rep. 472. This construction of the act must be placed upon it if any meaning is given the language in the act, "or by any contract, contrivance, or device whatever." There is a statute fixing the amount of fees to be charged by notaries public for official acts, and the act does not prohibit a bona fide charge and collection of or contract for such fees. The act does not prohibit a transaction wherein there is a bona fide charge of "other fees," or a bona fide charge "by way of commission for advances, discount, or exchange," or a bona fide "purchase of salary or wages," except when it directly or indirectly becomes a part of the usury prohibited.

[2] The right to purchase the salary or wages of another, and the right of the latter to sell the same, and the right to make the charges referred to, are not affected by any of the provisions of the act except as stated. The act never intended to interfere with the right of the citizen to make a bona fide contract for such purchases or sales or charges, save as a part of a usurious transaction, and there is nothing in the act authorizing a construction that the right to make such contracts is thereby impaired. The Legislature has the power to prohibit usury from being charged, directly or indirectly, through any scheme or device. This act deals with such a situation where the charge exceeds 5 per cent. per month.

[1a] Under the common law it was unlawful for a lender to make any charge for the use of money. In many, if not all, of the states there is a law fixing the rate of interest which may lawfully be charged. The right to do this is a matter which cannot now be questioned as being unconstitutional. In the case of *Griffith v. Connecticut*, 218 U. S. 563, 569, 31 Sup. Ct. 132, 133 (54 L. Ed. 1151), Mr. Justice White stated: "It is elementary that the subject of the maximum amount to be charged by persons or corporations subject to the jurisdiction of a state for the use of money loaned within the jurisdiction of the state is one within the police power of such state." In the case of *State v. Sherman*, 18 Wyo. 169, 105 Pac. 299, 301, 27 L. R. A. (N. S.) 898, 901, it was said: "It is too late to question the right of the Legislature to enact laws regulating the rate of interest that may be legally taken for the loan or forbearance of money, and to prescribe penalties for their violation." In the case of *Ornstein v. Cary*, 126 Wis. 135 on page 138, 105 N. W. 792 on page 793, 11 L. R. A. (N. S.) 174 on page 176, the court said: "This power has been exercised for the protection of the borrower, upon the ground 'that the lender and the borrower * * * do not occupy the same relations of equality that parties do in contracting with each other in regard to the loan or sale of other kinds of property, and that the borrower's necessities deprive him

of freedom in contracting, and place him at the mercy of the lender.' Prentice, Pol. Powers, p. 43. It is upon this theory that the state is deemed to have enacted usury laws in the exercise of the police power in protection of the public interest, and for the promotion of the general welfare." In this connection, see *M. & T. Trust Co. v. Krumseig*, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474. The right to fix the maximum rate of interest to be charged being clearly within the police power of the Legislature, it has the power to enact such laws as will prevent a violation of the provisions of the laws against usury. The enactment of a law against usury, with no penalty to be suffered by the party violating the law, would be merely advisory, and amount to no more than a recommendation to the public. Under the laws of this state the legal rate of interest is 7 per cent. per annum, unless there is a written agreement to pay more, when 8 per cent. may be exacted. It is also provided that, when a charge of more than 8 per cent. is provided for in a written contract, only 7 per cent. can be collected; and, where a conveyance of property is made as a part of a usurious transaction, the title is voidable at the instance of the one transferring it. If the Legislature in the exercise of the police power has the right to prevent a recovery of more than 7 per cent. interest where a charge of more than 8 per cent. is provided for in a written contract, and to give to a party undertaking to transfer title to property as a part of a usurious transaction the right to have the same declared void, we see no reason why it cannot go further and make penal the violation of the law controlling the interest rate, especially where a crime is committed only when the amount of interest charged exceeds 5 per cent. per month. Interest to the amount of 5 per cent. per month certainly ought to satisfy the greediest of money lenders, and it cannot be said that it is an unreasonable exercise of the police power to make criminal the charging of a greater rate. It is to be presumed that the Legislature investigated the matter in regard to which it legislated, and found that the existing laws in reference to usury were insufficient to prevent oppression and unreasonable exaction of interest, and that a law making it a crime to exact interest exceeding 5 per cent. per month was necessary to prevent such oppression and exaction. A large discretion is vested in the Legislature in deciding what the interests of the public require and what measures are needed to promote its welfare. In *re Berger*, 193 Mo. 16, 90 S. W. 759, 3 L. R. A. (N. S.) 530, 112 Am. St. Rep. 472, it was ruled: "Making the taking of more than 2 per cent. interest a month for the loan or forbearance of money a crime is not beyond the legitimate powers of the Legislature." In the case of

State ex rel. v. Cary, supra, it was ruled: "(1) The Legislature may restrict the exaction of sums in connection with a loan of money for commissions, examinations, and renewals, without unconstitutionally impairing personal liberty or freedom of contract."

2. Imprisonment may be imposed for violation of a statute forbidding the taking of usury or excessive sums in connection with a loan by way of commissions or compensation for views or appraisals. All property, and indeed all rights of natural persons, or corporations, are subject to the exercise of the police power of the state. The right to contract is not such an absolute right as to render it immune from the reasonable exercise of the police power. *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 557, 558, 69 S. E. 725.

The Legislature, in the exercise of the police power, having the right to make penal the exaction of interest exceeding 5 per cent. per month, had the right to make provisions in regard to different classes of persons making such exactions of interest, provided no unreasonable distinctions are made in making such provisions and all members of each class are dealt with in the same manner. The act provides "that regularly licensed pawnbrokers, where personal property is taken in their actual physical possession and stored by them, may charge, in addition to said rate of interest, not exceeding twenty-five cents at the time said property is first taken possession of by them, for the storage of said property." This exception does not make the act violative of the "equal-protection" clauses of the state and federal Constitutions. *State v. Hurlburt*, 82 Conn. 232, 72 Atl. 1079; *Griffith v. Connecticut*, 218 U. S. 563, 31 Sup. Ct. 132, 54 L. Ed. 1151. The pawnbrokers referred to in the language above quoted from the act, who are excepted from the operation of the general provisions of the act, are such as are "regularly licensed" to do the business of pawnbrokers. The business done by pawnbrokers is different from that done by other persons exacting interest for the use of money. It cannot be said that the classification is arbitrary and without legislative discretion.

The act is not class legislation because there is a general law (hereinbefore referred to) defining what constitutes usury, and this act only makes penal the exaction of interest exceeding 5 per cent. per month. Having passed a general law defining usury and providing for forfeitures and penalties for exacting it, the Legislature had the further right to denounce a certain class of usurers and to make penal the exaction of interest exceeding 5 per cent. per month. The law making the exaction of more than 8 per cent. interest usury is a general law; and so is the law we are considering, making it penal to increase the exaction to above 5 per cent. per month a general law. It is not unconstitutional on the ground of being class legisla-

tion because the act of the usurers therein referred to in exacting interest in excess of 5 per cent. per month is made penal, whereas the act of an usurer exacting less than this amount but more than 8 per cent. per annum is not penal. The Legislature had the right to make this distinction, and the provision of the act in question cannot be said to make an arbitrary selection, but it makes a classification upon a reasonable basis of subjects. In *re Berger*, supra, it was ruled: "Making it a crime to take usurious interest only when it is above a certain amount is not unconstitutional class legislation." In *Griffith v. Connecticut*, supra (pages 563, 564 of 218 U. S.; 31 Sup. Ct. 132, 54 L. Ed. 1151), the ruling made by the Supreme Court of the United States is as follows: Fixing maximum rates of interest on money loaned within the state by persons subject to its jurisdiction is clearly within the police power of the state, and the details are within legislative discretion if not unreasonably and arbitrarily exercised. Classification, on a reasonable basis of subjects, within the police power, is within legislative discretion, and a reasonable selection which is not merely arbitrary and without real difference does not deny equal protection of the laws within the meaning of the fourteenth amendment. The statute of Connecticut of 1907, limiting interest on loans, is not unconstitutional as denying equal protection of the laws because it excepts loans made by national and state banks and trust companies and bona fide mortgages on real and personal property. The classification is a reasonable one. The contract clause of the federal Constitution does not give validity to contracts that are properly prohibited by statute. In this connection, see *Wyoming v. Sherman*, 18 Wyo. 169, 105 Pac. 299, 27 L. R. A. (N. S.) 898; *State v. Griffith*, 83 Conn. 1, 74 Atl. 1068.

The act is not subject to the criticism that it only makes guilty of a crime that class of persons who exact interest exceeding 5 per cent. per month "by way of commissions for advances, discount, exchange, the purchase of salary or wages, by notarial or other fees." It makes penal the exaction of such interest by any person, directly or indirectly, "by any contract, or contrivance, or device whatever," and the exaction of such interest is a penal offense, though it is done in ways other than those specified in the preceding sentence. The act does not violate any of the provisions of either the state or federal Constitutions referred to in the first, second, and fourth questions propounded, and in headnote 1 (b) of this decision; and our answer to these questions is in the negative.

[2] 2. The act is not in conflict with article 1, § 4, par. 1 (Civ. Code 1910, § 6391), of the Constitution of this state, providing: "Laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an exist-

(136 Ga. 704)

ing general law. No general law affecting private rights shall be varied in any particular case by special legislation, except with the free consent, in writing, of all persons to be affected thereby; and no person under legal disability to contract is capable of such consent," because at the time it was passed there was a general law fixing the maximum rate of interest that could be charged and providing for a violation of this law, and a general law permitting the sale and assignment of choses in action arising ex contractu. The act does not interfere with the sale and assignment of any chose in action, except as hereinbefore shown. The law fixing the maximum rate of interest that can be lawfully charged is a general law. It is not a good objection to it that it makes penal the exaction of interest exceeding 5 per cent. per month when there was in existence a general law making the charging of more than 8 per cent. interest per annum usury, and providing forfeitures and civil penalties for a violation of it. The act we are passing on, while it deals with a certain class of usurers, is a general law. As far as concerns this class, it has general operation throughout the state, and has application to no limited territory, and applies to all persons in the state who violate it. The fact that there are certain usurers to whom it does not apply does not make the act a special law. The Legislature had the right to fix the amount of usury the exaction of which would constitute a crime, and to leave in force an existing general law providing that the exaction of a less amount, but more than 8 per cent. per annum, would be usury and subject the offender to certain forfeitures and civil penalties, but not to a criminal prosecution. In *re Berger*, 193 Mo. 16, 90 S. W. 759, 3 L. R. A. (N. S.) 530, 534, 112 Am. St. Rep. 472; *State v. Sherman*, 18 Wyo. 169, 105 Pac. 299, 27 L. R. A. (N. S.) 898, 908. The answer to the third question propounded is in the negative.

[3] 3. The act does not refer to more than one subject-matter, and does not contain matter different from that expressed in its title; and therefore does not violate article 3, § 7, par. 8 (Civ. Code 1910, § 6437), providing: "No law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof." The charges and sales referred to in the fifth question copied in the statement of facts are not prohibited by the act, save where they are connected with a loan and directly or indirectly constitute all or a part of a charge for the loan of money, or forbearance to enforce the collection of money, in excess of 5 per cent. per annum. The fifth question propounded is answered in the negative.

OATS v. JONES et al.

(Supreme Court of Georgia. Aug. 19, 1911.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 243*)—BONA FIDE PURCHASER—EVIDENCE AS TO PURCHASE IN GOOD FAITH.

A husband conveyed land to his wife, and the deed was recorded. Thereafter they lived on the place together for some time, when the wife moved away, leaving the husband in possession. Some years after making the deed to the wife, he made deeds to secure debts which he incurred. After she left he sold the land and a mule, and made a conveyance to a person who paid \$100 cash and agreed to take up a debt of the husband of \$568, which was done through a third person, who advanced the money, took a conveyance from the husband and also a conveyance from the holder of the security deed, and made a bond for title to the purchaser. In a suit in ejectment to recover the land, brought by the wife, the purchaser, besides the general issue of not guilty, pleaded estoppel by reason of the plaintiff's disclaiming right or title and inducing the defendant to purchase from the husband bona fide, for value, and without notice, and that the wife was a mere volunteer, and not a bona fide purchaser for value. The evidence was conflicting as to whether the purchaser had notice of the deed held by the wife before his purchase. *Held*, there was no error in admitting in evidence the deed from the husband to the person who advanced the money for the purchaser, and the bond for title from such person to the purchaser, along with the other evidence.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 606-608; Dec. Dig. § 243.*]

2. VENDOR AND PURCHASER (§ 243*)—BONA FIDE PURCHASER—EVIDENCE AS TO PURCHASE IN GOOD FAITH.

Nor was there error in admitting in evidence deeds showing a conveyance by the husband to another, to secure his indebtedness, and a conveyance by such creditor to the person who advanced the money for the purchaser to take up the debt, under the agreement of purchase.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 606-608; Dec. Dig. § 243.*]

3. FRAUDULENT CONVEYANCES (§ 192*)—REMEDIES—PERSONS ENTITLED TO ASSEET INVALIDITY—PLEADINGS AND EVIDENCE.

The pleadings and evidence did not authorize the submission of a question as to whether the deed to the wife was made generally for the purpose of defrauding his creditors and evading the payment of his debts, as a defense to one who claimed as a subsequent purchaser from the husband. In that capacity he was not concerned with any purpose to defraud creditors, who became such after the conveyance to the wife, except in so far as he may have succeeded to the right of a creditor sought to be defrauded. Such issue was not raised by the pleadings, but a claim to perfect title was asserted by the purchaser.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 192.*]

4. ESTOPPEL (§ 120*)—EQUITABLE ESTOPPEL—INSTRUCTIONS.

In a suit of the character stated above, where the evidence was conflicting as to whether or not the purchaser had notice of the deed to the wife, it was error to charge: "If it should appear to you from the testimony that the plaintiff in this case induced, by her acts

or words, the defendant to purchase the property in question, then she would be estopped from claiming the property as against him, although he may have had notice of the deed in her." It was too broad a statement to declare generally that estoppel would result from "acts or words" inducing action, without regard to notice or knowledge.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 120.*]

5. TRIAL (§ 280*)—INSTRUCTIONS—SCOPE OF EXCEPTIONS.

Except as herein indicated, the rulings assigned as error were not subject to the grounds of complaint urged against them.

(a) A general exception to a charge, without more, does not raise the question whether, assuming it to be a correct statement of a principle of law, it is applicable to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 691-698; Dec. Dig. § 280.*]

6. APPEAL AND ERROR (§ 706*)—QUESTIONS REVIEWABLE—RECORD.

The only exception being to the overruling of a motion for a new trial, and the brief of evidence being brought up by specification as part of the record, there is no merit in a motion to dismiss the writ of error because the certificate of the judge to the bill of exceptions states that it is true, "and specifies all of the record material to a clear understanding of the errors complained of," but does not expressly state that it contains or specifies all of the evidence material, etc.

(a) Nor was there any merit in the ground of a motion to dismiss the writ of error because the judge's charge as a whole was not brought to this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944-2947; Dec. Dig. § 706.*]

Error from Superior Court, Mitchell County; Frank Park, Judge.

Action by Amanda Oats against A. H. Jones and others. Judgment for defendants. Plaintiff brings error. Reversed.

Cox & Peacock, for plaintiff in error. Davis & Merry, for defendants in error.

LUMPKIN, J. Judgment reversed,

BECK, J., absent. The other Justices concur.

(136 Ga. 653)

JONES v. RAGAN.

(Supreme Court of Georgia. Aug. 16, 1911.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 50*)—CONSTRUCTION OF CONTRACTS.

On January 9, 1890, Jones executed and delivered to Mrs. Mary Laramore a bond to make her a title to lot of land 37 in the Fourteenth district of Lee county, upon the payment of her note given for the purchase price of the land, due January 9, 1896, or earlier than that date in the event Jones, or his heirs or assigns, should, prior to the maturity of the note, finish sawing and hewing the timber from such lot of land and lot 36 in the same district. On the same date the parties to the bond for title executed the following instrument: "Georgia, Lee County. This agreement, between Mary Laramore, of the one part, and D. C. Jones, of the other part, both of said state and county, made this Jan'y. 9th, 1890, witnesseth:

That the said Mary Laramore, for and in consideration of the sum of \$2.50 per acre, to be paid as hereinafter agreed, does hereby sell and convey unto the said D. C. Jones, his heirs and assigns, all the timber suitable for sawing or hewing on 160 acres of land, more or less, of lot of land No. 36, and 100 acres, more or less, of lot of land No. 37, being all of the timbered land on said lots of land, the same being in the Fourteenth district of Lee county, Georgia; and it is further agreed that the said Jones is to credit the amount due for said timber on a certain promissory note given in favor of said Jones by said Laramore, and bearing even date with this agreement, for the sum of \$510, due on the 9th day of January, 1896, six months from date, or whenever the said Jones should finish sawing or hewing said timber as aforesaid, by said Jones, in the event it is done sooner, and without interest; and should the number of acres from which the timber is sawed and hewed as aforesaid by said Jones, his heirs or assigns, at the price per acre aforesaid, be more than enough to cover said amount of said note, then the overplus to be paid to the said Mary Laramore, and the same to be due and payable monthly, at the end of each month, as fast as so hewed and sawed, and at the price aforesaid; and if said Jones, his heirs or assigns, fails to use the timber as aforesaid by the expiration of said six years from this date, then and in that event the said D. C. Jones, his heirs and assigns, are to be due said Laramore for whatever number of acres of timber thus sold that may not then be paid for, and not hewed and sawed. In testimony whereof we have hereunto set our hands and seals, this the 9th day of Jan'y., 1890. [Signed] Mary Laramore. D. C. Jones. Signed, sealed, and delivered in presence of J. V. Covin. H. L. Long."

On the following day H. L. Long made an affidavit, before the clerk of the superior court of Lee county, that he signed the same as a witness and also saw the other witness sign. The instrument was recorded in the clerk's office of Lee superior court on the date of such affidavit. *Held:*

In the trial of an action involving the contract exhibited by the foregoing instruments, the court properly instructed the jury to the effect that if, upon the date of the execution of such instruments, there were a sufficient number of acres of timber suitable for sawing and hewing on the lots 36 and 37 to amount at \$2.50 to the sum of \$510, the principal of the note, then Jones at the maturity of the note was bound to execute to Mrs. Laramore, if in life, and, if not, then to her heirs at law, a deed to the lot No. 37.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 50.*]

2. EXECUTORS AND ADMINISTRATORS (§§ 87, 115, 135*)—AUTHORITY OF EXECUTOR—STATUTORY PROVISIONS.

After the death of Mrs. Laramore, prior to the maturity of the note, the administrator of her estate was not authorized, merely by virtue of his office as administrator, to make a private contract with Jones, whereby the contract above referred to between Mrs. Laramore and Jones was rescinded, and the bond for title and possession of the land surrendered to Jones, and the note of Mrs. Laramore surrendered to the administrator, and certain other indebtedness of Mrs. Laramore to Jones and a debt of the administrator to Jones were canceled.

(a) Such agreement for rescission entered into by the administrator clearly was not embraced in the provisions of either section 3429 or section 3430 of the Civil Code of 1895 (Civ. Code 1910, §§ 4005, 4006). But, even if it was, a valid compromise could not be made by the administrator without an order of the ordinary

having first been granted to make it. Nor was such contract of rescission authorized by the Civil Code of 1895, § 3428 (Civ. Code 1910, § 4004), as that section authorizes administrators "to compromise all contested or doubtful claims for or against the estates * * * that they represent." In the present case neither the right of Jones to collect the note for the purchase price of lot 37, if it had not been paid, nor the right of the heirs at law of Mrs. Laramore to require Jones to execute to them a deed to such lot, constituted a contested or doubtful claim. See *Maynard v. Cleveland*, 76 Ga. 52, 69 et seq.

(b) Accordingly the court properly struck, on motion of the plaintiff below, the amendment to the defendant's answer, setting up the contract of rescission in the thirteenth paragraph of that answer.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. §§ 87, 115, 135.*]

3. HARMLESS ERROR—EFFECT OF VERDICT.

Many of the assignments of error in the motion for a new trial, upon certain instructions of the court to the jury, and upon the admission and rejection of evidence relating to the matter of mesne profits and damages, were eliminated by the verdict of the jury, which did not find any mesne profits or damages.

4. CONSTRUCTION OF CONTRACT—NO ERROR.

Under the construction of the contract between Jones and Mrs. Laramore, as applied by the trial court, and as approved by the preceding notes, the judge did not err in any of the other rulings complained of in the motion for a new trial.

5. CONTINUANCE (§ 30*)—GROUNDS—SURPRISE—DISCRETION OF COURT.

Upon the allowance of an amendment to the petition, it was not an abuse of discretion for the trial court to overrule a motion for continuance upon the ground of surprise, where it was not shown how the moving party was surprised, and that he was less prepared to go on with the trial than he would have been if the amendment had not been allowed. *Cradock v. Kelly*, 129 Ga. 818 (4), 60 S. E. 193.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 99-112; Dec. Dig. § 30.*]

6. APPEAL AND ERROR (§ 1078*)—REVIEW—ABANDONMENT OF ASSIGNMENTS.

Assignments of error in the bill of exceptions, which are not referred to in the brief of counsel for the plaintiff in error, will be considered as abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

7. APPEAL AND ERROR (§ 1078*)—REVIEW—ABANDONMENT OF ASSIGNMENTS.

Exceptions pendente lite, though duly allowed and ordered filed as a part of the record, upon which no error was originally assigned in the main bill of exceptions, and upon which counsel made no assignment before the argument of the case, will not be considered by this court. *Shaw v. Jones, Newton & Co.*, 183 Ga. 446, 66 S. E. 240, and citations; *Runnals v. Aycock*, 78 Ga. 553, 3 S. E. 657.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

8. SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL.

The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Action by Anna E. Ragan, guardian, against D. C. Jones. Judgment for plaintiff. Defendant brings error. Affirmed.

W. P. Wallis and H. B. Simmons, for plaintiff in error. Ware G. Martin and Shipp & Sheppard, for defendant in error.

FISH, C. J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(126 Ga. 700)

WOODALL v. WOODALL.

(Supreme Court of Georgia. Aug. 18, 1911.)

(Syllabus by the Court.)

DIVORCE (§§ 218, 286*)—APPEAL AND ERROR—ACTION FOR ALIMONY—RECORD ON WRIT OF ERROR—SCOPE OF REVIEW.

The authority of the court to modify or revoke an order granting temporary alimony is not confined to a change of condition occurring subsequently to the grant of the order. *Jennison v. Jennison*, 136 Ga. 202, 71 S. E. 244. Hence, on an application for the revocation of an order of temporary alimony, where the judge certifies that "no showing of any kind (except a showing for continuance by the applicant in the action for permanent alimony), but what was passed on in the original trial of the petition for temporary alimony," was made, it was not erroneous for the court to act upon such evidence; and where that evidence is not set out in the record, it cannot be said that the court abused its discretion in vacating the former order allowing temporary alimony "until further ordered by the court."

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 639; Dec. Dig. §§ 218, 286.*]

Error from Superior Court, Taylor County; S. P. Gilbert, Judge.

Action by M. E. Woodall against W. A. Woodall. From a judgment vacating an order allowing temporary alimony, plaintiff brings error. Affirmed.

C. W. Foy, for plaintiff in error. W. E. Steed, for defendant in error.

EVANS, P. J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(126 Ga. 671)

HAPP BROS. CO. v. HUNTER MFG. & COMMISSION CO.

(Supreme Court of Georgia. Aug. 17, 1911.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 148*)—PLEADING—ANTICIPATION OF DEFENSE.

It appears from the copy of the contracts attached to the petition that they were signed by L. Miller as the salesman, and by Happ Bros. Company, who gave the orders. Both the plaintiff and the defendant were corporations, and the petition alleged that the contracts were signed by the lawfully authorized officers and agents of the respective parties. It therefore appears from the petition that the plaintiff, who was the seller, and the defendant, who was the buyer, signed the contracts. Consequently,

under the allegations of the petition, the contracts did not fall within the statute of frauds, and they were not unilateral.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 353, 354; Dec. Dig. § 148.*]

2. SUFFICIENCY OF PETITION—EXTRINSIC EVIDENCE.

The allegations of the petition sufficiently explained the meaning of the contracts, in order to allow such meaning to be proved by competent aliunde evidence. In this connection, see *Borum v. Swift & Co.*, 125 Ga. 198, 53 S. E. 608.

Error from Superior Court, Bibb County; Wm. H. Felton, Judge.

Action by the Hunter Manufacturing & Commission Company against the Happ Bros. Company. Judgment for plaintiff. Defendant brings error. Affirmed.

The Hunter Manufacturing & Commission Company, a corporation of Greensboro, N. C., instituted suit against Happ Bros. Company, a corporation of Macon, Ga., on two writings, alleged to be contracts and to have been entered into by the lawfully authorized officers and agents of the respective corporations, as follows:

Hunter Manufacturing & Commission Co.,
Greensboro, N. C.

N. Y. Macon, Ga., Aug. 13, 1907.
Salesman's No. 2153. Mill No. A-45.

Please enter our order for:
Cases Terms: 2% 10-60 Ex. 6-1/4 Price.
25 cases Selwyn Gingham
Hapgrade Bands

To be shipped in 1/2 case lots if so ordered,
with an extra charge of 50 cts. per case. 6
sample cards soon as possible.

Corrected order to take the place of order
2151.

Not subject to cancellation.

Ship: 10 Feb. 10 Mch. 7 5 Apr. 1908.

Hold at mill.

Freight allowed to Macon, Ga.

No responsibility on your part after delivery to the railroad or steamboat company. This written memorandum comprises the whole of the contract, and no agreement or stipulation, either written or verbal, contradicting or adding to the same, has been made, except as it appears above.

Salesman: L. Miller.

Purchaser: Happ Bros. Co.

Hunter Mfg. & Commission Co., Greensboro,
N. C.

N. Y. Macon, Ga., Aug. 13, 1907.

Salesman's No. 2154.

Please enter our order for:

Cases Terms: 2% 10-60 Ex. 6-1/2-Price.
10 Camperdown Gingham

To be shipped in 1/2 case lots if so ordered,
with an extra charge of 50 cts. per case.

Not subject to cancellation.

Corrected order to take the place of order
2152.

Ship: 5 Mch. & Apr. 1908.

Hold at mill.

Frt. allowed to Macon, Ga.

No responsibility on your part after delivery to the railroad or steamboat company. This written memorandum comprises the whole of the contract, and no agreement or stipulation, either written or verbal, contradicting or adding to the same, has been made except as it appears above.

Salesman: L. Miller.

Purchaser: Happ Bros. Co.

The petition contained two counts, in each of which the writings were interpreted, and their breach alleged. The only difference in the counts related to the measure of damages. In the first count it was alleged that the goods were manufactured and tendered to the defendant, and, upon its refusal to accept in terms of the alleged contract, they were held by the plaintiff subject to the order of the defendant, and it was sought to recover the contract price. The same allegations relative to tender of the goods and breach were alleged in the second count; but there were further allegations stating a market price at the time and place specified in the alleged contract for delivery, which was less than the contract price, and it was sought to recover the difference between the two as damages. In each of the counts it was alleged that before the time for delivery of any of the goods the defendant "wholly repudiated said contracts and notified plaintiff it would not accept and pay for" any of the goods. There was no express allegation that the plaintiff did anything in recognition of the contract prior to the time of the alleged repudiation. The only allegation bearing upon this point was contained in a paragraph of the first count, wherein it was alleged that plaintiff "furnished said sample cards according to said contract," one of the contracts requiring shipment of "6 sample cards as soon as possible." With this exception nothing was alleged relative to any communication from the plaintiff to the defendant, pointing to a recognition of the contracts, until the time at which the goods were specified to be delivered, when tender was made by the plaintiff, which, according to the allegations, was subsequent to the time of the repudiation by defendant. However, it was alleged that the goods were made to special order, and that they were manufactured by the plaintiff for the defendant in pursuance of the order, though there was no allegation that they were so manufactured before the repudiation. The defendant demurred to the petition, on the grounds: (a) That the petition stated no cause of action; (b) that the contracts were unilateral and without consideration; (c) that the contracts were for the sale of goods to the amount of \$50 or more, and the pleadings showed affirmatively that the contracts were not in writing and were void under the statute of frauds; (d) that the petition did not set forth the proper measure of damages in either count. The judge overruled the demurrer, and the defendant excepted.

Hardeman, Jones, Callaway & Johnston, for plaintiff in error. Jno. R. L. Smith, for defendant in error.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 686)

ALLEN et al. v. CLARE et al.

(Supreme Court of Georgia. Aug. 16, 1911.)

(Syllabus by the Court.)

1. FORMER DECISION CONTROLLING.

In so far as the rulings made in *Hearn v. Clare*, 131 Ga. 374, 62 S. E. 187, apply to the present case, they are controlling.

2. CORPORATIONS (§ 568*)—RECEIVERSHIP—RIGHTS OF STOCKHOLDERS.

Where, upon an equitable petition filed against a corporation by some of its stockholders, its assets were put in the hands of receivers for winding up and distribution, and various creditors filed claims, and the case was referred to an auditor, who made a report thereon, and, after the allowance of a specified time for stockholders who were not parties to present their claims, a final decree was entered providing for the payment of debts which were allowed, and stating that from the balance of the funds, after paying the costs and expenses, there was left a sufficient amount to pay each stockholder \$3.40 per share, which they were allowed to receive upon filing their certificates with the receivers, stockholders who so filed their certificates and received the amounts thus decreed to be due to them could not thereafter, by mere petition or intervention in the main case, seek to set aside the judgments, orders, and decrees under which they had received their dividends, and prevent the discharge of the receivers; nor could they do so, whether they acted as claiming to be quasi parties under the allowance to file their certificates and receive the dividends due them, or sought to become actual parties by order of court.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 568.*]

3. RECEIVERS (§ 203*)—REVOCATION OF ORDER OF REFERENCE OF ACCOUNT—POWER OF JUDGE.

While it is common practice for the judge to refer complicated accounts or reports of a receiver to an auditor, he is not in all cases compelled to do so; and if an order of reference has improvidently been granted in such case, it does not stand as res adjudicata, so as to render the judge incapable of revoking the reference and withdrawing the consideration of the receiver's report from the auditor. This is true, although the judge who granted the order of revocation was not the same judge who presided when the order of reference was made.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 203.*]

4. PROCEEDING IN RECEIVERSHIP—DISMISSAL.

The facts set out in the present proceedings are numerous and complicated. Without reciting them in detail, or holding that each ground of the demurrer which was sustained by the court was well taken, in view of the nature of the case, the finding of an auditor in regard to the claims of creditors, the granting of the final decree, the determination and distribution of a dividend thereunder, and the payment of the debts and expenses of litigation by the receivers, and in view of the nature of the proceedings sought to be instituted by the present plaintiffs in error, and their laches in taking action, there was no error in dismissing such proceeding.

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Action between L. J. Allen and others and S. Clare, receiver, and others. From the judgment, Allen and others bring error. Affirmed.

Crovatt & Whitfield, and Haygood & Cutts, for plaintiffs in error. Hal Lawson, L. Kennedy, and A. J. McDonald, for defendants in error.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 777)

MANOR v. CITY OF BAINBRIDGE.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§§ 10, 112*)—VALIDITY OF REGULATIONS.

Under the general welfare clause in the charter of the city of Bainbridge the municipal authorities have the right to pass an ordinance prohibiting and making penal the sale of what is commonly known as "near beer" within the city limits, except within a prescribed territory therein, provided the provisions of the ordinance prescribing such territory are not unreasonable. *Badkins v. Robinson*, 53 Ga. 613; *Sanders v. Elberton*, 50 Ga. 176; *Campbell v. Thomasville*, 6 Ga. App. 212, 64 S. E. 815; *Cassidy v. Macon*, 133 Ga. 689, 66 S. E. 941.

(a) The ordinance of the city of Bainbridge prescribing the territory within which "near beer" may be sold, and making it unlawful to sell "near beer" without such territory in the city limits, does not appear to be unreasonable.

(b) The ordinance passed December 5, 1910, making it unlawful to sell "near beer" after January 1, 1911, in the city limits, except within a designated territory therein, is not shown to be unreasonable merely by proof that in the designated territory every suitable building for the sale of "near beer" was occupied at the time of the passage of the ordinance and at the time of the hearing for an interlocutory injunction in January, 1911, and that it would be impossible to procure one in which to carry on the sale of "near beer" at any reasonable price.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. §§ 10, 112.*]

2. INTOXICATING LIQUORS (§ 112*)—POLICE POWER—VALIDITY OF REGULATIONS.

The fact that one sold "near beer" during 1909 and 1910 under a license from the municipal authorities at a certain place, and that he made valuable improvements at such place for the purpose of operating there a "near beer saloon," did not make invalid a municipal ordinance, passed in December, 1910, whereby it was made unlawful after that year to sell "near beer" in the city limits, except within specified territory, which did not embrace the place above referred to; nor did such facts make unlawful the refusal of the city authorities to grant such person a license to sell "near beer" during the year 1911 at the place named.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 112.*]

3. MUNICIPAL CORPORATIONS (§ 594*)—ORDINANCES—CONSTRUCTION.

An ordinance making penal the violation of the provisions of another ordinance applies to the latter ordinance as amended by a subsequent ordinance, though there is no provision in either of the ordinances, or in the amendment, specially providing that it shall so apply.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 594.*]

4. INJUNCTION (§ 152*)—INTERLOCUTORY INJUNCTION—MATTERS CONSIDERED.

On the hearing of an application for an interlocutory injunction, a demurrer and answer may be presented by the defendant and considered by the judge hearing the application, and evidence may be offered by the defendant to show that the plaintiff is not entitled to the relief sought, though the demurrer and plea have not been filed in the office of the clerk of the superior court in which the case is pending. See, in this connection, *Hogan v. State*, 133 Ga. 875, 67 S. E. 288.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 337, 343; Dec. Dig. § 152.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by W. M. Manor against the City of Bainbridge. From a judgment for defendant, plaintiff brings error. Affirmed.

J. P. Pelham and L. W. Nelson, for plaintiff in error. R. G. Hartsfield, for defendant in error.

HOLDEN, J. Judgment affirmed.

BECK, J., absent. The other Justices concurred.

(136 Ga. 674)

LOUISVILLE & N. R. CO. v. ROGERS.

(Supreme Court of Georgia. Aug. 17, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 394*)—OPERATION—ACCIDENT AT CROSSING—PLEADING.

A petition by a father against a railroad company for the recovery of damages for killing his minor child is not open to general demurrer, in which petition it is alleged that the plaintiff's minor child of the age of six years was killed by a freight train while attempting to cross the railroad track at a point in a populous community where the public was accustomed at all times, day and night, to cross, and such travel of the public was so constant, open, and uninterrupted as to attract the attention of the defendant and its servants in operating trains; that the killing was the result of the negligence of the defendant, (1) in that the crew in charge of the train had a clear view of his minor child for a distance of six hundred feet before striking him, yet nevertheless continued to run the train at a reckless rate of speed, to wit, 60 miles per hour; (2) that notwithstanding the locality where the child was on the track was populous and well traveled, to the defendant's knowledge, yet the crew in charge of the train failed, as ordinary care required, to keep a proper lookout ahead to discover the presence of persons upon the track; and (3) that the engineer and crew of the train, after discovering the presence of the child and its peril on the track, negligently failed to stop the train or adopt measures to save the child's life, but maintained the reckless speed of 60 miles per hour until after the child was stricken.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1331-1338; Dec. Dig. § 394.*]

2. RAILROADS (§ 401*)—OPERATION—ACCIDENT AT CROSSING—CARE REQUIRED.

Where the law imposes a duty upon a railroad company to exercise ordinary care in the operation of its trains, and notwithstanding the exercise of such care an injury results to one who is upon the track, the company is not liable.

An instruction that "the law imposes upon the railroad company a duty to keep a lookout, and also a duty to run the train at such speed as it could by the exercise of ordinary care have prevented the injury," was not an accurate statement of the law. Its effect tended to impress the jury that the ordinary care, the exercise of which would exonerate the company, is such care as would prevent the injury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 401.*]

3. TRIAL (§§ 140, 236*)—INSTRUCTIONS—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES.

In formulating rules for the jury's guidance in determining what weight they should give to the testimony of conflicting witnesses, after instructing them that they may take into consideration the witness' interest or want of interest, his bias, and his opportunity to know the facts about which he testifies, an instruction that the jury may believe that witness who has the best means of knowing the facts about which he testifies, and the least inducement to swear falsely, without a qualification that if the witnesses be of equal credibility, tends to mislead the jury into supposing that the court intends that such witness is to be believed in preference to other witnesses. The credibility of witnesses is for the jury, and must be determined solely by them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335, 531-533; Dec. Dig. §§ 140, 236.*]

4. REVIEW OF CHARGES—NO ERROR.

Other charges complained of were not open to the criticisms made against them.

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action by H. B. Rogers against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant brings error. Reversed.

Neel & Neel and D. W. Blair, for plaintiff in error. Colquitt & Conyers, for defendant in error.

EVANS, P. J. [1] 1. H. B. Rogers sued the Louisville & Nashville Railroad Company for damages alleged to have been sustained because of the wrongful death of the plaintiff's minor child. The defendant demurred to the sufficiency of the petition, which is described in the first headnote. The court overruled the demurrer, and his ruling is in accord with the decisions in *Crawford v. Southern Railroad Co.*, 106 Ga. 870, 33 S. E. 826, and *Shaw v. Georgia Railroad*, 127 Ga. 8, 55 S. E. 960.

[2] 2. The court charged the jury that "if the child was at a place where those in charge of the railroad train had reason to suspect or believe that some one might be on the track, or dangerously near thereto, then the law imposes upon the railroad company a duty to keep a lookout and also a duty to run the train at such speed as it could by the exercise of ordinary care have prevented the injury; or, if by the exercise of ordinary care it could have prevented the injury, it would be liable." This excerpt is criticised as putting too great a burden on the com-

pany, in that it requires that it should have exercised such an ordinary care as would have prevented the injury. A railroad company is bound to exercise ordinary care in the operation of its trains, and the exercise of such care relieves it of liability for damages for injuries to persons other than passengers. The effect of the court's charge was that the company must exercise ordinary care to the extent of preventing the injury; whereas, if the company exercises ordinary care in the operation of its train at the particular time and place, it meets all the requirements of the law, and, if injury results notwithstanding ordinary care has been exercised, the company is not liable.

[3] 3. Exception is taken to the following instruction: "Then, gentlemen, in determining what weight you will give the evidence of the witnesses, any of them and all of them, you may look to them as they appear upon the stand, take their manner of testifying, their interest or want of interest in the case, their feeling, prejudice, bias, relationship to the parties and to the case, or anything of the kind that may appear from the evidence, and you may believe that witness or those witnesses who have the best means of knowing the facts about which they testify, and the least inducement to swear falsely; and with these rules determine what the truth of the evidence is, and let your verdict speak the truth as you may find it." In passing upon the credibility of a witness the jury may very properly take into consideration his feeling, interest, or want of interest, prejudice, bias, and opportunity of knowing the facts about which he testifies; yet there is no rule of law requiring the jury to believe that witness who has the best means of knowing the facts about which he testifies and the least inducement to swear falsely. As was remarked by Simmons, C. J., in *Hudson v. Best*, 104 Ga. 131, 30 S. E. 688: "Such a witness may for other reasons be entirely unworthy of belief; and certainly it would not then be the duty of the jury to believe him." The credibility of the witness is a question solely for the jury, and they should not be instructed that the testimony of a witness should be preferred because of his opportunity for knowing the facts and because he has the least inducement to falsify. In this case the plaintiff introduced an eyewitness to the casualty, upon whose testimony he largely depended for a recovery. He was accompanying the child which was killed, and according to the record apparently had no interest in the case. The company largely relied upon its employes. Under such circumstances, we think the charge was harmful. *Southern Mutual Insurance Co. v. Hudson*, 113 Ga. 434, 38 S. E. 964.

[4] 4. Other charges complained of were

not open to the criticisms made against them.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 701)

WHATLEY v. WATTERS et al.

(Supreme Court of Georgia. Aug. 18, 1911.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 198*)—JUDGMENT FOR YEAR'S SUPPORT—VALIDITY.

A judgment setting apart a year's support is not void because the appraisers' return was not filed within 30 days of their appointment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 708-712; Dec. Dig. § 198.*]

2. EXECUTORS AND ADMINISTRATORS (§ 200*)—JUDGMENT FOR YEAR'S SUPPORT—VALIDITY.

As against creditors whose debts are not secured by the loan deed, a judgment of a year's support, assigning the widow and minor children of a decedent a specifically described tract of land, subject to a loan deed for a stated amount, is not void on the ground that the title to the land was not in the decedent.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 200.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Mrs. G. W. Whatley against O. L. Watters and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Loundes Calhoun, for plaintiff in error.
Evins & Spence, for defendants in error.

EVANS, P. J. Mrs. Cynthia L. Watters, widow of John C. Watters, in behalf of herself and her minor children, applied to the court of ordinary of Fulton county to have a 12 months' support set apart out of the estate of her deceased husband, reciting in her application that there was no administration on his estate. On January 1, 1907, the ordinary passed an order appointing five appraisers to assign a year's support to the applicant and her minor children, and directing them to make a return of their actings and doings within 30 days. The appraisers made their return on November 25, 1907, wherein they set apart to the applicant and her minor children a specifically described tract of land containing 50 acres, more or less, and reciting that "on said property there is now a loan deed for about \$650." This return was filed in the ordinary's office on December 2, 1907. On December 11, 1907, the ordinary passed an order directing that citation be issued and published according to law. At the January term, 1908, the ordinary passed an order reciting that the return of the appraisers had been duly filed in his office, and that citation had been duly issued and published as required by law, and that, no objection being made thereto, the return

of the appraisers was approved and ordered to be recorded. On May 24, 1910, Mrs. G. W. Whatley filed her petition to the ordinary, representing that she was a creditor of John C. Watters, and praying that the judgment allowing his widow and minor children a 12 months' support out of his estate be declared void, for the reasons that the appraisers did not file their return within 30 days, as directed by the statute, and, further, that a 12 months' support cannot be set apart in land incumbered by a loan deed; these alleged defects being apparent on the face of the record. On demurrer the ordinary struck the petition to set aside the judgment granting a 12 months' support, as being insufficient in law. Whereupon Mrs. Whatley sued out a writ of certiorari to the superior court, and on the hearing of the case the certiorari was overruled and the judgment of the ordinary affirmed. To this judgment Mrs. Whatley excepts.

[1] 1. No fraud or collusion is alleged, and the plaintiff in error grounds her case solely upon the contention that the judgment allowing the 12 months' support is void in law, for the reasons assigned in her petition to vacate it. A judgment approving the return of the appraisers setting aside a 12 months' support, where all the proceedings are regular, is binding upon the creditors of the decedent. *Reynolds v. Norvell*, 129 Ga. 512, 59 S. E. 299. The statute prescribes that the appraisers appointed to assign a year's support to the widow and minor children out of the decedent's estate shall make a return to the ordinary within 30 days of their appointment. Civ. Code, 1910, § 4043. This provision as to the time within which the appraisers may make their return is directory; and, if they should fail to make their return within the statutory period, the ordinary could compel them to act, or appoint new appraisers. The widow's right to a year's support is not affected by the appraisers' dereliction of duty for which she is not responsible. After the ordinary receives a belated return and cites interested parties by publication as prescribed by the statute to show cause why the return should not be approved and made the judgment of the court, and such return is duly approved, it is too late for a creditor to object that the return was not made within 30 days of the appointment of the appraisers. *Goss v. Greenaway*, 70 Ga. 130. In the case just cited the widow filed her application for a year's support four years after the death of her husband, during which time she lived upon the land and made use of her deceased husband's personality; and the court held that, though these facts might furnish ground to defeat her application before the ordinary, yet, where the year's support had been formally set aside, it was too late to attack it.

[2] 2. The statute declares that the appraisers shall assign a year's support "either in property or money" from the estate of the decedent. Civ. Code 1910, § 4041. A year's support may be set apart in a bond for title. *Winn v. Lunsford*, 130 Ga. 436, 61 S. E. 9. The appraisers set apart the land, subject to a loan deed. It does not appear who was the creditor secured by the loan deed. The plaintiff in error was not that creditor. The year's support judgment took effect upon all the interest which the decedent had in the property after the satisfaction of the loan deed. That interest was an equitable estate; but an equitable estate is property, and a widow is not to be denied a year's support solely because her late husband's estate was equitable in character. Let it be borne in mind, however, that we are not holding that a widow's right to a year's support in land is superior to the claim of her husband's creditor who holds the title to the land. There is no antagonism between the year's support and the creditor who is secured by the loan deed. If the decedent's equity is property subject to be applied to the payment of the unsecured debts of the decedent, certainly it is property which may be assigned to his widow and minor children as a year's support. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 705)

JENSEN v. WATTERS et al.

(Supreme Court of Georgia. Aug. 18, 1911.)

(Syllabus by the Court.)

FORMER DECISION CONTROLLING.

This case is controlled by the decision in *Whatley v. Watters*, 71 S. E. 1103.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between E. L. Jensen and O. L. Watters and others. From the judgment, Jensen brings error. Affirmed.

Loundes Calhoun, for plaintiff in error.
Evins & Spence, for defendants in error.

EVANS, P. J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 778)

NEW v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977*)—REVIEW—QUESTIONS OF FACT—GRANT OF NEW TRIAL.

Where a verdict is not demanded by the law and the evidence, the first grant of a new trial will not be disturbed; and in such a case, where the presiding judge specifies in his order granting a new trial that the same is granted solely on a named ground of the motion for a

new trial, wherein complaint is made that the court erred in a specified charge given the jury, this court will not determine whether or not there was error in such charge. Civ. Code 1910, § 6204; Van Giesen v. Queen Insurance Co., 132 Ga. 515, 64 S. E. 456; Williams v. Brogdon, 133 Ga. 691, 68 S. E. 788.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by Luke New against the Southern Railway Company. From a judgment granting a new trial after verdict for plaintiff, he brings error. Affirmed.

A. M. Brand, for plaintiff in error. McDaniel, Alston & Black, for defendant in error.

HOLDEN, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 774)

PAXSON BROS. v. BUTTERICK PUB. CO.
(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

1. INJUNCTION (§ 59*)—SUBJECTS OF RELIEF—BREACH OF CONTRACT.

Where a manufacturer of patterns and a merchant contract that the former will furnish certain patterns during a series of years, according to stated deliveries, and that the latter will constantly keep on hand and sell such patterns, and none other, and will make monthly payments of accrued indebtedness, and stipulate that "failure or neglect by either party to perform any provision of this order will, at the option of the other, release the other party from all obligations hereunder," and where the manufacturer refuses to furnish patterns unless the merchant pays up past-due indebtedness, the manufacturer is not entitled to enjoin the merchant from selling the patterns of another manufacturer within the period specified in their contract.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114-116; Dec. Dig. § 59.*]

2. INJUNCTION (§ 60*)—SUBJECTS OF RELIEF—BREACH OF CONTRACT.

"Generally an injunction will not issue to restrain the breach of a contract for personal services, unless they are of a peculiar merit or character, and cannot be performed by others." Civil Code 1910, § 5496. The evidence did not show that the defendants' services, as stipulated in the contract, were of such peculiar merit or character as to take the case out of the general rule enunciated in the Code section.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 117-119; Dec. Dig. § 60.*]

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Action by the Butterick Publishing Company against Paxson Bros. Judgment for defendants. Plaintiff brings error. Reversed.

M. B. Cannon, for plaintiff in error. Hal Lawson, for defendants in error.

EVANS, P. J. The Butterick Publishing Company and Paxson Bros. entered into a written contract whereby the former contracted to sell the latter a certain quantity of patterns, and the latter engaged to constantly keep on hand and sell the former's patterns, to order at least a stated amount of patterns monthly, and to pay accrued indebtedness on the 15th of each month. The contract was for three years, and longer, if not terminated by three months' written notice of either party. The contract contained this stipulation: "Failure or neglect by either party to perform any provision of this order will, at the option of the other, release the other party from all obligations hereunder." The Butterick Company continued to ship goods under the contract until Paxson Bros. became indebted to them in a certain amount and had several times defaulted in their payments. Paxson Bros. ordered certain patterns, which the Butterick Company refused to ship unless Paxson Bros. settled their past-due indebtedness. Paxson Bros. then notified the Butterick Company that they deemed their refusal to furnish patterns a violation of the contract, and that they elected to treat the contract at an end, and purchased and undertook to sell patterns obtained from another manufacturer. Whereupon the Butterick Company filed its petition against Paxson Bros. to enjoin them from selling any patterns except those of the plaintiff until the termination of the contract. The court granted an interlocutory injunction.

[1] 1. The failure of Paxson Bros. to pay for the patterns agreeably to their contract entitled the Butterick Company to terminate the contract at its option. Failure to make payments for articles delivered under a contract during a series of years, to be delivered in installments and paid for monthly, entitles the vendor to rescind the contract. Savannah Ice Co. v. American Refrigerator, etc., Co., 110 Ga. 142, 35 S. E. 280. It would be unjust to compel the vendor to continue to make deliveries to one who continues to default in his payments. The parties to the contract did not wish any doubt to cling around this principle of law as applied to their contract, and incorporated its essence in the stipulation that "failure or neglect by either party to perform any provision of this order will, at the option of the other, release the other party from all obligations hereunder." When Paxson Bros. ordered additional patterns, the Butterick Company was put to an election to rescind the contract because of the default of Paxson Bros. in making payments or to comply with their covenants. Whether or not we treat the refusal to furnish patterns unless past-due installments are paid as a rescission, certainly it is not in a position, after refusing to furnish patterns, to enjoin the defendants

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

from selling patterns elsewhere obtained, on the ground that they contracted to sell exclusively the Butterick patterns. *Smith v. Georgia Loan, etc., Co.*, 113 Ga. 975, 39 S. E. 410; *Harden v. Lang*, 110 Ga. 392, 36 S. E. 100.

[2] 2. Although not pressed in the argument, we think, also, that the principle announced in Civil Code 1910, § 5496, controls the disposition of this case. That section reads: "Generally an injunction will not issue to restrain the breach of a contract for personal services, unless they are of a peculiar merit or character, and cannot be performed by others." The grounds set forth in the petition for injunction were that the plaintiff conducted its business through exclusive agencies, and the success of a particular agency depends upon the character and business enterprise of the agent and the location of the agency's establishment, with reference to the number of persons or establishments capable of undertaking an agency of this kind in a given locality, and the damages for breach of contract cannot be estimated, because the plaintiff's injury is not confined to loss of sales, but includes loss of commercial prestige, loss of custom, and loss of those advantages which are the natural accretion of a substantial business, which would result from the agent abandoning his contract with the plaintiff and engaging to sell the patterns of a competitor; that the damage is irreparable, because it is unable to procure, in the vicinity of the defendants' premises, an equally competent agency for the sale of its products. Insolvency was neither alleged nor proved. Nor did it appear at the hearing that the plaintiff was not able to procure other merchants to sell its products, or that the defendants possessed any special facilities superior to other merchants in the town for the sale of their wares. We think the case as made by the evidence is controlled by the cited Code section, and by the case of *Hammond v. Georgian Co.*, 133 Ga. 1, 65 S. E. 124.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 673)

DU BOSE et al. v. THOMAS.

(Supreme Court of Georgia. Aug. 17, 1911.)

(Syllabus by the Court.)

1. REFERENCE (§ 100*)—REPORT—EXCEPTIONS AND HEARING THEREON.

On the hearing in the trial court of exceptions of fact to an auditor's report, no new evidence other than that introduced before the auditor will be considered, except in those cases where a new trial would be granted after verdict on account of newly discovered evidence. Civ. Code 1910, § 5145.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 157-168; Dec. Dig. § 100.*]

2. REPORT OF AUDITOR—EXCLUSION OF NEW EVIDENCE.

Under the rule just stated, there was no error in denying the application of the exceptors to be permitted to introduce new evidence.

3. REFERENCE (§ 105*)—REPORT OF AUDITOR—EXCEPTIONS OF FACT—SUBMISSION TO JURY.

The case was an equitable proceeding, and the presiding judge was not compelled, as matter of course, to submit exceptions of fact to the jury. Civ. Code 1910, § 5142.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 205; Dec. Dig. § 105.*]

4. EXCEPTIONS OVERBULED—SUFFICIENCY OF EVIDENCE.

After a careful consideration of the exceptions both of law and fact, while the evidence contained in the record is not, in some particulars, clear and certain, nothing appears which renders a reversal proper.

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Action between John A. Du Bose and others and S. E. Thomas. From the judgment, Du Bose and others bring error. Affirmed.

W. D. Tutt and Hines & Jordan, for plaintiffs in error. J. N. Worley, for defendant in error.

LUMPKIN, J. Judgment affirmed

BECK, J., absent. The other Justices concur.

(135 Ga. 762)

SOUTHERN RY. CO. v. SAMS.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

1. NO ERROR—EVIDENCE SUFFICIENT.

No error of law appears requiring a new trial, and the evidence was sufficient to support the verdict.

(Additional Syllabus by Editorial Staff.)

2. TRIAL (§ 296*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In an action for injury to a passenger from the sudden starting of a train while she was attempting to alight, where the court charged that, if plaintiff bought a ticket for a certain destination, the defendant was bound to stop the train a reasonable length of time to let her alight in safety, and that if they did that, and she failed to exercise ordinary care by which the injury could have been avoided, she cannot recover, the use of the conjunctive clause at the end of the instruction is not ground for new trial, as confusing the defenses open to defendant under Civ. Code 1895, §§ 2321, 3830, of exercise of reasonable care by defendant and contributory negligence by plaintiff, where other portions of the charge separately stated that if she did not use ordinary care she could not recover, and that if the carrier used the degree of diligence required it was not liable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

3. TRIAL (§ 296*)—INSTRUCTION—CONSTRUCTION AS A WHOLE.

In an action for injuries to a passenger, an instruction that if plaintiff had had an operation performed for adenoids, and was already suffering from the same, and afterwards received the injury alleged, the jury should look to the evidence and see whether the sickness came

from the operation or from the act of the railroad company, is not ground for a new trial, as an expression of opinion by the court that the act of the railroad company, if it caused the injury, was a negligent act, nor that the railroad company was necessarily the cause of the injury, if the operation was not the cause, where the court also instructed that if the sickness, pain, and suffering occurred on account of the operation, plaintiff would not be entitled to recover, but if it resulted from the alleged act of the railroad, and the railroad was at fault, negligent in not exercising the diligence required by law, she would be entitled to recover for whatever pain and suffering resulted from the act of the defendant company.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

Error from Superior Court, Fayette County; L. S. Roan, Judge.

Action by A. L. Sams against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

C. E. Battle, Howell Hollis, and Blalock & Culpepper, for plaintiff in error. J. W. Wise, for defendant in error.

HOLDEN, J. The defendant in error (hereinafter referred to as the plaintiff) sued the plaintiff in error (hereinafter referred to as the defendant) for damages because of the alleged negligence of the defendant in not stopping the train on which the plaintiff was a passenger a sufficient length of time after it reached her destination at Woolsey, Ga., to allow her to alight in safety, and in causing the train to suddenly start and violently jerk while she was on the steps of the car in an effort to disembark, thereby throwing her from the car and injuring her. A verdict was rendered in favor of the plaintiff, and to the order of the court refusing it a new trial the defendant excepted.

[2] One ground of the motion for a new trial is as follows: "Because the court erred, as movant insists, in charging the jury as follows: 'If Miss Sams boarded the train at the time stated, and her destination was Woolsey, if she bought a ticket and got on the train expecting to get off at Woolsey when the train arrived there, and they had taken up her ticket, they were bound to stop that train a reasonable length of time, so as to let her alight in safety. If they did that, and she failed herself to exercise ordinary care and diligence required of her, by which the injury she alleges could have been avoided, then she cannot recover'—the vice complained of being the conjunctive clause last added to the charge quoted; defendant contending that, if it had stopped the train a reasonable length of time for her to alight in safety, it had discharged its duty to her, and would not be liable, without further qualification, but the joining of the qualification added by the court confuses and confounds the defenses open to the defendant as embodied in Civ. Code 1895, §§ 2321, 3830, and imposes a greater burden upon the

defendant than is authorized by the laws, deprived it, as it does, of the defense that its servants and agents had exercised all care and diligence." The charge excepted to was not error requiring a new trial, for any reason assigned in the exception thereto, in view of the entire charge.

The court charged the jury, in different portions of the charge, as follows: "Miss Sams was required to use ordinary care and diligence to protect her person from injury, while traveling as such passenger. If she did not use ordinary care and diligence to protect her person, she cannot recover. * * *

A carrier of passengers, and this railroad was the carrier of passengers when it undertook to carry plaintiff from Atlanta to Woolsey, Ga. She was a passenger, and they were bound to extraordinary diligence on the part of themselves to protect her life and person; but said carrier of passengers is not liable for injuries to the passenger if they use such diligence. * * *

No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him. If the evidence shows that the plaintiff was less at fault than the defendant, and that by the exercise of ordinary care and diligence she could have prevented the damage she alleges she sustained, if she sustained any, then the plaintiff could not recover; but if the evidence shows that the plaintiff is less at fault than the defendant, and by the exercise of ordinary care could not have prevented or avoided injury, if any is shown, then in that kind of a case, if both are at fault, the plaintiff may recover, but the damage shall be diminished by the jury in proportion to the amount of default attributable to her. If the plaintiff could have avoided the injury to herself by the exercise of ordinary care and diligence, she cannot recover. If the injuries complained of were not caused by the negligence of the defendant, and as alleged, she cannot recover. * * *

If the railroad took up her ticket and stopped there at that station, they had to exercise extraordinary care and diligence in protecting her to alight in safety; and if they failed to stop a sufficient length of time to give her a reasonable opportunity to alight, and before she had time in the exercise of a reasonable amount of ordinary diligence on her part, they started the train with such a sudden jerk, before she had time to leave the train, and if you believe in so doing they were not exercising extraordinary care and diligence, and she was injured as she alleges, and the same is shown by the evidence, she would be entitled to recover."

In view of the above quoted portions of the charge, we do not think the jury were, by the charge excepted to, misled into the belief that the plaintiff could recover if it appeared that the defendant was guilty of the negligence alleged, even though the plaintiff could have avoided the consequences of the same by the exercise of ordinary care, nor was the jury led into the belief that the plaintiff could recover, even though the defendant was not guilty of the negligence alleged. The court several times told the jury that the plaintiff could not recover if the injury was the result of her failure to exercise ordinary care and diligence, nor could she recover if she was not injured by reason of the alleged negligence of the defendant. In view of the entire charge, the charge excepted to was not error, requiring a new trial, for any reason assigned.

[3] The only other ground of the amendment to the motion for a new trial is as follows: "Because the court erred, as movant insists, in charging the jury as follows: 'If this young lady had had an operation performed for adenoids, and if she was already sick, suffering from the same, and if she afterwards received the injury alleged at this place, and afterwards was laid up for some time, and suffered pain, and was sick, look to the evidence and see whether or not you can determine from the evidence, with a reasonable degree of certainty, whether that sickness came from that operation or from the act of the railroad company'—the error and vice complained of being that the charge is an expression of opinion by the court in the use of the last clause therein, 'or from the act of the railroad company,' tantamount to a statement by the court that the act of the railroad company, if the same caused the injury, was a negligent act. And the charge quoted also tended to impress the jury that, if the operation alleged was not the cause of the injuries alleged, then the railroad was necessarily the cause, and would be liable therefor, without regard to whether the railroad was negligent or not."

After giving the charge above quoted, in immediate connection therewith the court instructed the jury as follows: "If her sickness, pain, and suffering occurred on account of the operation performed, then plaintiff would not be entitled to recover in this case; but if the sickness, pain, and suffering resulted from the alleged act of the railroad, and you find the railroad was at fault, negligent in not exercising the diligence required by law, which I have already charged you, then she would be entitled to recover for whatever pain and suffering resulted from that act of the defendant company. That is a plain proposition, and it is for you to determine. Work it out with a view of determining what is right between these par-

ties. You are supposed to be impartial between the parties. Let your verdict speak the truth. When you write it, it ought to be the truth as clearly as 12 honest men can write it. There is no claim for lost time. The claim for physician's bill has been abandoned. Therefore do not consider it at all in this case. In the event you find the railroad is liable, and that plaintiff is entitled to recover in this case, she can only recover for pain and suffering, and then only on account of pain and suffering resulting from the alleged injury in the manner and form described."

The evidence was undisputed that after the alleged negligent acts of the defendant the plaintiff underwent pain and suffering. She contended that this pain and suffering was caused by the alleged negligent acts of the defendant, causing her to be thrown from the train. The defendant contended that such pain and suffering, if the plaintiff underwent any after the time of the alleged negligent acts of the defendant, were the result only of an operation for adenoids, which the plaintiff had had performed in Atlanta on the day of the alleged injury. The charge excepted to was not harmful to the defendant, in view of the issues made by the pleadings and the evidence, especially in view of the other instructions given the jury, above quoted.

[1] The only other grounds of the motion for a new trial are the general grounds that the verdict is contrary to law and evidence and without evidence to support it. The evidence was sufficient to support the verdict. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(196 Ga. 658)

DREW et al. v. STATE.

(Supreme Court of Georgia. Aug. 16, 1911.)

(*Syllabus by the Court.*)

1. HOMICIDE (§ 124*)—JUSTIFICATION—DEFENSE OF PERSON OR PROPERTY.

It may be stated as a general rule that, if a trespass on person or property amounts to a felony, the killing of the trespasser will be justifiable, if necessary in order to prevent it; but a trespass which amounts to a misdemeanor only will not justify a killing.

(a) The doctrine of reasonably apparent necessity, as the equivalent of actual necessity, is to be taken in connection with this rule.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 184-188; Dec. Dig. § 124.*]

2. HOMICIDE (§ 124*)—JUSTIFICATION—SELF-DEFENSE—AGGRESSION.

If an owner of property is authorized to use reasonable force for its protection, or recapture from a fleeing thief, and does no more, and such thief resists the owner with force, his conduct may be such as to place him in the position of the aggressor, and to authorize the

owner to defend himself by the use of further reasonable force.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 184-188; Dec. Dig. § 124.*]

3. HOMICIDE (§ 124*)—JUSTIFICATION—MAKING ARREST.

If one steals the property of another and flees, and the owner, upon learning later of the theft, pursues and overtakes him at a distance from the place where the larceny was committed, and without any effort to retake possession by peaceable means, and without any necessity to take life, fires upon the thief and kills him, such a killing is not justifiable, though the theft be a felony.

(a) The right to arrest an escaping felon, under Penal Code 1910, § 921, involves a different principle from mere recaption of property.

(b) There was no error in charging in accordance, with the principles above ruled; the presiding judge having instructed the jury as to the law of voluntary manslaughter, as well as that of murder and justifiable homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 184-188; Dec. Dig. § 124.*]

4. INDICTMENT AND INFORMATION (§ 124*)—JOINER OF PARTIES—SEPARATE ASSAULTS.

While the charge of the court was not free from criticism, nothing in it requires a reversal of the judgment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 332; Dec. Dig. § 124.*]

Error from Superior Court, Chattooga County; Jno. W. Maddox, Judge.

Sam Drew and Charley Smith were convicted of murder, and bring error. Affirmed.

P. D. Wright and W. M. Henry, for plaintiffs in error. Jno. W. Bale, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

LUMPKIN, J. Sam Drew and Charley Smith were convicted of the murder of Love Dean. There was but one eyewitness, who gave substantially the following account of the transaction: The defendants were at a dance at night. It was reported to Drew that his mule and buggy, which had been left standing near by, were gone. He and Smith and the witness gave chase. They overtook the mule and buggy about a mile and a quarter from the starting point. The buggy was then turned across the road and standing still. A man was sitting in it, who afterward appeared to be Dean. Drew called to the person in the buggy to stop. Drew asked, "Who in the hell is that?" The man in the buggy answered, "Me." When they ran up to the buggy, he reached back "this way" (the witness illustrating). He was not trying to strike Drew or Smith, or do anything to them to cause them to shoot him. Drew fired at him twice with a pistol. The decedent sprang from the buggy and ran. Drew fired a third shot. He said something to Smith, which sounded like "Hand me." Smith ran around the buggy and fired a pistol at the decedent, who fell. Each of the defendants said he thought he had fired the fatal shot. They did not go to the place where the decedent fell. When the witness

asked Drew who the decedent was, Drew said that it was Dean. Drew and Smith told the witness not to say anything about the killing, but that, if it went to court, they should all tell the same tale, and say that they found the mule and buggy at a certain telegraph pole, which was about a quarter of a mile from the scene of the homicide, and that they went no further than that point. After the shooting they went back to the dance, and remained there for a while. Next day the dead body was found, with three wounds upon it, one in the back of the head, which was fatal, one in the side, and one in the arm. The sheriff testified that Drew said "he killed Love Dean on account of his stealing his mule and buggy, or that he and Charley Smith had killed him." This was said in the presence of Smith. The latter said that he did part of the shooting, and that he shot the decedent because he had two quarts of whisky in the buggy, which the decedent carried away, "and that he shot him because he got his whisky." The defendants introduced no evidence.

Drew's statement did not materially conflict with the evidence, except that, when he asked who it was in the buggy, and the person in it answered, "Me," the statement added: "At the same time throwing the lines over the dashboard, and reaching down in the buggy; and as he came up I shot. I thought he was going to do something to me. I knew he was a horse thief; had no other thought; did not know it was Love at all, if I had known that it was Love, I would not have shot." The statement of the defendant Smith included the following: "He threw the lines over the dashboard, and reached down, and jumped up. When he did that, Sam shot, and then he turned and jumped over the right wheel of the buggy, and then ran, and Sam shot twice more. I had two quarts of whisky in the buggy, and I thought he had the whisky, and I was going to stop him to see who it was. I thought he was a horse thief, going through the country stealing, and I shot. But I did not shoot to hit him, but to stop him. I did not know who it was, and I was mad, and bad excited. If I had known it was Love, I would not have done it for anything in the world." The defendants were convicted of murder, and recommended to life imprisonment. After the refusal of a new trial, they excepted.

[1] The charge of the court was not altogether exact in some particulars. But, under the evidence, and in the light of the entire charge, we do not think a reversal should be granted. There was ample evidence to authorize a charge on the subject of conspiracy or concert of action in the commission of the homicide. The killing of a human being in self-defense, or in defense of habitation, property, or person, against one

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

who manifestly intends or endeavors, by violence or surprise, to commit a felony on either, is justifiable homicide. Penal Code 1910, § 70. It has been held that, if a trespass on the person or property of another amounts to a felony, the killing of the trespasser will be justifiable if necessary in order to prevent it, but that a trespass which amounts only to a misdemeanor will not justify a killing, and also that the right of an owner to protect his property against a robber does not end at the moment that the taking is accomplished, so as to prevent the owner, before the robber has gotten away with the article taken, and while the crime is still progressing in his presence, from protecting his property. *Crawford v. State*, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242.

[2] The subject of recaption of property by the owner of it from one wrongfully taking it, and the limitation of the use of force in connection therewith, has given rise to much learned discussion and the drawing of various distinctions, resulting in some differences. The facts of the case before us do not require a discussion of these distinctions and differences. It may be said that the taking of human life by a private person is a grave matter, and is generally to be justified only as an actual or reasonably apparent necessary defensive or preventive measure against a trespass amounting to a felony. Sometimes a lawful act by an owner of property may be met by force on the part of a thief or trespasser, so as to authorize counter force to be used. There may be exceptional facts, as indicated in the *Crawford Case*, *supra*. Instructive discussions of the subject will be found in 1 *Bishop's Crim. Law* (8th Ed.) §§ 849, 853; *Wharton on Homicide*, §§ 524, 525; *Storey v. State*, 71 Ala. 329; note to *Barnes v. Martin*, 82 Am. Dec. 670, 673 (15 Wis. 240); *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389; *Commonwealth v. Donahue*, 148 Mass. 529, 20 N. E. 171, 2 L. R. A. 623, 12 Am. St. Rep. 591; *Gyre v. Culver*, 47 Barb. (N. Y.) 592; *Waterman on Trespass*, § 167; *State v. Doolley*, 121 Mo. 591, 26 S. W. 558; *McClelland v. Kay*, 14 B. Mon. (Ky.) 103, 106, et seq.; *Gray v. Combs*, 7 J. J. Marsh. (Ky.) 478, 23 Am. Dec. 431; *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159; 1 *Horr & Thomp. Crim. Def.* 891, 900, and note.

[3] In the case before us, the presiding judge charged that if the defendants were in pursuit of their property, or that of one of them, believing it to have been stolen, they would have had the right to use just such force as was necessary to recover the property and to arrest the party in possession of it, but could not shoot such party in revenge; that if, when the defendants approached the buggy, the party in possession of it made a demonstration as if seeking to

get hold of a weapon, or in some other way was threatening an attack on the defendants, and his conduct was such as to excite their fears, as reasonable men, that their lives were in danger, or that some serious bodily harm was about to be committed on them, or either of them, and they acted under the influence of those fears, and not in a spirit of revenge, and shot and killed the decedent, they should be acquitted. He also charged as to the possibility of reducing the homicide from murder to manslaughter by reason of passion arising from the conduct of the decedent in taking the property or in his conduct when the defendants approached him. The defendants thus got the benefit of a charge as favorable as they could expect on the theories arising from the evidence and statements. Whether or not there was any inaccuracy in charging as to reducing the killing to manslaughter if Drew believed he had to shoot to recover his property, we do not think there should be a reversal. Drew's own statement was that he thought the man in the buggy was "going to do something to" him, and he shot. The evidence did not indicate any apparent necessity to shoot merely to recover the property (if that would suffice), or to arrest a felon, nor did Drew so claim.

[4] Nor, under the particular facts of this case, do we think that a new trial should be granted on account of the charge as to the possible forms of verdict, if the jury believed the defendants acted in concert, or if they did not. If two persons pursued a third as a thief having property of each of them, with the common purpose of overtaking him and recapturing the property, and upon overtaking him both fired at him with pistols as he ran, and he was killed, this presented no case of separate and independent assaults, and the rule in such cases, as laid down in *Walker v. State*, 136 Ga. 126, 70 S. E. 1016, did not apply. The charge may have been inaccurate in some respects, but was, in its entirety, as favorable to the defendants as the evidence and statements authorized, perhaps more than they could have required. No new trial should be granted.

Judgment affirmed.

BECK, J., absent. The other Justices concur.

(138 Ga. 662.)

SOUTHERN PINE CO. v. DICKEY.
(Supreme Court of Georgia. Aug. 17, 1911.)

(Syllabus by the Court.)

1. REFERENCE (§ 101*)—REPORT—EXCEPTIONS.

"The auditor shall make an accurate report of all motions made before him, and of his rulings thereon, and reduce to writing a brief of the oral and documentary evidence submitted by the parties. But, at the request of either par-

ty, any original document introduced in evidence shall be properly identified and attached to the report in lieu of a brief thereof." Civil Code 1895, § 4585 (Civil Code 1910, § 5131). "After hearing the evidence and argument, the auditor shall file the evidence and a report, in which he shall clearly and separately state all rulings made by him, classify and state his findings, and report his conclusions upon the law and facts." Civil Code 1895, § 4587 (Civil Code 1910, § 5133). "For indefiniteness, omissions, errors of calculation, failure to report evidence, errors of law, or other proper cause, the judge may recommit the report for such further action as may be proper," etc. Civil Code, 1895, § 4593 (Civil Code 1910, § 5139). It follows that the report of an auditor, which failed to "clearly and separately state all rulings made by him, classify and state his findings," or in which his findings commingled matters of fact, of law, of argument, and conclusions of law, was not in compliance with the provisions of the statute quoted, and should, upon motion of the party dissatisfied therewith, have been recommitted for the purpose of requiring the auditor to clearly and separately state all his rulings, and to classify them into findings of fact and findings of law, and after so doing to report his conclusions of the law and the facts to the court.

(a) There are good reasons for the requirement of the statute that all rulings made by the auditor should be clearly and separately stated, and that his findings of fact and of law should be separately classified. If the findings of an auditor should commingle matters of fact, of law, of argument, and conclusions of law, the party desiring to except to such findings, in so far as they related to a fact or facts, would, in a case at law, be placed at a disadvantage when the issue made by his exceptions to such findings was submitted to the jury, because the whole finding, in which law, fact, argument, and conclusions of law were commingled, would have to be read to the jury, and in this way they might be unduly influenced by the matters of argument and law to the prejudice of the excepting party. Moreover, a party desiring to file exceptions to the report of an auditor is required to separately classify them as "exceptions of law," and "exceptions of fact," and all such "exceptions shall clearly and distinctly specify the errors complained of." Civil Code 1895, § 4589 (Civil Code 1910, § 5135). The requirement of the statute in respect to a clear and separate ruling made by an auditor, and the classification of them into findings of law and findings of fact, necessarily tends to greatly aid parties desiring to except to his findings, and to classify his exceptions as exceptions of law and of fact, and to relieve parties in making issues by exceptions, and the court in the disposition of them.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 169-180; Dec. Dig. § 101.*]

2. REFERENCE (§ 88*)—REPORT—FINDINGS OF LAW.

Of course, the rulings of the auditor upon the admission or rejection of evidence are rulings of law, and should be clearly and separately stated and classified as findings of law, and not merely stated in a brief of the evidence made and filed by him.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 134; Dec. Dig. § 88.*]

3. REFERENCE (§ 101*)—REPORT—EXCEPTIONS.

The report of the auditor in this case failed to comply with the provisions of Civil Code 1895, § 4587 (Civil Code 1910, § 5133), above quoted, and on this account the court erred in refusing to recommit the report upon the mo-

tion of the plaintiff in error, based upon such failure.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 169-180; Dec. Dig. § 101.*]

4. REFERENCE (§ 101*)—REPORT—BRIEF OF EVIDENCE.

It appears from the brief of the evidence filed by the auditor that he failed to report therein all of the evidence submitted on the hearing before him, a report of various documents as having been put in evidence, and which he had filed with the clerk of the court, and thereby made them a part of the evidence reported by him. This was not a compliance with the provisions of Civil Code 1895, § 4585 (Civil Code 1910, § 5131). This action upon the part of the auditor was also made a ground of the motion to recommit the report. The court should have either recommitted the report on this ground, or required the auditor to make an additional report of evidence submitted to him, embracing the documents or the material portions of the same, which he had filed with the clerk, and so reported, instead of embracing them in the brief of evidence which he filed.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 169-180; Dec. Dig. § 101.*]

5. ASSIGNMENTS NOT CONSIDERED.

In view of the foregoing, we do not deem it proper to pass upon any of the other assignments of error.

After the report has been recommitted, and another report made in accordance with the rulings we have announced, either party will be at liberty to make such exceptions thereto as are proper.

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Action between the Southern Pine Company and Lon Dickey. From the judgment, the Southern Pine Company brings error. Reversed.

W. W. Gordon, Jr., and Haygood & Outts, for plaintiff in error. Jay & Jay and Elkins & Wall, for defendant in error.

FISH, C. J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(126 Ga. 778)

DUVALL v. MATHEWS et al.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

MORTGAGES (§ 504*)—FORECLOSURE—RESTRAINING SALE—INTERLOCUTORY INJUNCTION.

Under the pleading and the evidence, there was no error in refusing an interlocutory injunction, especially as the sale sought to be enjoined was under the foreclosure of a mortgage given to secure a note of which the plaintiff in error was one of the makers, and which had matured and been sued to judgment.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 504.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by J. R. Duvall against D. M.

Mathews and others. From a judgment for defendants, plaintiff brings error. Affirmed.

Robt. P. Jones, for plaintiff in error. Etheridge & Etheridge and Alvin L. Richards, for defendants in error.

HOLDEN, J. Judgment affirmed.

BECK, J., absent. The other Justices concurred.

(130 Ga. 737)

HAWKINS v. STUDDARD.

(Supreme Court of Georgia. Aug. 21, 1911.)

(Syllabus by the Court.)

1. CONTRACTS (§ 212*)—SPECIFIC PERFORMANCE (§ 92*)—CONSTRUCTION OF CONTRACT—PERFORMANCE BY PLAINTIFF.

A contract, the legal import of which is that it shall be performed "presently," means, not that it may be performed "within a reasonable time," but that it must be performed "immediately; now; at once."

(a) Applying this rule to the facts of the present case, the purchaser of the land in question was not entitled to specific performance of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 944-956; Dec. Dig. § 212;* Specific Performance, Cent. Dig. §§ 233-244; Dec. Dig. § 92.*

For other definitions, see Words and Phrases, vol. 6, p. 5531.]

(Additional Syllabus by Editorial Staff.)

2. FRAUDS, STATUTE OF (§ 148*)—PLEADING—DEMURRER.

In a suit for specific performance, an amendment to the petition, alleging an agreement extending time for the payment of the balance of the price by the plaintiff, was properly allowed over the objection that it sought by parol to add to or vary the terms of the written contract, which was required by the statute of frauds to be in writing, where the amendment did not affirmatively show that the transaction set forth was in parol.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 353, 354; Dec. Dig. § 148.*]

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by J. T. Studdard against O. M. Hawkins. Judgment for plaintiff, and defendant brings error. Reversed.

George & Anderson and F. C. Foster, Sr., for plaintiff in error. S. H. Sibley and O. L. Williford, for defendant in error.

FISH, C. J. This is the second appearance of this case before the Supreme Court. See 132 Ga. 265, 63 S. E. 852, 131 Am. St. Rep. 180, where a statement of the facts is given. Hawkins contracted to sell to Studdard a described parcel of land, and executed the following receipt: "Rutledge, Ga., Apr. 15, 1905. Received of John F. Studdard twenty-five dollars, closing purchase of the Hanleiter place, containing 187.6 acres one tract, and one 4 acres more or less, at \$15.00 per acre." When the case was formerly here, it was

ruled that this receipt contained the entire contract, and that the legal import of the contract was that the balance of the purchase money was to be paid presently, and that a mere parol agreement of the parties to the writing, made subsequently to its execution and delivery, fixing a subsequent specified time for the balance of the purchase money to be paid, was not admissible to illustrate the time within which the balance was to be paid.

[2] Upon the second trial an amendment to the fifth paragraph of the petition was allowed, over the objection of the defendant that it sought by parol to add to or vary the terms of the written contract, which was required by the statute of frauds to be in writing, which amendment was as follows: "On the afternoon said sale was made and presently thereafter, plaintiff, being ready and willing to make full payment for said land, so informed defendant, who requested plaintiff to delay payment until December 1st. Accordingly, on December 1, 1905, plaintiff tendered to defendant, in lawful money, all that was due him on said land as aforesaid, which tender was refused and declined. Plaintiff owed defendant no interest, because defendant, by plaintiff's consent, had occupied said premises for the year 1905, and the use of them was worth more than the interest on the purchase price." As it did not affirmatively appear from this amendment that the transaction therein set forth was in parol, the court did not err in allowing it. *Crovatt v. Baker*, 130 Ga. 507(3), 512, 61 S. E. 127. This is on the theory that the amendment sought to set out a written agreement between the parties, extending the time for the payment of the balance of the purchase money. The allegations of the amendment were not, however, sufficient to constitute a tender by Studdard of the balance of the purchase price for the land. Taking the facts set out therein to be true, there was no offer on the part of Studdard, although it was alleged that he was ready and willing to do so at the time indicated in the amendment, to pay the balance of the purchase money. As there was no offer on his part to pay, there was, of course, no refusal on the part of Hawkins to accept. What is stated in the amendment, in effect, amounts only to an agreement between the parties to postpone the payment of the balance of the purchase money until December 1st following. This being true, it was merely an attempt by a parol agreement to change the terms of the contract as to the payment of the balance of the purchase money, and was futile, as this court formerly ruled in this case. See, also, *Willis v. Fields*, 132 Ga. 242, 63 S. E. 828. Of course, if the agreement had been in writing, it might have been effective. The evidence shows that the transaction set out in the amendment was wholly in parol.

[1] As previously ruled in this case, as already herein indicated, the balance of the purchase money under the contract was to be paid "presently." The word "presently" has been defined in the law dictionaries as follows: "Immediately; now; at once." Black; Cyclopedic; English; Anderson; Ralpalje & Lawrence. Webster's International Dictionary defines the meaning of "present" to be: "At once; without delay; forthwith; also, less definitely; soon; shortly; before long; after a little while; by and by." The evidence fails to disclose any act or conduct on the part of the defendant, Hawkins, which tended to prevent or deter the plaintiff, Studdard, from tendering the balance of the purchase money "presently," as required by the contract. According to the evidence, the only tender made by Studdard was on December 1, 1905, 7½ months after the making of the contract under which the balance of the purchase money was to be paid "presently." Certainly the length of time cannot be said, in the circumstances and under the undisputed evidence in the case, to have been made "presently" and in compliance with the contract.

As the balance of the purchase money was to be paid "presently," the doctrine of reasonable time for making such payment was not applicable to the case. The same rule which prevails in a cash transaction applies in this respect to this case. "Time is not generally of the essence of a contract, but by express stipulation or reasonable construction it may become so." Civil Code 1895, § 3675(8); Civil Code 1910, § 4268(8). There was no contemplation of credit by the parties to the contract in the present case, the payment of the balance was a condition precedent to the sale, and the time of payment, being "presently," was necessarily of the essence of the contract; and, as Studdard failed to comply with this condition precedent in accordance with the contract, Hawkins was not bound to carry out his part of the contract, and Studdard was not entitled to specific performance. In 1 Addison on Contracts (Morgan's Ed.) § 320, it is said: "A contract to do a particular thing 'directly,' or 'as soon as possible,' or 'forthwith,' does not mean that it is to be done instantly; but there must be no delay in performance, and such a contract requires a much more speedy fulfillment than a contract to do a thing within a reasonable time. When a party covenants to pay money 'immediately on demand,' the word 'immediately' must receive a reasonable construction, so as to allow the debtor time to procure the money, and, if the demand is not made by the creditor himself, to inquire into the authority of the person making it." See, also, in this connection, *Sentenne v. Kelly*, 59 Hun, 512, 13 N. Y. Supp. 529; *Lewis v. Hojer* (Com. Pl.) 16

N. Y. Supp. 534; *Tobias v. Lissberger*, 105 N. Y. 410, 12 N. E. 13, 59 Am. Rep. 509.

In none of the cases cited and relied on by counsel for the defendant in error, wherein the doctrine of reasonable time as to the payment of purchase money was applied, did it appear that such payment was, under the contract, to be made "presently," but in all of them credit was given, and it could be well inferred from the facts that the day fixed for performance was, in accordance with the intention of the parties, named merely in order to secure performance within a reasonable time; and therefore equity would not refuse to enforce the contract if the promise required to be so performed was performed within a reasonable time.

In what has been said, we have in effect passed on all the grounds of the motion for a new trial of a controlling nature. Under the facts of the case and the law applicable thereto, Studdard was not entitled to specific performance of the contract, and the court erred in overruling the motion made for a new trial by Hawkins.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 705)

PAYNE v. SUPREME RULING OF FRATERNAL MYSTIC CIRCLE.

(Supreme Court of Georgia. Aug. 19, 1911.)

(Syllabus by the Court.)

INSURANCE (§ 198*)—MUTUAL BENEFIT INSURANCE—RECOVERY OF PREMIUMS PAID—PLEADING.

The petition as amended did not set forth a cause of action, and was properly dismissed on general demurrer.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 198.*]

Exceptions from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by George E. Payne against the Supreme Ruling of the Fraternal Mystic Circle. From a judgment dismissing the petition on general demurrer, plaintiff excepts. Judgment affirmed.

George E. Payne, a resident of Augusta, Richmond county, brought an action against the Supreme Ruling of the Fraternal Mystic Circle, an incorporated insurance fraternal association, with its principal office at Philadelphia, Pa., and an agency and place of business in the city of Augusta. The substance of so much of the petition as is here material is as follows: In 1906 the Modern Puritans, a similar association to the defendant, and of Norfolk, Va., issued to the plaintiff two certificates, dated, respectively, April 23d and July 31st, by which the life of plaintiff was insured for the benefit of his wife in stated amounts, and on each of which

the plaintiff was to pay a given sum monthly as premiums. On December 31, 1906, the American Guild, of Richmond, Va., assumed all of the responsibilities covered by the certificates issued to the plaintiff by the Modern Puritans, issuing to the plaintiff two certificates in lieu of those of the last-named association. On May 27, 1907, the defendant assumed all of the liabilities to the plaintiff on the certificates issued to him by the American Guild, and issued to him two certificates, on which he was to pay the same monthly premiums as on the original certificates. In the plaintiff's applications to the Modern Puritans for certificates of insurance, which applications were accepted, it was stated that the plaintiff was a wholesale liquor dealer. He has ever since remained in this business.

On March 24, 1909, the plaintiff sent to the defendant from Augusta the following letter: "The Fraternal Mystic Circle, Philadelphia, Penn.—Sirs: I have just received from Mr. Fred W. Thomas notice to pay my monthly dues for March. I have heard in the meantime that a policy held by a person engaged in the sale of liquors, in your order, is void; and I want to know the facts in this particular. I made application for the policy in question with the Modern Puritans, then it was transferred to the Guild, and then to the Mystic Circle. Now, when I made this application I was engaged in the whisky business, and the agent that took my application did so in my place of business and with full knowledge of same; and I ask you to look on the original application and see what I said my occupation was. I am not going to stand for an additional 75 cents per thousand on my policy; neither will I lose what I have paid. I ask that you mail the original application to your representative, Mr. Fred W. Thomas, which will settle the question in dispute. Hoping to hear from you by return mail, I am respectfully, [Signed] Geo. E. Payne."

On March 27th following the plaintiff received from the defendant this reply: "Geo. E. Payne, Augusta, Ga.—Dear Sir and Brother: I am in receipt of your favor of the 24th inst., and in reply will say, by referring to your application for membership, we find that you stated that you were a wholesale liquor dealer. The constitution and laws of the Modern Puritans provide that no person shall be admitted to nor hold membership in the Modern Puritans who is engaged as 'principal, agent, or employe in the sale of spirituous or malt liquors as a beverage.' We do not know how or why the Modern Puritans accepted your application for membership, unless they placed an interpretation upon the laws of their order to mean a person engaged in the wholesale liquor business was not selling liquor as a beverage. Be that as it may, when you became a member of the American Guild by reason of that organiza-

tion having reinsured the business of the Modern Puritans, you became subject to their constitution and laws, and their constitution and laws provide that a person who is engaged in the manufacture, sale, or delivery of intoxicating liquors, either as principal, agent, or servant, shall be classed as hazardous and pay a rate of 75 cents per \$1,000 per month extra; and we took the business over subject to these restrictions. It appears from a letter written by Mr. Floyd Thomas, under date of March 10th, that you are in the soft-drink business, and, not handling liquors, would not be subject to this extra rate. We are willing to let the past go; but if in the future you engage in the liquor business you would become subject to the requirements of the constitution and laws, and the most favorable classification that could be given you would be the classification of the American Guild, which provides for an extra premium rate. Very truly and fraternally yours, [Signed] J. D. Myers, Supreme Recorder."

On April 9th thereafter the plaintiff sent the defendant the following letter: "The Fraternal Mystic Circle, Philadelphia, Pa.—Sirs: I have your letter of March 27th, and would have replied sooner, but have been out of the city. In reply I will say that if it be true, as you state in your letter, that the Puritans do not insure persons engaged in the sale of liquors, then I have no insurance; but they received my money and receipted for it from time to time, as the Guild did, and yourselves. Now, there is only one thing I can do, and that is ask for the money back that I have paid, with legal interest. I see very plain from your letter your stand in this matter; nothing more or less than to try to swindle me out of what I have paid. But I will spend as much more before I will submit to any such treatment. I will give you your choice of settling this with me or the courts. [Signed] Geo. E. Payne."

The plaintiff thereupon brought suit against the defendant for all the premiums he had paid to the several insurance associations, with interest thereon at 7 per cent. per annum, "for the average time since the payment of the same." The petition was dismissed on general demurrer, and the plaintiff excepted.

B. B. McCowan, for plaintiff. Wm. H. Barrett, for defendant.

FISH, C. J. (after stating the facts as above). Under the record and the briefs of counsel for the respective parties, the case is made to depend on whether the letters which passed between the parties, set forth in the foregoing statement of facts, show that the defendant committed a breach of its contract of insurance contained in the certificates it issued to the plaintiff. A careful reading of the letters will show, in our opinion, that the contract of insurance as ex-

hibited by the certificates was rescinded or repudiated by the plaintiff, and not by the defendant. While it may be inferred from the letter written by the plaintiff to the defendant, on March 24, 1909, that the plaintiff was then engaged in the sale of liquors, and had been in such business from the time the original certificates were issued to him by the Modern Puritans, it is clear from the responsive letter written by the defendant March 27th that the defendant did not understand that the plaintiff was then engaged in such business. In this letter the defendant informed the plaintiff that in a letter written by Thomas on March 10th, who appears to have been the defendant's agent, the plaintiff was then engaged "in the soft-drink business," and not in the handling of liquors, and would therefore not be subject to the payment of the extra rate imposed on members of the association selling liquor. In this letter the defendant stated, in effect, that, whatever may have been the rights of the plaintiff in the past, it was willing "to let the past go," but that if in the future the plaintiff should engage in the liquor business he would become subject to the payment of the extra premium rate for those engaged in such business.

The plaintiff was therefore put upon notice that the defendant understood from its agent, Thomas, who had notified the plaintiff to pay his March dues, that the plaintiff was not then engaged in the sale of liquor; and the plaintiff, instead of informing defendant that its understanding as to this matter was incorrect and that he was still engaged in the liquor business, interpreted the letter of the defendant to be a rescission of the contract of insurance certificates held by him, and demanded of the defendant repayment to him of all premiums he had paid, with interest thereon, and soon thereafter brought his suit for the same. The plaintiff misinterpreted, we think, the letter of the defendant as being a rescission or repudiation of the certificates. This letter stated that, as the plaintiff was not then engaged in the sale of liquor, he was not subject to the extra premium, but that, in the event he should in the future engage in such business, then he would be subject to the extra premium. It does not appear where Thomas, the defendant's agent, was located, nor where the plaintiff did business as a wholesale liquor dealer, and we cannot legally assume that he was engaged in such business in Augusta in 1909 in violation of the general prohibition law. From what has been said, it follows that the court properly dismissed the petition on general demurrer.

Judgment affirmed.

BECK, J., absent. The other Justices concur.

(134 Ga. 657)

ATLANTIC POSTAL TELEGRAPH-CABLE
CO. v. MAYOR, ETC., OF SAVANNAH
et al.

(Supreme Court of Georgia. Aug. 16, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 122*)—ORDINANCES—VALIDITY—BURDEN OF PROOF.

Where an attack is made on the reasonableness of an ordinance because of certain extrinsic facts, the burden is on the party attacking the ordinance to prove such facts, and upon his failure to carry this burden the ordinance will not be declared invalid. In this case the plaintiff failed to carry the burden of proof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 284-286; Dec. Dig. § 122.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Atlantic Postal Telegraph-Cable Company against the Mayor and Aldermen of Savannah and others. From a judgment for defendants, plaintiff brings error. Affirmed.

Anderson, Felder, Rountree & Wilson and Garrard & Meldrim, for plaintiff in error. Samuel P. Adams and R. J. Travis, for defendants in error.

EVANS, P. J. When this case was before us on a writ of error to the judgment dismissing the petition on demurrer, it was held that the allegations of the petition were sufficient to call upon the city to show that the tax was reasonable, either by contesting the truth of the plaintiff's allegations, or by showing other matters which might tend to explain or lessen the evidentiary value of the plaintiff's allegations, if proved on the trial. 133 Ga. 66, 65 S. E. 184. The case as made by the petition was that there were two telegraph companies operating in Savannah, the Western Union and the plaintiff; that the former was a pioneer in the field, and possessed certain advantages because of that fact, and the number of offices and the interstate and intrastate business of both companies were compared; that the plaintiff did an unprofitable business, although it was conducted as conservatively and judiciously as the Western Union's; and that its business was proportionately equal to that of the Western Union. The inference of fact sought to be established by these allegations was that the tax was unreasonable, when considered in connection with the total telegraph business done in Savannah, and the demand of such a tax tended to promote a monopoly, as it could only be paid by the Western Union because of its superior advantages, which were not obtainable by other telegraph companies.

On the trial the plaintiff submitted proof tending to show that it operated its Savannah office at a loss, but failed to submit evidence to establish the allegations of its pe-

tion upon which we placed our decision in passing on the demurrer. The isolated fact that the business of the plaintiff was conducted at a loss does not make the tax excessive. An occupation tax only becomes unreasonable when applied to the municipality as a whole. Mayor, etc., of Savannah v. Cooper, 131 Ga. 876, 63 S. E. 138. The burden was on the plaintiff to show the unreasonableness of the tax, and it failed to submit evidence sufficient to overcome the presumption in favor of the reasonableness of the ordinance. Under such circumstances it is idle to inquire into the correctness of the criticisms on the charge, or the appositeness of the requests to charge which were denied. "Wrong directions, which do not put the traveler out of his way, furnish no reason for repeating the journey." Cherry v. Davis, 59 Ga. 454, 456.

Judgment affirmed.

BECK, J., absent. The other Justices concur.

(126 Ga. 698)

STEED v. AMERICAN NAT. BANK et al.
(Supreme Court of Georgia. Aug. 18, 1911.)

(Syllabus by the Court.)

1. BUILDING AND LOAN ASSOCIATIONS (§ 38*)
—SECURITIES—BONA FIDE PURCHASERS.

The provision of the act of 1896 (Acts 1896, p. 52), as changed by the act of 1897 (Acts 1897, p. 62), which declares that every building and loan association shall deposit with a legal depository of the state, or with a trust company, to be selected by the board of directors, 75 per cent. of the mortgages or other securities received by it in the usual course of its business, in trust for all its members and creditors, does not operate to charge any particular mortgages or securities, not deposited, with a trust as against persons taking them bona fide and for value. Nor are persons dealing with such an association bona fide and for value put on inquiry, by reason of such law, to ascertain whether the association has complied with it.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 38.*]

2. BUILDING AND LOAN ASSOCIATIONS (§ 42*)
—RECEIVERSHIP—EVIDENCE.

The evidence authorized the decree which was rendered by the presiding judge, passing on questions of law and fact, without a jury, by consent.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 42.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Equitable petition by one Sanders and others against the American National Bank and others, in which E. J. Steed filed an intervention. From the decree, intervener brings error. Affirmed.

Robt. L. Berner and Claud Estes, for plaintiff in error. Lane & Park, W. J. Grace, T. E. Ryals, R. L. Anderson, and Guerry, Hall & Roberts, for defendants in error.

LUMPKIN, J. Sanders and others filed an equitable petition against the Equitable Banking & Loan Company and others, for the purpose of having the assets of the company placed in the hands of a receiver and reduced to cash, and to have the fund used for the payment of debts. Among the defendants were the Home Savings Bank, which held a considerable amount of the securities of the company as trustee for its bondholders, and the American National Bank, which held certain of the assets of the company to secure an indebtedness to it. E. J. Steed filed an intervention, in which he claimed that neither the Home Savings Bank nor the American National Bank acquired any title, interest, or lien in, to, or upon the assets of the Equitable Banking & Loan Company. It appeared that originally the company was incorporated, under the name of the Equitable Building & Loan Association, to do a building and loan business. Afterwards it changed its name to the Equitable Banking & Loan Company, and proceeded to discharge some of the functions of a bank. Steed deposited money with it as a savings bank, at interest. When the company failed, much the larger part of its indebtedness was on account of interest-bearing deposits. There were also about \$1,200 of fixed-dividend stock, \$1,700 of paid-up stock, and \$5,940 of preferred stock. The regular building and loan installment stock had been reduced to \$849.11. The case was, by consent, submitted to the presiding judge, to pass on the issues both of law and fact, without a jury. He held that the trustee of the bondholders and the American National Bank were entitled to priority as to the assets held by them as security, to the extent of the indebtedness so secured. Steed moved for a new trial, which was refused, and he excepted.

[1] 1. The corporation involved in this case was born as a building and loan association, and died in the effort to be a bank. Its charter gave it no authority to do a banking business, nor could the superior court confer such power upon it. When it changed its name from "Building & Loan Association" to "Banking & Loan Company," the use of the word "Banking" was a misnomer. The act of 1896 (Acts 1896, p. 52) provided, among other things, that every building and loan association should deposit with the Treasurer of the state, or with a legally incorporated and organized trust company, to be selected by the board of directors, "in trust for all its members and creditors, seventy-five per cent. of the amount of all mortgages or other securities received by it in the usual course of its business." The act of 1897 (Acts 1897, p. 62) differed from that of 1896 by omitting the provision as to the Treasurer, and inserting in lieu thereof, "one of the legal depositories of the state." This act required

a deposit of 75 per cent. of the amount of such securities, but it did not itself select which securities should be deposited, or charge any particular securities with a trust, before their deposit, at least as to third parties acting bona fide, for value, and without notice. Persons dealing with such an association were not bound at their peril to see that it had made the deposit. In the absence of anything to show the contrary, it might be presumed that there had been such compliance. *Morgan v. Interstate Building & Loan Association*, 108 Ga. 185 (4), 187, 33 S. E. 964. The theory that any person who dealt with the association and took any of its securities was put on notice or inquiry by the act itself, and held the securities charged with a trust, and that this was true, even if they were transferred, for value and for an entirely different purpose, to a corporation with which they might have been deposited, is untenable. It is also not to be overlooked that the plaintiff in error did not deal with the debtor as a building and loan association, but as a bank of deposit, or savings bank, and his claim arose from a character of business which neither its charter nor the acts above cited contemplated.

[2] 2. The case was, by consent, submitted to the decision of the presiding judge without a jury. The grounds of the motion for a new trial are really only elaborations of the position that, under the law, the evidence did not authorize the judgment or decree, and specifications of certain reasons why it was contended that this was true. The judgment or decree, as to questions of fact, stands like the finding of a jury. Upon a review of the whole case, we cannot say that such judgment was erroneous. It was contended that the contract with the trustee for the bondholders was not authorized. But it was executed in the name of the company, by its president and its treasurer, apparently with a seal attached; and while the minutes of the company did not show direct authority for the contract made, there were various entries tending in that direction. In the minutes of the directors appeared the statement that a committee was appointed to prepare "the copy" for an issue of bonds. At a later meeting, "the issue of \$25,000 of 7 per cent. gold bonds was approved, to be secured by mortgages and real estate held by the company." Again, there appeared an entry that "it was deemed an opportune time to issue some 7 per cent. gold bonds, authorized some time ago, and the president was authorized to advertise the same for sale." Incorporated in the minutes were monthly statements made by the president to the board of directors, which showed receipts from the bonds issued. Still later was an entry that, "on motion, the president was authorized to make other banking ar-

rangements with such institutions as will offer the best accommodations," and that the president was authorized to make a loan of \$5,000 specified, "and also such loans as might be needed." The original trustee for the bondholders failed, and a similar agreement was made with a second institution. This was known to all of the directors, and the bonds were issued under the trust contract, and certified by the trustee. That the contract and the transfers upon the security deeds placed in the hands of the trustee were not recorded did not render the transaction invalid as against the plaintiff in error. The grounds of the motion for a new trial did not expressly make the point that a transfer of a security deed does not carry with it a transfer of title to the land. But the notes secured by them were transferred to the trustee, and, under the trust contract, the trustee had at least an equitable lien, and a right superior to that of the plaintiff in error.

The transfer of certain securities to a bank for a loan was also attacked for want of authority on the part of the president of the association to contract the debt and give the security, and on the ground that the loan was made after the insolvency of the association, and that the bank had notice thereof. In the light of the facts above cited, and of the other evidence in the record, there was no error in holding that the bank had the right to realize from such securities the amount due to it. Upon the whole case, the presiding judge did not err in the decree which he entered.

Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 664)

PATTERSON et al. v. CAMPBELL et al.
(Supreme Court of Georgia. Aug. 17, 1911.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 124*)—PROCEEDINGS TO PRODUCE—GROUND OF MOTION.

A ground of a motion for a new trial should be complete in itself, or rendered so by an exhibit attached to the motion. Accordingly, it has been repeatedly ruled that a ground based upon the admission or rejection of evidence presents nothing for adjudication, when such evidence is not set forth therein, either literally or in substance, nor attached as an exhibit to the motion. *Shaw v. Jones*, 133 Ga. 446 (9), 66 S. E. 240.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 250-253; Dec. Dig. § 124.*]

2. INSTRUCTIONS—EXPRESSION OF OPINION.

The judge did not express an opinion as to what had been proved in any of the instructions to the jury of which complaint was made.

3. TRIAL (§ 244*)—INSTRUCTIONS.

An assignment of error upon the ground that the judge, after fully charging all of the contentions of the plaintiff, failed to charge one of the principal contentions of the defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"until after his charge in chief to the jury," was without merit.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 244.*]

4. PAYMENT (§ 77*)—TRIAL (§ 193*)—INSTRUCTIONS—BURDEN OF PROOF AS TO PAYMENT—EXPRESSION OF OPINION BY JUDGE.

On the trial of an action for land, the plaintiff relied in part for a recovery upon 20 years' adverse possession, and the defendant contended that the land had been purchased by the plaintiff from the defendant's predecessor in title under a parol agreement, and that, though the plaintiff went into possession, he had never paid the purchase price. The court instructed the jury as follows: "That the law presumes that after 20 years the purchase price was paid, if nothing to the contrary be shown to you. If there were any admissions made by the plaintiff in this case, admissions should be scanned with care by the jury. You ascertain if there were any admissions made that the price was not paid, and you decide under the ruling given you whether or not the price was paid." Such charge was not "erroneous for the reason that the same fails to explain to the jury under what conditions the law would presume that the purchase price had been paid after the expiration of 20 years," nor because the court therein intimated and expressed "an opinion as to the weight and consideration to be given by the jury as to admissions," nor because that portion of the charge to the effect that "you ascertain if there were any admissions made to you that the price was not paid" placed "a greater burden upon the plaintiff [the defendant?] than the law requires"; nor was the charge erroneous "for the further reason that, if the testimony disclosed that there was a contract of purchase by the plaintiff from the defendant, the burden would then rest upon the plaintiff to show that he had paid the purchase price, and no prescription could ripen in his favor until that was done." *Hodges v. Stuart Lumber Co.*, 128 Ga. 733, 58 S. E. 354, and citations.

[Ed. Note.—For other cases, see Payment, Dec. Dig. § 77.* Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

5. APPEAL AND ERROR (§ 713*)—RECORD—MATTERS PRESENTED FOR REVIEW.

It appears from the motion for a new trial and the approved brief of the evidence that certain deeds were put in evidence by the plaintiff, upon which he relied as color of title. In neither the motion for a new trial nor in the brief of evidence as approved by the judge does even the substance of such deeds appear. Following the brief of evidence are copies of certain deeds sent up in the record, which are in no way made a part of such brief. These documents cannot be considered by this court, as they constitute no part of the brief of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2379, 2463, 2465, 2956, 2957; Dec. Dig. § 713.*]

6. APPEAL AND ERROR (§ 926*)—REVIEW—PRESUMPTIONS IN APPELLATE COURT.

One of the contentions of the plaintiff below was that he had title by prescription under color and seven years' adverse possession. It appears from the motion for a new trial made by the defendant below that the plaintiff put in evidence certain deeds under which he claimed as color. It appears from evidence submitted in behalf of the plaintiff that he was in adverse possession for more than seven years after the execution and delivery to him of such deeds. As neither these deeds nor their substance, except as to the parties thereto and dates thereof, appear either in the motion for a new trial or the brief of evidence approved by the judge,

this court will assume that such deeds covered the land in dispute.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 926.*]

7. SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL.

The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Decatur County; Frank Park, Judge.

Action between Harriet Patterson and others and E. D. K. Campbell and others. From the judgment, Harriet Patterson and others bring error. Affirmed.

E. S. Longley and T. S. Hawes, for plaintiffs in error. G. G. Bower, for defendants in error.

FISH, C. J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 730)

HEARD et al. v. SHEFFIELD et al.

(Supreme Court of Georgia. Aug. 21, 1911.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§ 363*)—SALES UNDER ORDER OF COURT—AUTHORITY OF ADMINISTRATORS—PLACE OF SALE.

Where the court of ordinary grants an order to an administrator to sell the wild uncultivated lands of his intestate either at private or public sale, the administrator may sell as authorized. If the land to be sold is located in a county other than that of the administration, and the administrator elects to sell at public sale, the situs of the sale is the county having jurisdiction of the administration of the estate, in the absence of a provision in the order of sale fixing the place of sale in the county where the land to be sold is located.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1490; Dec. Dig. § 363.*]

Error from Superior Court, Early County; W. C. Worrell, Judge.

Action by Columbus Heard and others, executors, against N. L. Sheffield and others. From a judgment for defendants, plaintiffs bring error. Reversed.

J. E. Hall, for plaintiffs in error. D. F. Crosland, R. H. Sheffield, C. L. Glessner, and J. R. Pottle, for defendants in error.

EVANS, P. J. The writ of error is to the grant of a nonsuit in an action of ejectment. The plaintiff would have made out a prima facie case if his last muniment of title had been admitted in evidence. The rejected deed was from William M. Weaver, executor of William W. D. Weaver, to Columbus Heard. The subject-matter of the suit was a lot of wild land located in Early county, and title to it was shown to have been in William W. D. Weaver, of Greene county, at the time of his death. There was intro-

duced in evidence an order from the court of ordinary of Greene county, passed at the November term, 1898, granting to William M. Weaver, executor of William W. D. Weaver, leave to sell the wild land of his intestate at public or private sale as he deemed for the best interest of the estate. The rejected deed was duly recorded, and recited that it was made pursuant to a sale under this order at public outcry before the courthouse of Greene county, and that the grantee was the highest and best bidder thereat. It is stated in the bill of exceptions that the defendants objected to the introduction of the deed in evidence "on the ground that the sale therein was void, the statute (Civil Code 1895, § 3448) directing that wild land be sold at private sale, and the deed was inadmissible for the reason that the executor named in said deed had no right under the law and under the order hereinabove set out to sell said land at public outcry in Greene county, Georgia, but that the land, being wild land, should have been sold in the county of its situs, to wit, Early county, inasmuch as the same was sold at public outcry." The objection was sustained. Thereupon the case was nonsuited on the evidence before the court.

We think the court erred in sustaining the objection urged against the reception of the deed in evidence. The Code declares that, before an administrator can sell the land of his intestate, he must procure an order from the court of ordinary having jurisdiction of the administration, granting him leave to sell. The sale must be at public auction, after due advertisement, in the county having jurisdiction of the administration, unless by special order a portion of the land is sold in another county where the land lies. Civ. Code 1910, § 4028. Where the land to be sold is wild land, the Code provides: "On application by the administrator and due notice advertised as herein-after provided in case of lands, the ordinary may grant an order authorizing the administrator to sell, at private sale, wild uncultivated lands lying in counties other than that of the administration: Provided, no objection is filed by any one interested in the estate, and the ordinary is satisfied that such sale is preferable." Civ. Code 1910, § 4024 (Civ. Code 1895, § 3448). These two provisions of the Code are in pari materia, and are to be construed together. The rule which they prescribe for the sale of land by an administrator is that land belonging to an intestate shall be sold at public sale in the county having jurisdiction of the administration, except in two instances. One exception is that, in case a portion of the land to be sold lies in a county other than where the administration of the estate is had, the ordinary may by special order authorize the sale to be had in the county of the situs of

the property to be sold. The other exception relates to the sale of wild land located in a county other than that of the administration, in which case the ordinary may authorize the administrator to sell such land at private sale. If the land to be sold is located in the county of the administration, whether it be wild or improved land, the sale must be public, and must take place in the county having jurisdiction of the administration of the estate. If the land be wild uncultivated land, and located in a county other than that of the administration, then the ordinary may authorize it to be sold either at public or private sale; and, if at public sale, the situs of the sale is the county of the administration, unless the order specially designates the place of sale in the county where the land lies. The obvious purpose of the Code section authorizing a private sale of wild and scattered land is to allow the administrator, when interested parties do not object and the ordinary deems that a private sale will be more advantageous, to privately negotiate a sale and consummate it without further formality than to make a deed. It was not intended to make this an exclusive mode of sale of wild land, since, if the ordinary should decline to permit a private sale of the land, the sale must be public and in the manner prescribed generally for the sale of land. Hence we conclude that the deed was admissible in evidence as against the objection urged against its admission; and, if this deed had been received in evidence, the grant of a nonsuit would have been erroneous.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(126 Ga. 637)

VINTON v. POWELL et al.

(Supreme Court of Georgia. Aug. 18, 1911.)

(Syllabus by the Court.)

1. INFANTS (§ 24*)—ADVERSE POSSESSION—INFANCY OF OWNER.

Time does not run against the equitable estate of minors, where the legal estate does not reside in one authorized to assert their rights. Civ. Code 1910, § 4173.

(a) Accordingly, where it was alleged in the petition that the father of the plaintiff's ward died seised and possessed of a given tract of land in the fall of 1899, that he was at the time of his death the absolute owner thereof, that no administration had ever been had upon his estate, that the wards were all of his children and were minors at that time, that a guardian was appointed for them November 4, 1901, and it appears that the action was brought by their guardian against their mother, claiming as an heir, and others holding by deed under her and in possession of the premises, the defendants did not have title to the land by prescription under color and seven years' adverse possession, although they were in actual possession of the same, claiming title thereto, from October, 1900, because, even if prescription would

run against minors represented by a guardian (see *Wood v. Haines*, 72 Ga. 189), seven years had not elapsed from the appointment of the guardian on November 4, 1901, to the bringing of the suit by him for his wards, on April 20, 1906.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 25; Dec. Dig. § 24.*]

2. DESCENT AND DISTRIBUTION (§ 90*) — RIGHTS OF HEIRS—ACTION TO DETERMINE RIGHT.

The petition as amended was for the establishment of title to undivided interests in the plaintiff's wards, and for the recovery of their proportion, for the partition of the premises, for the cancellation of deeds as clouds upon their title, for the reformation of another deed, and to recover for rents, profits, and waste. It set forth a cause of action sufficient to authorize the relief prayed for, except the cancellation of deeds and recovery for the whole of the mesne profits and waste. The allegations show that the defendants claiming under the widow had title to her interest, which made them tenants in common with the plaintiff's wards; and accordingly there was no ground for the cancellation of the deeds under which the defendants held. As to the mesne profits and waste, the plaintiff's wards would be entitled to only their undivided interests.

[Ed. Note.—For other cases, see *Descent and Distribution*, Dec. Dig. § 90.*]

3. PLEADING (§ 259*)—AMENDMENT—AMENDMENT OF ANSWER.

The amendment to the answer of the defendants, that they "deny that they hold under any common source of title with the plaintiffs, but claim a complete legal title to the premises," was properly allowed over the objection "that such amendment was contrary to law."

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 259.*]

4. DEPOSITIONS (§ 83*)—TRANSMISSION TO COURT—INDORSEMENT BY POSTMASTER.

"Whenever any package containing interrogatories or depositions shall be received by mail, the postmaster of the office to which they are directed shall immediately, upon their receipt, indorse upon the package the fact of its reception by due course of mail, and at once deliver the package to the clerk, or presiding judge, or justice of the court to whom it is directed." Civ. Code 1910, § 5890.

(a) Where a package purporting to contain interrogatories was delivered, by the postmaster of the office to which it was directed, to the clerk of the superior court without an indorsement by such postmaster upon the package that it had been received by due course of mail, and a written motion was made to suppress the interrogatories for the absence of such receipt upon the package, and thereafter counsel for the party in whose behalf the interrogatories had been sued out took the package from the clerk's office, without the knowledge of the judge, and without any order authorizing counsel so to do, and carried the package to the post-office, and there had the postmaster to enter thereon the required receipt, the court did not err in suppressing and excluding such interrogatories, although counsel taking the same from the clerk's office and having the postmaster to enter his receipt upon the same may have acted in good faith. See *Findlay v. Mineralized Rubber Co.*, 98 Ga. 275, 25 S. E. 456; *White v. Southern Railway Co.*, 123 Ga. 353, 51 S. E. 411.

[Ed. Note.—For other cases, see *Depositions*, Dec. Dig. § 83.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by I. B. Vinton against W. H. Powell and others. From a judgment for defendants, plaintiff brings error. Reversed.

J. Clifford Hale, for plaintiff in error. Bower & Bower and G. G. Bower, for defendants in error.

FISH, C. J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(126 Ga. 709)

ESTES v. ESTES.

(Supreme Court of Georgia. Aug. 19, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1078*) — REVIEW — ABANDONMENT OF ERROR.

Assignments of error in a bill of exceptions, which are not referred to in the brief of counsel for plaintiff in error, will be treated as abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4258-4261; Dec. Dig. § 1078.*]

2. APPEAL AND ERROR (§ 1052*) — REVIEW — HARMLESS ERROR—EXCLUSION OF EVIDENCE.

On the trial of an issue involving insanity, whether or not a witness laid the foundation for testifying as an expert, a ruling that he had not done so will not cause a reversal, where the same witness was subsequently allowed to give substantially the same evidence which was excluded at the time the ruling was made.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

3. GRANTING NONSUIT—NO ERROR.

There was no error in granting a nonsuit.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between A. B. Estes, guardian, and M. T. Estes. From the judgment, the guardian brings error. Affirmed.

J. R. Walker, Andrew B. Estes, and Hitch & Denmark, for plaintiff in error. O'Byrne, Hartridge & Wright, for defendant in error.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(126 Ga. 687)

MILLS et al. v. BELL.

(Supreme Court of Georgia. Aug. 17, 1911.)

(Syllabus by the Court.)

PROHIBITION (§ 10*) — GROUNDS — WANT OF AUTHORITY—ACT OF JUSTICE OF THE PEACE.

"A justice of the peace has no authority to set aside a judgment rendered by him, and he may be restrained from so doing by the writ of prohibition." *Doughty v. Walker*, 54 Ga. 595.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

Error from Superior Court, Grady County; Frank Park, Judge.

Action between T. J. Mills and others and W. C. Bell. From the judgment, Mills and others bring error. Affirmed.

S. P. Cain and W. J. Willie, for plaintiffs in error. R. R. Terrell, for defendant in error.

EVANS, P. J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(9 Ga. App. 687)

PERTEET v. FRICKS. (No. 3,074.)

(Court of Appeals of Georgia. Aug. 4, 1911. Rehearing Denied Sept. 11, 1911.)

(Syllabus by the Court.)

TAXATION (§ 577*)—PERSONS LIABLE.

"Liens for taxes due the state, or any county thereof, or municipal corporation therein, shall cover the property of taxpayers liable to tax, from the time fixed by law for valuation of the same in each year until such taxes are paid." Civil Code 1910, § 3333. It follows that the owner of property on the day when the state authorities annually fix the time for the valuation of property for state and county taxes is liable for the municipal tax for that year, and is therefore the proper person against whom a tax execution should be issued.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1170, 1171; Dec. Dig. § 577.*]

Error from Superior Court, Stephens County; J. J. Kimsey, Judge.

Affidavit of illegality on levy of tax execution between Mrs. G. B. Perteet and A. L. Fricks. Judgment by a justice in favor of Mrs. Perteet was reversed by the superior court on certiorari, and she brings error. Reversed.

R. C. Ramey, for plaintiff in error. Fermor Barrett, for defendant in error.

HILL, C. J. On April 9, 1909, A. L. Fricks conveyed to Mrs. G. B. Perteet a house and lot in the city of Toccoa. In June, 1909, the city assessors assessed the realty in the city of Toccoa for taxation, and the tax was levied by ordinance in September, 1909. The property conveyed by Fricks to Mrs. Perteet was assessed for taxation as the property of A. L. Fricks, and, Fricks refusing to pay the tax, Mrs. Perteet paid the tax *fi. fa.* and had the same duly transferred to her, and she then had the tax execution levied on property of Fricks, whereupon he filed an affidavit of illegality. The justice of the peace decided the question in favor of Mrs. Perteet, and Fricks, by certiorari, took the case to the superior court, where the certiorari was sustained, and only a question of law being involved, a final judgment was entered, sustaining the affidavit of illegality filed by Fricks, whereupon Mrs. Perteet sued out a writ of error to this court.

It will be seen that the only question to

be decided is, When did the lien for municipal taxes for 1909 attach to this real estate? If it attached before the property was bought, then Fricks should pay the taxes. If the lien for taxes attached subsequently to the conveyance of the property to Mrs. Perteet, she ought to pay the taxes, and the court properly entered a final judgment sustaining the illegality. In the year 1874 the city of Toccoa was organized under a charter granted by the superior court of Habersham county, which embraced a provision of the act of 1872 (Acts 1872, p. 22) embodied in Code 1873, § 791 (Political Code 1895, § 704), as to towns so incorporated, that the lien for municipal taxes attaches on realty "from the time the same are assessed or imposed." In 1897 the charter granted by the Legislature took the place of the old charter granted by the superior court, and made nugatory any provisions of the former charter, including the Code section referred to. Walker v. McNeely, 121 Ga. 114, 48 S. E. 718. Therefore the contention of counsel for defendant in error that the question made is controlled by that Code section is unsound.

It is insisted by learned counsel for plaintiff in error that, as it is not provided in the act of incorporation, or in any city ordinance passed in pursuance thereof, when the lien for municipal taxes shall attach, the question is governed by the general law of the state; and it is agreed that for the year 1909 March 31st was the day fixed by the state authorities as the day for the making of returns of property for the purpose of state and county taxation for that year. We are inclined to think that, without reference to whether any provision on the subject was made in the act of incorporation or by ordinance or not, the general law on that subject does control. It is desirable that there should be uniformity on this question, and that the liens for state, county and municipal taxes throughout the entire state should attach on the same day, and this uniformity seems to be the statutory purpose. Section 3333 of the Civil Code of 1910 fixes the rank of liens for taxes as follows: "Liens for taxes due the state or any county thereof, or municipal corporation therein, shall cover the property of taxpayers liable to tax, from the time fixed by law for valuation of the same in each year until such taxes are paid," etc. This law is general in its terms, and in our opinion applies to all municipalities, as well as to the state and counties, and fixes the date when the liens for taxes shall attach as the same for state, county, and municipal taxes. This seems to be the view entertained by the authorities of the city of Toccoa on the subject; it being agreed that the uniform custom of the city authorities has been to assess realty taxes on the date set by the state author-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 71 S.E.—71

ities for making the return of property for taxes for state and county purposes. But such we think to be the law on the subject, regardless of any custom.

It being agreed that March 31, 1909, was the day fixed by the state authorities as the day for the making of returns of property for the purpose of state and county taxation for that year, it follows that the lien for the taxes for that year attached on all realty on that date, whether the taxes were state, county, or municipal taxes, and the owners of realty on that date were the proper persons to pay the taxes and against whom tax executions were properly issued; and it being admitted that on that date the property conveyed by Fricks to Mrs. Pertee on April 9th was owned by the former, the tax execution was properly issued against him. The lien for taxes attached to his property, and his subsequent conveyance did not divest this lien, and we conclude that the court erred in entering up a final judgment in favor of Fricks, and that, on the contrary, the final judgment should have been in favor of Mrs. Pertee.

Judgment reversed.

(9 Ga. App. 640)

JOHNSON v. PAPP. (No. 2,855.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

INFANTS (§ 98*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

The only issuable question of fact was fairly submitted to the jury, and their finding is fully authorized by the evidence.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 98.*]

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by T. C. S. Johnson against John Pappa. Judgment for defendant, and plaintiff brings error. Affirmed.

Dorsey, Brewster, Howell & Heyman, for plaintiff in error. Westmoreland Bros., for defendant in error.

RUSSELL, J. Miss Johnson sued Pappa, alleging that when she was a minor she paid over to him the sum of \$600 upon the purchase price of a parcel of land, and that on or before her arrival at majority she repudiated the transaction. The suit was for the recovery of the sum so paid. At the trial it developed that Miss Johnson had not paid the money personally. It was paid over by an attorney of her mother. The plaintiff set up that while her mother had paid over the money, or had caused it to be paid over, it was money of hers (the plaintiff's); that her father had died a few years before, leaving some property and some money; that the mother had taken a portion of the money and invested it in a stock of goods and in cer-

tain furniture; that the goods and furniture had been destroyed by fire, and that this money had been collected on the insurance policy, and that it had been agreed between the mother and the children, some of whom, including the plaintiff, were still minors, that the plaintiff might have \$600 of this money as her part of her father's estate; and that the mother, in causing the attorney to pay over the money to the defendant, was paying it over for and on behalf of the plaintiff. The defendant set up that, if the money belonged to the plaintiff, he did not know it; that he and his agent, acting for him, took it as being the mother's money, and supposed it to be hers; that the insurance policy was in the mother's name, and the attorney who paid it over held it for her.

The court instructed the jury that, before the plaintiff could recover, she would have to show two things: First, that the plaintiff paid the defendant the money, or caused some one else to pay it for her; and that the defendant took it, knowing that it was her money. This issue was fairly and squarely submitted to the jury, and they found in favor of the defendant. There is no evidence that the plaintiff herself paid over the money. We doubt very much that she showed any title to the money at all. If the plaintiff had herself made the payment to the defendant, he could not have set up that it was not her money. At most, the plaintiff had only an equitable interest in the money. There had been merely an agreement (probably an invalid agreement) that her mother might pay this money over to her as her part of her father's estate, but it had never been paid over. But, conceding that the mother held it as trustee for her, it was only an implied and not an express trust, and the defendant, having taken the money from the mother without notice of the plaintiff's title, is to be protected. Even if the evidence did not demand the verdict, we have no hesitancy in saying that the finding of the jury was fully authorized, and that, after carefully examining all the errors assigned in the record as to the rulings of the court, we find no reason for reversing the judgment.

Judgment affirmed.

(9 Ga. App. 646)

CLARKE v. ANDERSON, FELDER, ROUNTREE & WILSON. (No. 2,887.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

DIRECTION OF VERDICT—NO ERROR.

The court did not err in directing a verdict for the defendant.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between Thomas A. Clarke and Anderson, Felder, Rountree & Wilson. From the judgment, Clarke brings error. Affirmed.

R. O. Lovett, for plaintiff in error. Malvern Hill, for defendants in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 668)

LOUISVILLE & N. R. CO. et al. v. CURRY.
(No. 3,180.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

SUFFICIENCY OF PLEADING — ACTION FOR CAUSING DEATH.

Under the allegations of the petition, the decedent, when killed by the running of the engine and cars was either an employé or a licensee. Both counts of the petition show a cause of action, and there was no error in overruling the demurrer filed thereto.

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by Savannah Curry against the Louisville & Nashville Railroad Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Jos. B. & Bryan Cumming, J. M. Hull, Jr., and W. K. Miller, for plaintiffs in error. C. H. & R. S. Cohen, for defendant in error.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 699)

BRANCH v. JOHNSON. (No. 3,460.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

1. LOGS AND LOGGING (§ 3*) — SALES OF STANDING TIMBER — CONSTRUCTION OF CONTRACT — ACTION — BURDEN OF PROOF.

The plaintiff's action was based upon a promissory note. The defendant pleaded that the note was given for the purchase price of certain standing timber, and that, after only a part of the timber had been cut, the plaintiff sold the remaining timber to a third person for more than enough to pay the balance then due upon the note. On the trial it appeared that the plaintiff had sold the timber to the defendant, subject to the limitation that it was to be cut within two years. The cutting began, but was discontinued. The plaintiff in parol agreed that he would not insist upon the two-year limitation, and that the defendant might have a longer time in which to cut it; but no definite period was named. After the lapse of seven years (i. e., five years from the time the original lease expired), the defendant having made no further effort to cut the timber, the plaintiff sold it, along with the timber on certain other lands, for a gross sum. *Held:*

(a) Even if the parol agreement made during the time set in the original contract was legally enforceable, it had the effect of extending the defendant's right to cut the timber only for a reasonable time.

(b) In determining what would be a reasonable time to allow as to this extension, the duration of the original lease must be considered; and, as the original lease ran for only two

years, it would be unreasonable to construe the parol agreement as extending the lease for five years more.

(c) The defendant's title to the timber had reverted to the plaintiff before the latter resold it.

(d) Even if this were not true, the burden was upon the defendant of furnishing to the jury the data upon which a just abatement of the purchase price could reasonably be estimated, and the proof is not sufficiently specific in this respect.

(e) The court did not err in directing a verdict for the plaintiff.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

2. PLEADING (§ 129*) — ANSWER — ADMISSIONS.

One paragraph of the plaintiff's petition alleged the giving of the statutory notice for the purpose of collecting the attorney's fees stipulated for in the note, and a copy of the notice was set out. The defendant answered equivocally, alleging that for lack of sufficient information, based upon lack of recollection, he could neither admit nor deny this paragraph of the petition. *Held*, that the fact whether the notice was or was not personally served upon the defendant was a matter with which he was charged with knowledge, and that, as he failed to deny it, the court properly construed his answer as admitting it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. § 129.*]

Error from City Court of Baxley; A. V. Sellers, Judge.

Action by W. J. Branch against J. A. Johnson. Judgment for defendant, and plaintiff brings error. Affirmed.

W. W. Bennett, for plaintiff in error. Parker & Highsmith, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 650)

MILNER v. TYLER. (No. 2,994.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 65*) — CONSTRUCTION OF CONTRACT — SALE BY TRACT OR ACRE.

Where a bond for title, after locating a tract of land as being in a given county and district, describes it as follows: "Seventy-five acres of land, more or less, in one body, bounded [by certain definitely described boundaries]" — it was a sale by the tract, and not by the acre.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 93-96; Dec. Dig. § 65.*]

2. VENDOR AND PURCHASER (§ 80*) — REMEDIES OF VENDOR — ACTION FOR PRICE — BURDEN OF PROOF.

Where the vendee in possession under a bond for title containing a description such as that set forth in the preceding headnote seeks to defend against an action brought to recover a portion of the purchase price, on the ground that the tract contained only 55 acres by actual survey, the burden is upon him of showing that the vendor, in making the sale, perpetrated actual fraud upon him, though the amount of the deficiency in acreage is a circumstance to which the jury may look, together with all the other evidence, in determining whether there was actual fraud or not.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 132; Dec. Dig. § 80.*]

3. VENDOR AND PURCHASER (§ 317*)—REMEDIES OF VENDOR—ACTIONS FOR PRICE—VERDICT.

The verdict was contrary to the evidence.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 317.*]

Error from City Court of Forsyth; W. M. Clark, Judge.

Action between Eva Milner and A. L. Tyler. From the judgment, Milner brings error. Reversed.

R. W. Milner and R. L. Williams, Jr., for plaintiff in error. J. M. Fletcher and A. M. Zellner, for defendant in error.

RUSSELL, J. The plaintiff sued upon a promissory note of \$200, representing the unpaid balance of the purchase price—\$650—which the defendant was to give for a tract of land, as to which he held a bond for title, containing the description set forth in the first headnote. The defendant pleaded that the tract contained only 55 acres, and claimed an abatement of the purchase price accordingly. The jury "split the difference" between the parties, and gave the plaintiff judgment for only \$100. The charge of the court is not contained in the record; but the trial judge certifies as being true a ground of the motion for new trial which complains that the court neglected and refused to charge the jury that the sale was by the tract or body, and that, to be entitled to an apportionment or rescission, the vendee would have to show intentional fraud and deception on the part of the vendor.

[2] The vendee is not entitled to an apportionment of the purchase price, unless both fraud and deficiency are shown. *White v. Adams*, 7 Ga. App. 764, 68 S. E. 271, and cases cited therein. Even though the quantity is specified "more or less," a gross deficiency may be sufficient to justify a finding of willful deception or of mistake amounting to fraud, so as to authorize "an apportionment of the price according to relative value." Civil Code 1910, § 4122. The deficiency in such cases is not conclusive of fraud, but is evidentiary of it.

[3] The apportionment, when made, should be in accordance with the rule of relative value. There are cases where the apportionment according to relative value is not to be determined by a mere comparison of the number of acres described in the bond for title with the admitted deficiency, though that is the ordinary rule by which the calculation is to be made. See *White v. Adams*, 7 Ga. App. 764, 68 S. E. 271.

[1] In this case there was nothing in the evidence to justify a calculation otherwise than according to the ordinary rule. So that, if the jury found that there was fraud, they should have found an abatement of the purchase price sufficient in amount to have prevented any recovery by the plaintiff, as there

was no dispute as to the amount of the deficiency in acreage. On the other hand, if the jury did not find there was fraud, they should have found for the plaintiff for the full amount sued for. The finding in favor of the plaintiff for any sum is, under the facts of the case, equivalent to a finding that there was no fraud. Hence the verdict, which made a mere arbitrary deduction in the purchase price, is contrary to the law and the evidence.

Judgment reversed.

(112 Va. 389)

MARBURY et al. v. JONES et al.

(Supreme Court of Appeals of Virginia. June 8, 1911. Rehearing Denied September 14, 1911.)

1. MORTGAGES (§ 372*)—AGREEMENTS BY MORTGAGOR—EFFECT—TITLE OF PURCHASER.

An agreement by a mortgagor, after giving the deed of trust, does not affect the rights of the trustee or his purchaser.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 372.*]

2. ADVERSE POSSESSION (§ 46*)—INTERRUPTION.

P., being in possession under a deed from defendant, made an agreement verbally acknowledging plaintiff's ownership, without defendant's knowledge. Later P. mortgaged the land, and defendant purchased under the deed of trust. Held, that the parol agreement did not interrupt defendant's adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 46.*]

3. TRIAL (§ 296*)—INSTRUCTIONS—CURE OF ERROR.

Omission from an instruction of holding under color of title as an element of adverse possession was cured by another instruction requiring that element.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

4. EJECTMENT (§ 93*)—EVIDENCE—SUFFICIENCY.

Evidence in ejectment held insufficient to warrant verdict for plaintiff.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 93.*]

5. EJECTMENT (§ 9*)—RIGHTS TO RECOVER.

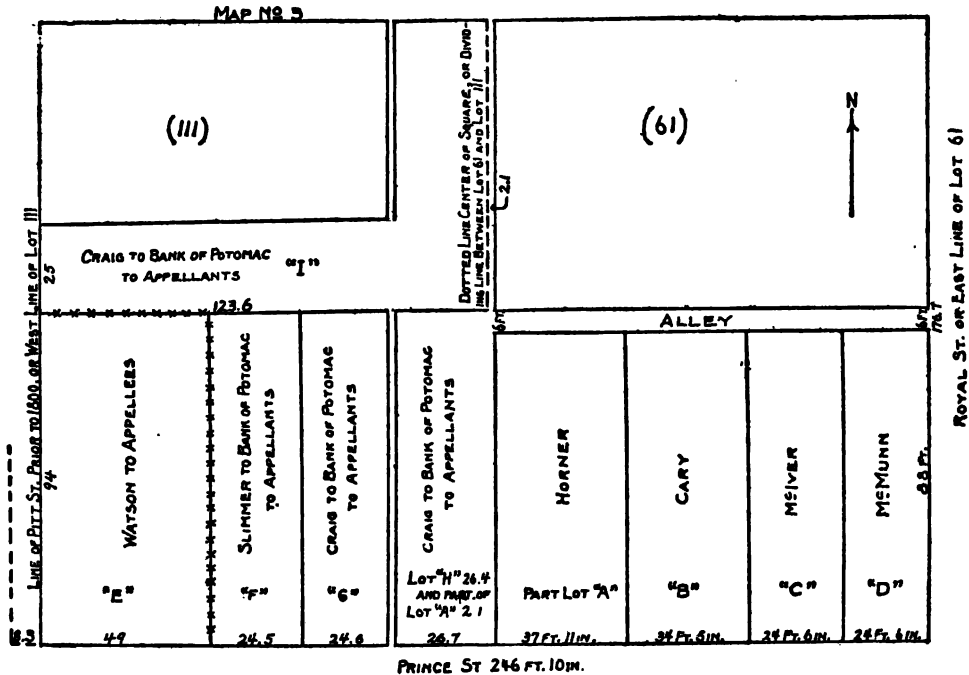
Plaintiff in ejectment must recover, if at all, on the strength of his own title, and not on the weakness of defendant's.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 18; Dec. Dig. § 9.*]

Error to Circuit Court of City of Alexandria.

Ejectment by Anna T. Marbury and another against Bessie W. Jones. Judgment for defendant, and plaintiffs bring error. Affirmed.

The following is a plat of the property in controversy:



Francis L. Smith and Lewis H. Machen, for plaintiffs in error. J. K. M. Norton, for defendants in error.

WHITTLE, J. This writ of error is to a judgment for the defendant in error, Bessie W. Jones, who was the defendant in an action of ejectment brought by the plaintiffs in error, Anna T. Marbury and Eliza H. Marbury, to recover an estate for their joint lives and for the life of the survivor in a strip of land fronting 4 feet 11 inches on the north side of Prince street, in the city of Alexandria, and extending back between parallel lines perpendicular to the front line 94 feet.

The square embracing the land in controversy and the respective holdings of the plaintiffs and defendant is bounded on three sides as follows: By Prince street on the south, by Royal street on the east, and by Pitt street on the west—and comprised (in the original plan of the city) two lots, each containing one-half of an acre. Lot No. 61 composed the eastern, and lot No. 111 the western, half of the square. The former lot "binds" 176 feet 7 inches on Royal street, on the east, with a frontage of 123 feet 5 inches on Prince street, on the south. Lot No. 111 is bounded by lot No. 61 on the east, and has an equal frontage, 123 feet 5 inches, on Prince street, the original location of the east line of Pitt street forming its western boundary, and was so recognized and described in conveyances of subdivisions of lot No. 111 made prior to the year 1800. Before that date a brick dwelling, known as the John Dundas house, stood on the northwest

corner of lot No. 111, the western gable of which overlapped the eastern line of Pitt street, as then located, 8 feet 3 inches. Presumably for the purpose of leaving the John Dundas house undisturbed, the council of Alexandria, on February 5, 1800, passed an ordinance establishing a new location for Pitt street, the east side of which was on a line with the west gable of the Dundas house.

While this change in the location of Pitt street obviously did not affect the paper titles of property holders in that square, it practically resulted in adding 8 feet 3 inches to the lots adjoining Pitt street on the west.

For it is unquestionably the general rule, that the grantee of a city lot bounded by a street, subject to the right of way, owns to the center of the street (*Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135; *Durbin v. Roanoke Building Co.*, 107 Va. 753, 60 S. E. 86); and, consequently, where the location of the street in front of such owner's lot is changed, for a distance not exceeding one-half the width of the street, the abandoned portion necessarily inures to his benefit.

The defendant, Bessie W. Jones, derived her title *mediately* through Joseph Wilson, who, in the year 1786, conveyed to Josiah Watson the southwestern portion of lot 111 (lot E) on map No. 3 (which is filed as a part of this opinion) as follows: "A part of the lot described in the plan of the said town by number (111), the same being bounded as follows, viz.: Beginning at the corner of the said lot (111) binding upon Prince street and Pitt street, and running thence by Pitt street 94 feet; thence easterly, with a line parallel

to Prince street, 49 feet; thence, southerly, with a line parallel to Pitt street, 94 feet, to Prince street; thence, with Prince street, to the beginning."

It will be observed that this deed antedated the change of location of Pitt street; and the description of lot E then given has been substantially followed from that time, through intermediate conveyances, down to and including the deed of July 2, 1882, from Caroline M. Mason to T. Marshall Jones, trustee of his wife, Bessie W. Jones, the defendant.

The plaintiffs' paper title embraces lots F, G, H, I, and a part of A, as shown on map 3. This property was formerly owned by the Bank of Potomac, and passed by successive conveyances to the Farmers' Bank of Virginia (the Alexandria Branch), and the First National Bank of Alexandria, Va. The buildings on this property were erected and used for many years for banking purposes, and the predecessors in title of the plaintiffs, 70 years or more before the institution of this suit, inclosed their property with massive brick walls, which are still intact. These walls, which separate lots F and I from lot E, are designated on map 3 by crossmarks.

It plainly appears from the evidence of the plaintiffs that, beginning at the southwest corner of lot 111, a line 49 feet east on Prince street will extend to the Marbury wall on the east, and that a line extended 94 feet north from the same point will reach the Marbury wall on the north. It is clear, therefore, that lot E, which is within the paper title of the defendant, includes the land in controversy. It is equally true that, unless the plaintiffs' line is to be extended westwardly upon the theory that their holdings have been enlarged by reason of the relocation of Pitt street (a pretension plainly without merit), their paper title does not embrace the land in dispute.

But the plaintiffs also insist that they have acquired the land by adverse possession under color of title. Upon that theory of the case they introduced evidence that the strip of land was an alleyway entered from Prince street through an archway, supported by brick pilasters, connected with the Marbury wall on the east and the wall of an old building on the west; that it was closed by a gate, secured by a lock, the key to which was in the possession of the bank people and subsequently of the plaintiffs; that the strip of ground was paved with bricks, and for many years had been used by the bank officers, and other occupants of the bank property, as a means of access to a toilet on their premises.

Let it be conceded that by this user the plaintiffs' predecessors in title acquired the strip of land by adverse possession; nevertheless, the testimony of the defendant (from the standpoint of a demurrer to the evidence) shows that the possession of those under whom the plaintiffs claim wholly ceased

shortly after the close of the Civil War, that the archway on Prince street was planked up at that time, and that the defendant and her predecessors in title took actual possession of the strip by virtue of their paper title, and have held the possession hitherto.

The individual possession of the defendant is contemporaneous with the conveyance from Caroline M. Mason of lot E to her trustee July 2, 1882. On September 8, 1882, she and her husband and trustee conveyed to B. F. Peake 20 feet, more or less, off the east side of lot E, beginning at the middle of the east wall of a brick dwelling then in course of erection by the defendant on the western part of lot E, running thence to the Marbury line, and put him in possession up to the Marbury wall, including the whole of the strip in controversy. Thereupon Peake erected a brick dwelling upon his lot, extending slightly over the western line of the strip in dispute. He laid his pavement in front on Prince street on a line with the Marbury wall, and had a gate opening into his yard between the brick wall and his house occupying the entire space, and cultivated the ground up to the wall in flowers. Peake had occupied the house and premises for about eight years without objection, when a brother of the plaintiffs asserted title to the strip of ground, and threatened to dispossess him and erect a fence along the west line of the strip, unless he would acknowledge the Marbury title, and hauled a load of lumber there for that purpose. Accordingly Peake made verbal acknowledgment of the Marbury claim. A few months afterwards, on March 25, 1889, Peake and wife, by the same description contained in the Jones deed to him, conveyed his lot to Hulfish, trustee, to secure debts. On November 19, 1891, Peake entered into a written agreement, acknowledging the Marbury ownership of the land, and stipulating to pay an annual rental of \$1 for the use thereof until the lessor should elect to annul the agreement. Peake having made default in the payment of the debts secured in the trust deed to Hulfish, the property was sold, and bought by the defendant, Bessie W. Jones, who was placed in possession and received her conveyance on July 1, 1902.

[1] The first assignment of error is to the exclusion by the circuit court of the lease from Marbury to Peake. The contention of the plaintiffs in that regard is that the written agreement and antecedent parol acknowledgment by Peake of the Marbury title created the relation of landlord and tenant between them, which prevented Peake, and also the defendant, who obtained possession under him, from denying the Marbury title.

We think it clear that the agreement made by Peake with Marbury, after he had given the deed of trust, could not in any way affect the rights of the trustee, or his purchaser, the defendant.

The principle is stated in Jones on Mortgages (6th Ed.) § 676, as follows: "Of course, the mortgagee is not affected by any act of the mortgagor in passing any right of his in the premises to third persons, whether by deed, or by confession of judgment, or otherwise. He cannot bind the mortgagee by any contract or deed prejudicial to his title. He cannot create an easement in the land to the prejudice of the rights of the mortgagee. The mortgagor's assignee has no greater rights than the mortgagor himself."

Section 679: " * * * Neither can the mortgagor or his grantee, by any subsequent arrangement themselves, affect the mortgagee's lien, or prevent its operation to the full extent of the mortgage." See, also, section 1202.

In Creigh's Heirs v. Henson, 10 Grat. 231, Judge Moncure, in delivering the opinion of the court, observes: "The possession of a grantor in a deed of trust, after the execution of the deed, is not adverse to the title of the trustee, but only as his tenant at will or sufferance. The trustee may eject him without notice, or, without ejecting him, may convey the trust subject to a purchaser, whose tenant at will or sufferance the grantor will then become, and by whom he may in like manner be ejected without notice. A person who purchases the trust subject, or any part of it, from the grantor, with notice of the deed of trust or after its due registration, stands in the place of the grantor, and bears the same relation that he does to the trustee and purchaser from him. These propositions, as general rules of law, will not be denied."

The foregoing principles are familiar to the profession, and fully sustain the ruling of the circuit court in excluding the agreement in question.

[2] The court admitted evidence of Peake's verbal acknowledgment of the Marbury claim, made prior to the execution of the deed of trust to Hulfish; but the acknowledgment was without the knowledge of the defendant, who had previously conveyed the disputed land to Peake and put him in possession thereof. In these circumstances this parol agreement cannot operate to interrupt

the otherwise continuous adverse possession of the defendant.

The principle is thus stated in 23 Am. & Eng. Ency. of Law, 506: "The possession must be inconsistent with the apparent or record title of the grantor, else it will not be sufficient to impose upon the purchaser the duty of making further inquiry; the reason being that in such a case the possession is presumed to be under the grantor's title."

In other words, Peake's possession, after the parol agreement with Marbury, was consistent with his apparent title and previous possession under the defendant, and the defendant, at the sale of the lot by Hulfish, trustee, became a purchaser thereof for value and without notice of the parol agreement. The principle stated in the text is sustained by Townsend v. Little, 100 U. S. 504, 3 Sup. Ct. 857, 27 L. Ed. 1012, and other authorities cited in the notes.

[3] The next assignment of error relates to giving, refusing, and amending instructions. One of the defendant's instructions, which undertook to define adverse possession, was objected to because it omitted to state that possession, to be adverse, must be under color of title. That defect, however, was cured by another instruction, which distinctly informed the jury that such possession must be under color or claim of title, so that the jury could not have been misled by the omission.

[4, 5] It is not necessary to notice in detail objections to other instructions, or the last assignment of error, that the verdict was contrary to the law and evidence, as, under the evidence, no verdict in favor of the plaintiffs could have been properly rendered. The burden rested upon them to recover by the strength of their own title, and not upon the weakness of the defendant's title. Their evidence not only fails to measure up to that fundamental requirement in an action of ejectment, but even upon a comparison of titles the defendant showed the better right to the land in controversy.

The result of our consideration is that the judgment is plainly right, and must be affirmed.

Affirmed.



